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## **Tenth Circuit is first circuit court to hold that “temporary” positions are not considered “vacant” positions for purposes of the Americans with Disabilities Act.**

The Americans with Disabilities Act (“the ADA”) requires employers to, among many other things, make reasonable accommodations for employees with qualifying disabilities who are able to perform the essential functions of the job. In some circumstances, a reasonable accommodation may include a reassignment to a vacant position. However, there are many instances where a reassignment may not be reasonable, such as where the reassignment would bump another employee from a job. Until recently, no circuit court has addressed the issue of whether temporary positions in a workplace constitute vacant positions for the purpose of the reassignment provision of the ADA. The Tenth Circuit Court of Appeals was presented with the issue of temporary positions via a lawsuit filed by an Oklahoma paper plant worker with cystic fibrosis.

In that case the worker, Travis Duvall, had been employed by the paper plant for approximately seven years. When he was hired, he informed plant management that he had cystic fibrosis. He was assigned to the shipping department and worked there without incident for seven years until the company decided to outsource its shipping operations. During the transition to outsourcing, employees from the shipping department bid on other positions within the company and, as they left the department, the company filled their positions with temporary workers, as needed, until the transition was complete. Duvall bid into a position in another department which also resulted in an increased rate of pay. However,

Duvall’s cystic fibrosis became aggravated shortly after moving to the new position, and his doctor restricted him from working in areas of the plant where there was paper dust. Duvall’s restrictions limited him to working in the shipping department or in the storeroom. At that point in time, the company was contracting individuals from a temporary employment agency to fill positions both in the shipping department during its outsourcing transition and in the storeroom while it was considering whether to outsource that work as well. Consequently, the paper company had no vacant position to which it could reassign Duvall that would meet his medical restrictions.

Duvall went on medical leave for approximately three months until the paper mill offered him two positions. The first was a position filling in for shipping employees who were on vacation, and the second was a full time job in the store room for a considerable decrease in pay. Duvall accepted the store room job and filed his lawsuit shortly thereafter alleging that the paper mill violated the ADA when it failed to place him in one of the temporary positions in the shipping department during the three months that he was on medical leave. He argued that the employer was obligated under the ADA to reassign him to one of those temporary positions. The Tenth Circuit disagreed.

For the first time, the circuit court held that “a position is ‘vacant’ for the purposes of the ADA’s reassignment duty when that position would have been available for

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similarly-situated nondisabled employees to apply for and obtain.” The court reasoned that to hold otherwise would transform the ADA from a statute that seeks to prohibit employers from discriminating against disabled individuals to one requiring an employer to give mandatory preference to such individuals. Thus, the court held in Duvall’s case that because the temporary positions in the shipping and storeroom departments were not available to the company’s other employees, the positions were not considered “vacant” for the purposes of the ADA.

While this case turned in favor of the employer, employers must remember that any time an employee requests an accommodation, they are required to engage in the interactive process in order to determine if the employee is entitled to an accommodation under the act and if a reasonable accommodation exists for the employee.