IN THE SUPREME COURT OF THE UNITED STATES

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US AIRWAYS, INC., :

Petitioner :

v. : No. 00-1250

ROBERT BARNETT :

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Washington, D.C.

Tuesday, December 4, 2001

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:03 a.m.

APPEARANCES:

WALTER E. DELLINGER, III, ESQ., Washington, D.C.; on behalf of the Petitioner.

CLAUDIA CENTER, ESQ., San Francisco, California; on behalf of the Respondent.

C O N T E N T S

P R O C E E D I N G S

(11:03 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in Number 00-1250, U.S. Airways, Inc. v. Robert Barnett.

Mr. Dellinger.

ORAL ARGUMENT OF WALTER E. DELLINGER, III

ON BEHALF OF THE PETITIONER

MR. DELLINGER: Mr. Chief Justice, and may it please the Court:

Title I of the Americans With Disabilities Act does more than merely prohibit hostile discrimination against individuals with disabilities. Congress recognized that an additional kind of discrimination is the failure of employers through indifference or whatever to undertake reasonable accommodations to the physical or mental limitations of otherwise qualified individuals. As a result, this act does affirmatively require businesses to lift barriers that inhibit employment opportunities for those with disabilities.

The question here, though, is whether, in one particular respect, the act goes beyond a requirement that obstacles be cleared away. The issue is this. Where an employee is unable, because of a disability, to continue in his job, is that employee entitled to be placed in

another position instead of a more senior fellow employee who would be entitled to the job under the normal operation of a bona fide seniority system?

Now, this is not an easy question, but we believe that in the end a clear answer necessarily emerges from the act, and that is this, that the act simply does not require an employer to override neutral selection criteria wholly unrelated to disability in choosing among applicants for a position, and in particular it does not require the employer to set aside the normal operation of a bona fide seniority system.

QUESTION: Mr. Dellinger, are you suggesting by that argument that the express exception for bona fide seniority systems in title VII was surplusage, that it wasn't needed, because there would have been -- it would have been counted as a neutral rule?

MR. DELLINGER: That is correct. In fact, I think the presence of that provision in title VII is part of a background assumption in which neither title VII nor any other Civil Rights Act has ever taken what would be a fairly substantial step of requiring an employer to prefer someone for a position over an employee who is entitled to it under a seniority system or, indeed, to prefer any applicant over a more qualified employee.

QUESTION: But your answer is that it wasn't

necessary to put that in title VII, title VII would apply just the same way without it?

MR. DELLINGER: That is correct. I do not believe that --

QUESTION: Is there any indication that that's what Congress thought when it didn't -- I mean, it does seem a rather conspicuous absence, that the model statute, the basic one has an express exception for bona fide seniority systems, and this one doesn't.

MR. DELLINGER: Title VII took especial care to do that, but if you look at the more relevant statute, the Rehabilitation Act, it also does not contain any express exception and, moreover, it was interpreted not to require that, but most importantly under title VII, is this Court's decision in TWA v. Hardison, where the Court said it would reach the same result as the principle we argue for here, even without, even before you get to the portion of the act about bona fide seniority systems.

The Court in Hardison held that the reasonable accommodation language of that act for religious adherence, the same reasonable accommodation undue hardship language does not require displacing the rights of more senior employees under a seniority system in order to accommodate a religious adherence need to avoid working on a Saturday shift.

QUESTION: But are there any instances in which the seniority clause has to be ignored in favor of a reasonable accommodation? Suppose there are two positions and they pay the same thing, but a senior employee wants position A, and that's the only one that the disabled person can fulfill? The seniority provision trumps there?

MR. DELLINGER: Yes, it does, Justice Kennedy, and let me acknowledge that, of course, whenever you have a clear rule like the rule here that an employee, that an employer may apply a neutral standard unrelated to disability, such as a merit standard or a seniority standard, any time you have a clear rule, and that's the way seniority systems operate, you're going to have individual cases where, if you had a different kind of system involving individual assessment, you might reach a different conclusion in the very particular instances, but that -- that notion that you look and see whether in one particular case favoring the interest of the less-senior employee would in some social sense be better, that system is fundamentally incompatible with the nature of how a seniority system operates.

This is a system that, for US Airways, there are 14,000 customer service employees. Seniority is a system that gets rid of the potential of favoritism --

QUESTION: Would you talk about what the system

is here, because I found it a little hard to understand. Is it that a policy of the employer, the airline, that every so often all positions in the category in which this person worked are declared vacant?

