



PAUL, PLEVIN,
SULLIVAN &
CONNAUGHTON LLP



**U.S. SUPREME COURT FURTHER NARROWS THE
PROTECTIONS OF THE
AMERICANS WITH DISABILITIES ACT
(May 1, 2002)**

On Monday, the United States Supreme Court attempted to give employers guidance on a long-debated question in federal disability law:

In order to reasonably accommodate a disabled employee, must an employer with an established seniority system give preference in job assignments to the disabled employee over non-disabled employees with greater seniority?

The Court's response, although simplistically hailed by the media as a victory for employers, was actually a less than clear, "ordinarily no, but sometimes yes." ([U.S. Airways, Inc. v. Barnett](#), April 29, 2002)

Specifically, the Court held that "ordinarily" an employer with an established seniority system will not have to make exceptions to its system or "prefer" disabled workers over more senior workers. The Court reasoned that in the "run of cases," asking the employer to disregard its seniority system would not be a "reasonable" accommodation because other employees count on the seniority system to provide job stability and well earned rewards for long and faithful service.

However, and this is a big "however," the Court went on to hold that in certain cases, granting an exception to the particular seniority system at issue would be "reasonable," and thus required. For example, the Court postulated that where an employer frequently changes the rules of the seniority system, or has made exceptions to the rules for other employees, it may be reasonable for the employer to prefer a disabled worker in order to provide an accommodation.

What this means

In most cases, an employer need not make exceptions to an established seniority system in order to accommodate a disabled employee. However, if the seniority

system is new, the employer has made exceptions for others, or it appears that the employer changes the rules too frequently, the employer may be required to make exceptions for disabled employees as a reasonable accommodation.

California employers should note, however, that it is unclear how California courts will react to this decision. Before this decision, California interpreted its disability discrimination law (the Fair Employment and Housing Act or "FEHA") to *require* preferential treatment in job assignments for disabled employees. Yet, this interpretation was based on federal case law as it existed before the Supreme Court's decision in *Barnett*, not any specific language in the FEHA. Now that the U.S. Supreme Court has effectively changed federal law, only time will tell if California will follow suit, or if – as it has done in the past – it will opt to set a higher standard than federal law.

Until this issue is resolved, California employers should use caution in making decisions about reasonable accommodation, especially where job reassignments or seniority systems are involved.

This E-Update was authored by [Denise Brucker](#). If you have any questions about this E-Update, please contact the authors or any PPS&C attorney.

This E-Update is offered as general information to our clients and friends. The Update is not intended as legal advice applicable to any specific situation and should not be taken as such.

ANNOUNCEMENT

Rich Paul will be speaking at the SDEA 17th Annual Employment Practices Seminar The Masters of Employment Law Issues. Mr. Paul will speak on the subject of "Lying in Wait" - How to Avoid the Retaliation Trap. The registration form is attached to this e-mail.

Send comments to info@paulplevin.com. Last modified 5/1/2002