Supreme Court of the United States.
Pam HUBER, Petitioner,
v.
WAL-MART STORES, INC., Respondent.
No. 07-480.
November 9, 2007.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

Wal-Mart's Brief in Opposition

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QUESTIONS PRESENTED

1. Whether this Court should review a decision of the Eighth Circuit holding that the Americans with Disabilities Act ("ADA") does not forbid an employer from using a legitimate, nondiscriminatory job transfer program to fill vacant positions where the decision under review is fully consistent with the only other circuit court decision to address this subject after *U.S. Airways, Inc. v. Barnett,* 535 U.S. 391 (2002).

2. Whether, in the absence of any indicator that the decision would change the outcome of this case, this Court should grant the petition, vacate the judgment, and remand for consideration of *Long Island Care at Home v. Coke,* 127 S. Ct. 23 (2007), where *Long Island Care* did not change any legal doctrine relied on by the Eighth Circuit, where there is no conflict in the circuit regarding its application to these facts and where *Long Island Care* was considered by the Eighth Circuit in denying the Petition for Rehearing.

***II** RULE 29.6 STATEMENT

Respondent Wal-Mart Stores, Inc. has no parent corporation, and no publicly-held company owns 10% or more of its stock.

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***1** STATEMENT OF THE CASE

The Questions Presented as framed in the Petition neglect to mention the single most important fact in this case: Wal-Mart filled the vacant position desired by Huber by using a standardized, legitimate, and non-discriminatory Associate Job Transfer Program that in no way disadvantaged Ms. Huber on the basis of her disability. This undisputed fact is what demonstrates there is no conflict in the circuits on the issue presented and that there is no other issue worthy of review. This is not a case where Huber did not receive her desired position because a local store manager made a subjective decision regarding the relative qualifications of several candidates. Rather, Wal-Mart filled the vacant position using a formal job advancement program that gave important, expectation-based rights to all employees.

The pertinent facts are as follows: Pamela Huber worked at Wal-Mart and was not able to perform her job duties due to a disability. She could, however, perform other jobs at the Company. Wal-Mart fills open jobs under its Associate Job Transfer Program. Under the Program, vacant positions go to the most qualified applicant, as determined based on length of service with the Company, most recent job evaluations scores, and any specialized or technical skills required for the position. In this case, Huber was not the most qualified applicant for the job she wanted. That job went to a co-worker who had the highest evaluation score possible and who

had been at the Company six years longer than Huber. Huber's ***2** disability had nothing to do with this decision. Huber obtained another job at the Company that she could perform without the need for an accommodation. Thus, she did receive a reassignment remedy.

The issue in this case was whether Wal-Mart was required to give the desired vacant position to Huber even though other applicants were more qualified under Wal-Mart's nondiscriminatory and legitimate Associate Job Transfer Program. The decision below held that Wal-Mart may follow its Associate Job Transfer Program and award the open position under its established protocol. The other employees of Wal-Mart have a legitimate expectation that the Program will be followed. They have the right to expect the Program to be uniformly and fairly applied to permit them to advance their careers at the Company. There is no allegation that the Program is applied in an arbitrary manner or that the Program otherwise is not a valid, uniformly-applied approach to filling vacant positions. Under these circumstances, there is no division of authority among the circuits, no conflict between the decision under review and the decisions of this Court, and no other reason warranting review under Rule 10 of this Court.

***3** REASONS FOR DENYING THE PETITION

I. The Decision Below is Consistent with the ADA and there is No Post-*Barnett* Split in the Circuits.

The purpose of the ADA is to "assure equality of opportunity" and the "opportunity to compete on an equal basis." 42 USC § 12101(a)(8)-(9). The regulations state that reasonable accommodations are those that "enable a covered entity's employee with a disability *to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities.*" 29 CFR § 1630.2(o)(1)(iii) (emphasis added). An employer needs to adjust a job application process to "enable a qualified applicant with a disability to be considered for the position such qualified applicant desires." *Id.* at § 1630.2(o)(1)(i). There is no inconsistency between the decision below and the decision of this Court, the ADA, or its regulations. *See also* Part II, *infra.*