MR. DELLINGER: I think that terminology is not used, Justice O'Connor. The effect may be the same. What happens under US Airways' system is that periodically, basically once a quarter, all positions are put up for rebidding.

QUESTION: All positions throughout the company, or in certain categories of jobs?

MR. DELLINGER: All through the entire category of customer service employees, which would be 14,000. I don't think they rebuild the --

QUESTION: Customer service jobs, once a quarter, are all declared open?

MR. DELLINGER: That's right. Each different division would -- well, they're not so much declared open, as simply put up for rebidding. That is, the way the system operates is that there is a -- it's a very simple system. There's a list kept in order of seniority. Everybody can rely upon where they are in the pecking order of that list. When there are positions eliminated, the people who are in those positions are not necessarily the ones who lose their job.

If two positions are eliminated in the freight area, the two juniormost employees have to leave, and the --

QUESTION: Well, we're not talking about job elimination. I thought we were talking about an existing job that continues but it's declared open.

MR. DELLINGER: No. There is no -- there's no -- if you gained the impression from respondent's brief that Mr. Barnett's position was somehow singled out to be declared vacant --

QUESTION: No. No, all customer service jobs, every quarter, are essentially declared open. Is that the policy?

MR. DELLINGER: That is correct. That is correct.

QUESTION: And at that -- is it also true, as I think you allege, that the seniority policy does not create legally enforceable rights in any employee? No employee wanting to come in would be able to sue to get that enforced.

MR. DELLINGER: That is correct. The company's --

QUESTION: So what kind of a seniority plan is that? I mean, on the one hand you say, we have to apply our seniority plan, but on the other hand, it isn't

enforceable.

MR. DELLINGER: Yes, and I'm glad you asked that. Of course, the company's consistent position in court, whenever someone wants to have a court review how a seniority plan is applied, is it relies upon the fact that it does not create legal rights enforceable in court, but no one has challenged the fact that it is a bona fide program. It's not a --

QUESTION: I know, but what would be the situation if there were truly a vacant position at US Airways in customer service? Would you think the ADA would say that it would be a reasonable accommodation to consider a disabled employee for placement in one of those slots?

MR. DELLINGER: Yes, absolutely. We believe that the reassignment aspect of reasonable accommodation does have considerable bite and does considerable work. It requires you not only to consider, but actively consider whether there are any other vacant places in which you could place an employee.

QUESTION: I mean, there is a provision in the act itself, is there not, that speaks to a vacancy and that can be a reasonable accommodation?

MR. DELLINGER: That is correct, and we believe that what that means, Justice O'Connor, is that an

employer must, unlike the situation under the Rehabilitation Act, where you could simply say you can't do the job --

QUESTION: Yes.

MR. DELLINGER: -- we're letting you go, we can't accommodate that job, they have no obligation to consider other places in the company.

Here, they have to actively consider. You have to actually go out, you're obligated to go out and try to find a vacant position.

QUESTION: Okay, so why isn't the sort of thing that US Airways does here, declaring all these jobs open once a quarter, create the kind of thing that US Airways has to consider a vacant position?

MR. DELLINGER: Well, you are exactly right that when the quarterly rebidding process comes up, yes, they have to consider, and they did, indeed, consider Mr. Barnett's request to be transferred into that position. Moreover, if they needed to make adjustment or accommodations on how that second position functioned, they would be obligated to do that as well.

What they were not obligated to do at this point, after they've identified available positions, overridden any arbitrary rules that say, you know, some people can't have that position, altered the position,

they then consider whether there's any good reason not to place Mr. Barnett in that position and, in the absence of a good reason, they are required by this provision to do so. At this point, we believe that the better reading of the act does not require the employer to override neutral selection criteria wholly unrelated to disability in choosing among applicants --

QUESTION: May I ask, do you mean any neutral -- any neutral selection criteria would trump the statute? Say they had a criteria that they used brand new employees for certain ticket-selling jobs as a training mechanism, and they always took people who hadn't worked for the company for more than 90 days or something, that that was their regular practice, would that practice always trump the interest of the disability -- disabled person?

MR. DELLINGER: Yes. I believe that an employer is entitled, under the statute -- you've got to have a good, neutral reason unrelated to disability, but the bright line --

QUESTION: Now you've added the word good. I thought it only had to be neutral.

MR. DELLINGER: I mean good in the sense that it has to be legitimate, bona fide business reason.

QUESTION: Something they always do.

MR. DELLINGER: Yes. You've got to, because the

act requires you to make this appointment, but where we --

QUESTION: Suppose you have a seniority system that's riddled with exceptions.

MR. DELLINGER: Where you have a seniority system that's riddled with exceptions, it is perfectly open to someone who challenges that to say, you don't really have a neutral policy unrelated to disability.

QUESTION: No, no, you do. I mean, here you happen to have just one exception. Well, suppose there were five or six, and so the argument would be, well, if you can make an exception for the hardship, the catastrophic illness, for this special situation in that one, what we want you to do is also make an exception for the handicapped person.

Now, nobody's doubting the employer's good faith. The question is, well, why not make na exception for us. You have a lot of others. Let's have a trial on it to see how open to you that is.

MR. DELLINGER: The answer to your question is, no, you are not required to do the reassignment merely because your seniority policy is one that applies seniority in some circumstances and not others.

QUESTION: All right, then at that point I'd become uncertain what exactly -- why we should hold what

you want, from my point of view. That is, I can easily see this act simply requires the employer to act reasonably, and now you could say, where there's a longstanding seniority system, and there's nothing special about it, and there are zero or very few exceptions, it's automatically a reasonable thing to not stir up enormous trouble in the workplace by saying, we're going to start making exceptions. I could see that. I'm not saying I agree, but I understand it.

But now, why is it, if there are, however, quite a few exceptions, that it isn't even open to the handicapped person to argue, make another, it's not unreasonable to make another?

MR. DELLINGER: Let me preface my answer by saying that for decades US Airways has had an established seniority policy that covers all of these positions, which has been regularly followed, with one exception for catastrophic illnesses and one revision of how you calculate the time of seniority, so that that issue is not, you know, raised or put before the Court as to whether you would think that not a good reason.

But it seems to me that under -- if you look at the sequence from the title VII through the Rehabilitation Act, through Hardison, the background principle that our civil rights laws have simply not restricted the ability

of an employer to make a good faith determination about how to fill positions, and that nothing in the ADA itself seems to question that bedrock assumption. That is to say, no one suggests, though it would be a perfectly -- not unduly costly that you need to add positions. Everyone seems to concede and agree that you don't need to transfer an employee to a position that would constitute a, quote, promotion, unquote, even though that might -- the employee might be qualified to do that position. No one suggests that you have to bump an employee who was actually sitting in a position.

Here, what you have is the defeated expectations under a seniority system, and if that system is bona fide, the way it works is to allow each employee to determine what his or her most important desires are, and that is what you gain through seniority. If you lose to --

QUESTION: Mr. Dellinger --

MR. DELLINGER: Yes.

QUESTION: -- one of the reasons that I find this particular statute puzzling is that it's not like title VII. Title VII says, thou shalt not discriminate. It says, you don't prefer -- you don't just redress imbalances. It's a straight nondiscrimination statute.

This one isn't. This one is driven by a concept called, reasonable accommodation. It makes reasonable

accommodation -- if you don't reasonably accommodate, you're discriminating, and so it seems to me that this statute has reasonable accommodation, if it's undue hardship, then it would be unreasonable, but there's nothing like that in title VII. This disabilities act gives a starring role to reasonable accommodation, which it truly doesn't have in title VII, so to give that effect, couldn't you look at this and say, well, this man was already in the job, and no body is going to be out of work, so the accommodation is reasonable. If he were seeking to bump somebody else, it wouldn't be reasonable. Why isn't that an appropriate way to look at this act that's driven by the idea, reasonable accommodation?

MR. DELLINGER: Let me acknowledge that what makes this an interesting case is the fact that the ADA does go beyond merely prohibiting hostile discrimination, so you're right that there are things that an employer affirmatively has to do that it doesn't have to do for other employees under this act.

The general language of the act, though, in my view is not sufficient to change the landscape that existed under the Rehabilitation Act, where the Courts had uniformly held that reassignment was never required. It's now a possibility, but you're never required.

QUESTION: But did the statute have the word,

reassignment in it, as this one does?

MR. DELLINGER: It did not have in it the word, reassignment, but we don't think that that word is intended to change -- in the Hardison case under title VII it was a reasonable accommodation case, and yet the Court said, no, there's a bright line. We're never -- even though the religious part of title VII requires a reasonable accommodation, we're never going to require another employee to sacrifice his or her standing under the seniority policy.

Now, the other part of your question, I think the question asked by Justice Breyer was, but what if it's really reasonable in a particular instance, and here's where I need to suggest why that approach is fundamentally inconsistent with how a seniority system operates. You are introducing an element of judgment and discretion which will unsettle settled expectations in a way that is completely unpredictable. What happens is, you simply can't know what the domino effect will be of substituting for a seniority system.