The Eighth Circuit properly recognized that its decision was "bolstered by the Supreme Court's decision in *U.S. Airways, Inc. v. Barnett,* 535 U.S. 391, 406 (2002)." (Panel Op. 6). In *Barnett,* this Court held that the ADA does not require an employer to reassign a disabled person to a position that another employee is entitled to hold under the employer's *bona fide* and established seniority system. *Id.* at 395-96. *Barnett* likewise holds that a disabled worker is entitled to "the *same* workplace opportunities that those without disabilities automatically enjoy." *Id.* at

397 (emphasis added). Here, as the Eighth Circuit's ***4** opinion correctly held, Huber did receive the same workplace opportunities as her co-workers. She did not obtain (and should not have obtained) an unfair advantage over other workers under the non-discriminatory Associate Job Transfer Program. To do so would run counter to the ADA's goal of equality of opportunity for both disabled and non-disabled employees.

The Petition contends a conflict exists between the Panel decision and the decisions of other circuits on this issue. No post-*Barnett* split in the circuits exists, however. Instead, the Panel's decision is consistent with *Mays v. Principi,* 301 F.3d 866 (7th Cir. 2002), which holds that an employer "did not violate its duty of reasonable accommodation by giving the job to [better qualified applicants]." *Id.* at 872. The Seventh Circuit recognized (as did the Panel opinion here) that, "[t]his conclusion is bolstered by a recent decision of the Supreme Court which holds that an employer is not required to give a disabled employee superseniority to enable him to retain his job when a more senior employee invokes an entitlement to it conferred by the employer's seniority system." *Id.* (citing *Barnett*). There is, accordingly, no post-*Barnett* split in the circuits. For a split in the circuits to exist, a circuit court would need to consider the issue of a bona fide qualification-based job transfer program in light of *Barnett* and rule contrary to the Eighth Circuit's decision. Indeed, as discussed below, the most recent case Petitioner even alleges to conflict with the Eighth Circuit's decision was decided in 1999. ***5** This issue should be permitted to percolate in the circuits to see if a split does develop.[FN1]

> FN1. The Petition notes that four Eighth Circuit judges voted for rehearing. The dissenting judges did *not* contend that *en banc* review was appropriate due to a split in the circuits on any of the issues presented.

Barnett is significant to this case because both *Barnett* and this case involve established and *bona fide* programs used to fill vacant positions. *Barnett* involved a seniority system. Here, Wal-Mart has a non-discriminatory policy of hiring the most qualified applicant pursuant to its Associate Job Transfer Program. The Program relies on seniority as a key component. Huber thus did not lose the job she wanted due to a subjective assessment by a local manager. Petitioner did NOT challenge the Associate Job Transfer Program as illegitimate or a sham. She did not claim the Program was not followed regularly. She did not claim the Program had been misapplied in this context. She did not claim that the Program had exceptions that rendered it arbitrary. Rather, Huber stipulated that the Program existed, that it applied to the jobs at issue, and that if the Program were followed, another employee would be entitled to the position she wanted because that employee had superior qualifications.

Because Wal-Mart's Associate Job Transfer Program is a legitimate and nondiscriminatory program, Huber's co-workers have valid expectations ***6** that they can advance their careers at Wal-Mart consistent with this Program. As such, this case is materially different from a case where an employer lacks such a formal program and just argues that it should be able to fill a position with a different employee it likes better. *See* *Barnett,* 535 U.S. at 404 (employer seniority system "provides important employee benefits by creating, and fulfilling, employee expectations of fair, uniform treatment").

Petitioner's leading cases are *Aka v. Washington Hosp. Ctr.,* 156 F.3d 1284 (D.C. Cir. 1998), and *Smith v. Midland Brake,* 180 F.3d 1154 (10th Cir. 1999). *Aka* was properly distinguished by the Eighth Circuit in footnote 2 of its opinion with the observation that
"Contrary to Huber's assertion [*Aka*] does not hold the ADA requires an employer to place a disabled employee in a position while passing over more qualified applicants. Rather, *Aka* only rejects an 'interpretation of the reassignment provision as mandating nothing more than that the employer allow the disabled employee to submit his application along with all of the other candidates.' "

The *Aka* court did not consider whether the employer could follow an established program of selecting the most qualified applicant, and in fact "decline[d] to decide the precise contours of an employer's reassignment obligations" and remanded the case to the district court to determine whether reassignment conflicted with the terms of a collective bargaining ***7** agreement. *Id.* at 1304-06. No conflict with *Aka* exists.