This is a system that is now operated by lower level managers who need to keep a posted list where every employee knows what the position is. If someone -- it would be a fundamental alteration of the system to require the employer no longer to utilize this neutral basis. For

example --

QUESTION: I notice that one of the amicus briefs suggests -- on behalf of labor unions suggests that that might well be true if it were the subject of collective bargaining and an agreement, but not for an ordinary employer plan. Is that how you read the brief?

MR. DELLINGER: That is how you read that brief, and I see that is not a distinction which Congress made in title VII when it chose there to protect seniority plans,and it is not one that seems to make a great deal of sense here. That is, in many States, in spite of the language put in by US Airways, in many States the provisions of a company plan are legally enforceable in court.

Moreover, I don't think there's any intent on Congress to weigh in on the question of whether the workforce should be unionized or not unionized by giving the disabled lesser rights --

QUESTION: Then if that's true, then what meaning do we give to reasonable accommodation in the ADA?

MR. DELLINGER: I think what reasonable accommodation --

QUESTION: It has to be something different, I assume, than undue hardship, because that's a separate defense.

MR. DELLINGER: Undue hardship, that's right, really goes to cost on an employer. I think the reasonable accommodation language here requires an employer to take affirmative steps to try to enable a person with a disability to continue in the workplace, and in particular with respect to reassignments, to look for vacant places to make second job accommodatable, for example, but not to cross a very major line --

QUESTION: But in a situation where the employer's policy is just to create open positions every quarter, that aren't enforceable anyway on behalf of any employee, is it unreasonable to say the employer has to accommodate this disabled worker?

MR. DELLINGER: Yes, it is unreasonable for the following reason. The reassignment, the sort of quarterly declaration of vacancy to which you refer is simply how a system operates where every employee accumulates seniority and then gets to choose the position and the shift, so that if you gain seniority, you get enough, you say thank goodness I can now get off the graveyard shift, I can go on the swing shift or the day shift position, I've gained all of this, and that is rebid every quarter. People rebid on positions, and that seems like a perfectly reasonable thing to do.

It is a -- there's nothing -- what is the bright

line, I think, here is that Congress has -- would have fought long and debated hard before it took the major step of saying an employer could not, at the end of the day, once all accommodations had been made, choose a person for a position based on who was the best-qualified or who was the most senior.

Now, let me say again what --

QUESTION: Your argument for that, as I understand it, is the argument that you've repeated in a couple, or your claim that you've repeated in a couple of instances that there would be something fundamentally unhinging to the seniority system to allow a disabilities exception, and that seems to me in part sort of an empirical question.

I mean, if a company like yours was going to have 100 disability exceptions a month at every terminal, yes, I can see it, but is there any reason to believe that the magnitude of the possible disabilities exceptions under reasonable accommodation would be so great as to have that kind of cataclysmic effect on the general reliance that employees can place on seniority?

MR. DELLINGER: Justice Souter, that is a good question that I think would go to whether it was an undue hardship.

QUESTION: Well, it would go to that, but

wouldn't it -- you know, it would go to --

MR. DELLINGER: But here, on the question of unreasonableness, I think we're looking at a question of principle. As Judge Posner said in the Seventh Circuit decision, it is a difference not just of cost but of principle, and here the principle at stake is the interest of other employees, so --

QUESTION: There's no question, to the extent of the exceptions, their interest is going to be discounted in some way.

MR. DELLINGER: And even -- even though we don't know the numbers, because we don't know ultimately how broadly the court will interpret the phrase, disability, which you have sub judice in other cases, and even them would take some working out. We don't know the numbers, but we do know how it would disrupt the expectations of employees.

Here, for example, even though we have a bright line rule -- we have a bright line rule with promotions. Even though promotions are a reassignment to a vacant position, you never have to promote, and that's because there's a good reason, it is thought, that promotions are not a reasonable accommodation. There's an even better reason, in my view, not to trump the rights and interests of other employees who have earned a right to a position,

and to try to look, as several of you have in questions, as to whether it might be reasonable in a particular instance, I don't know how you place this burden on managers in a system that is a seniority system to make those complex social judgments not knowing what the domino effect is. You could have --

QUESTION: Well, one thing is easy to see is that if you bump somebody, it's no good. That's not reasonable. If somebody, as in this case, is already in the job, you let that person remain in the job, so it's not as though every exercise of seniority rights is of equal magnitude. If somebody is trying to bid for that job and some senior person otherwise would be laid off, then you say it's unreasonable, but here there isn't such a situation.