Midland Brake states that the reassignment remedy requires an employer to do more for a disabled employee than "consider [her] on an equal basis with all other applicants." *Midland Brake,* 180 F.3d at 1164-65. But that case does not involve an employer who had an established and legitimate policy that gave rise to expectations for other employees. This is a key difference. The court recognized that it is proper to consider whether an employer's policies would "make it unreasonable to require an employer to reassign a disabled employee to a particular job." *Midland Brake,* 180 F.3d at 1175-76 (stating "[a]n employer need not violate other important fundamental policies underlying legitimate business interests" in reassigning a disabled worker). The Tenth Circuit stated that it would look at whether a program gave "*rise* to legitimate expectations by other, more senior employees to a job." *Id.* at 1176. The Court went on to note that "[r]equiring an employer to disrupt and violate any such well-established reasonable expectations of seniority rights in order to favor a disabled employee in a job reassignment could, at least under some circumstances, constitute a fundamental and unreasonable alteration in the nature of the employer's business." *Id.* There is no conflict in the circuits on this point

unless and until the Tenth Circuit faces a non-discriminatory policy similar to Wal-Mart's and, applying *Barnett*, rules contrary to this case. That has not happened yet, nor should it ***8** ever happen in light of *Barnett* and the text of the ADA.

The remaining cases cited by Petitioner likewise do not address a disabled worker seeking reassignment under a legitimate and established job transfer program. *Mengine v. Runyon,* 114 F.3d 415, 419 (3d Cir. 1997), involves only a claim that an employer failed to meet its obligation to assist a disabled employee in finding vacant positions. *Bratten v. SSI Servs.,* 185 F.3d 625, 634 (6th Cir. 1999), holds only that reassignment "may" be required to reasonably accommodate a worker. *Jackan v. New York State Dep't of Labor*, 205 F.3d 562, 565-66 (2d Cir. 2000), recognizes that an employee is only entitled to reassignments permitted by "then-existing civil service rules." *Shapiro v. Township of Lakewood,* 292 F.3d 356, 360 (3d Cir. 2002), involved an "unwritten practice under which vacancies for positions … are posted on a bulletin board[.]" The court held that was not a legitimate "policy," *id.*; whereas, here, the validity of the policy was not challenged. *Dark v. Curry,* 451 F.3d 1078 (9th Cir. 2006), does not even involve a company policy regarding job vacancies. These cases do not present a conflict with the decision in this case.

The Eighth Circuit's decision in fact is fully consistent with those of other circuits holding that the ADA does *not* require an employer to give preferential treatment to disabled employees under legitimate and non-discriminatory policies. *See EEOC v. Sara Lee Corp.,* 237 F.3d 349, 353-54 (4th Cir. 2001) ("Virtually all circuits that have considered the issue ***9** have held that the ADA's reasonable accommodation standard does not require an employer to abandon a legitimate and non-discriminatory company policy"); *Hedrick v. Western Reserve Care Sys.,* 355 F.3d 444, 457 (6th Cir. 2004) ("Although a 'reasonable accommodation' may include reassignment to a vacant position, …, an employer need not reassign a disabled employee to a position for which he is not qualified, nor is the employer required to waive legitimate, non-discriminatory employment policies or displace other employees' rights in order to accommodate a disabled employee" (internal citation omitted)); *EEOC v. Humiston-Keeling, Inc.,* 227 F.3d 1024, 1027-28 (7th Cir. 2000) (finding that "[t]he reassignment provision makes clear that the employer must also consider the feasibility of assigning the worker to a different job in which his disability will not be an impediment to full performance, and if the reassignment is feasible and does not require the employer to turn away a superior applicant, the reassignment is mandatory," but "[t]hat is not the same thing as requiring the employer to give him the job even if another worker would be twice as good at it, provided only that this could be done without undue hardship to the employer"); *Terrell v. USAir,* 132 F.3d 621, 627 (11th Cir. 1998) (holding that under the "reasonable accommodation" provisions "employers are only required to provide 'alternative employment opportunities reasonably available under the employer's

existing policies' "); *Daugherty v. City of El Paso,* 56 F.3d 695, 699-700 (5th Cir. 1995) ("[W]e do not read the ADA as requiring affirmative action in ***10** favor of individuals with disabilities, in the sense of requiring that disabled persons be given priority in hiring or reassignment over those who are not disabled. It prohibits employment discrimination against qualified individuals with disabilities, no more and no less").

II. The EEOC Guidance is Not Applicable, There is No Split on the Subject, and There is No Basis for a GVR.

The Petition contends that the Eighth Circuit's decision was inconsistent with the EEOC enforcement guidance. This issue is not worthy of review. There is absolutely no split in the circuits regarding how this guidance should be applied to a legitimate, non-discriminatory job transfer program. Indeed, the fact that the Eighth Circuit did not even mention this issue demonstrates both that this is not an appropriate vehicle to address this issue and that, under the facts presented, the guidance does not change the outcome.

The EEOC guidance at issue here should not be read or understood to address the circumstance where the employer has a legitimate and non-discriminatory company-wide policy that has given other employees valid expectations of advancement. Nor should it be read to require an employer to short-circuit the career advancement of a more qualified co-worker. The guidance does not address the circumstances where there is a legitimate non-discriminatory company policy that gives expectation-based rights to the position to other employees. The guidance never ***11** mentions a policy like that of Wal-Mart and how such a policy would impact the reassignment remedy. There is no case from this Court or any other circuit holding that this guidance does so apply; as such, the requirements of Rule 10 are not met.

Under *Auer v. Robbins,* 519 U.S. 452 (1997), an agency interpretation is entitled to deference only when the language of the regulation or statute is ambiguous. Here, as discussed above at page 3, the statutory text and regulations make clear that the disabled employee is to obtain equal opportunities in the job place. This text is not ambiguous and was followed here. *See also EEOC v. SunDance Rehab.,* 466 F.3d 490, 500 (6th Cir. 2006) ("As the EEOC acknowledges, its Enforcement Guidance is entitled to respect only to the extent of its persuasive power. The Enforcement Guidance does not receive Chevron-type deference").

Petitioner's request that the writ be granted, the judgment be vacated, and the case remanded relies primarily on *Long Island Care v. Coke,* 127 S.Ct. 2339 (2007). In *Long Island Care,* the agency at issue (the Department of Labor) initially adopted

the position at issue in the context of notice and comment rule-making and made the regulation at issue part of a formally-adopted federal regulation. *Id.* at 2346 ("The Department focused fully upon the matter in question. It gave notice, it proposed regulation, it received public comment, and it issued final regulations in light of that comment"). Here, no such notice and comment rule-making is present and the statement ***12** at issue in the EEOC guidance is not part of a formal regulation.

The EEOC did not consider the reassignment issue in the context of a company with a *bona fide*, established qualification-based company policy that is uniformly applied and that gives the plaintiff's co-workers legitimate expectations of advancement consistent with the policy. The guidance does not discuss policies like the Associate Job Transfer Program. It is this policy that factually distinguishes this case from *Midland Brake* and *Aka.* The Policy also demonstrates that the EEOC guidance does not apply to Huber's case. There is no indication that the guidance reflects the agency's "fair and considered judgment" regarding how such a policy should be applied under similar facts. *Long Island Care*, 127 S.Ct. at 2349-50, citing *Auer v. Robbins*, 519 U.S. 452, 462 (1997).

Under these circumstances, no GVR order is appropriate. The issue of deference to the EEOC guidance was fully briefed in the Court of Appeals. It was properly recognized by the Eighth Circuit that these regulations did not affect the outcome. *Long Island Care* was brought to the attention of the Eighth Circuit in the rehearing petition and no member of the panel who decided the case voted to rehear the case. A GVR is *potentially* appropriate only where there exists "a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for their consideration." *Lords Landry Vill. v. Cont'l Ins. Co.,* ***13** 500 U.S. 893, 896 (1997). There has been no such showing here. *Long Island Care* did not even involve the EEOC guidance at issue in this case.

CONCLUSION

The Petition for Writ of Certiorari should be denied.