MR. DELLINGER: That could well be. We don't know what the effect is, because someone will be bumped if they don't get their desired position. For example --

QUESTION: I thought we know on the facts of this case that it's only a question of, that nobody is going to be bumped. The question is whether he stays in that job. There were jobs he could have done in cargo, if he weren't disabled.

MR. DELLINGER: We don't know what the consequences will be, because what Mr. Barnett is

asking -- and this is from his declaration, which is not in the joint appendix, but is at page 3 of his declaration of February 28, he says, the intent and potential effect of my request was to have the employee who is going to displace me in the mailroom go around me and bump the next less senior position.

You could have the following situation. You could have the person who's claiming the job in the mailroom could be an older single parent who's finally worked out child care arrangements and is entitled by seniority to the mailroom position, but who finds out, when, though she is senior in position, or he is senior in position, that Mr. Barnett is insulated from the normal operations system, would have to bump the next position down, which might well be a graveyard shift position, or a position in cargo, which the person was too old to handle the effects of, so you simply --

QUESTION: What it boils down to, though, is, I think as Justice Ginsburg is suggesting, it means that no one can bump up, but it doesn't mean that anybody gets bumped down, and that, there's a -- I mean, she suggests there's a qualitative difference between those two.

MR. DELLINGER: And I think we don't know that, Justice --

QUESTION: Well, why don't we know that as a

matter of logic?

MR. DELLINGER: Because it could well be that the more senior employee who needs to be in the mailroom, she needs -- her position is being eliminated. She needs to be in the mailroom, which has a day shift. She's senior and entitled to it. She can't get it. The next senior position, which she has to take, could be a graveyard shift, or a graveyard shift in cargo. She might not be able to work --

QUESTION: That's true, but it's still the fact that we know that the effect of following Justice Ginsburg's suggestion is that no extra person gets bumped down. It's merely that one person doesn't bump up and bump the disabled employee down. That we can say with certainty, can't we?

MR. DELLINGER: It may well be in many instances the bottom-most person will lose their job, and it could be that the more senior person would get a job that they -- that doesn't work out for them.

QUESTION: But that's going to be a wash no matter how it works.

MR. DELLINGER: Not necessarily.

QUESTION: If you have zero-sum -- I mean, if you have a finite number of employees and you're laying somebody off, that's --

MR. DELLINGER: Under our plan, it won't be that more people will lose jobs, or get their less desired accommodation. It will be that the more senior employees do not get the position to which they are entitled, which for complex reasons may be very important to them.

I'll reserve the remainder of my time.

QUESTION: Very well, Mr. Dellinger.

Ms. Center, we'll hear from you.

ORAL ARGUMENT OF CLAUDIA CENTER

ON BEHALF OF THE RESPONDENT

MS. CENTER: Mr. Chief Justice, and may it please the Court:

There are four points that must be made in this case. First of all, the petitioner's proposed definition of the term, reasonable accommodation, as meaning fair, proper, fit, appropriate, not extreme, not excessive, et cetera, et cetera, must be rejected, because that construction eviscerates all of the statutory defenses, is contrary to all of the regulations, and it is contrary to the listed reasonable accommodations, including reassignment.

Second, the term reasonable accommodation in the ADA means a modification that enables the disabled employee to participate that is reasonable to the disabled employee.

Third, even if you --

QUESTION: You're -- stopping you at the second point, there, so from your point of view, reasonable relates only to its effect on the employee, not on anybody else?

MS. CENTER: That's correct.

Third, even if you disagree with my proposal for the definition of reasonable accommodation, the term must include the listed reasonable accommodations. Where it says reasonable accommodations may include, those accommodations listed, which include reassignment to a vacant position, are reasonable accommodations by definition.

QUESTION: But the statute says may include. It doesn't say must include. Your definition says must include?

MS. CENTER: The may include relates to the case-by-case individualized analysis that must take place. All of the accommodations won't be necessary in every cases. The may include relates to the specific needs of the specific individual employee.

And finally, reassignment to a vacant position means an actual reassignment to a job that is not currently occupied or that has not already been filled.

QUESTION: Would you -- Ms. Center, why is it --

it has been conceded, I gather -- you didn't contest this anyway, in your brief, that reasonable accommodation would never include appointment to a promotion to a more -- a position that pays slightly more, even though the amount it pays more is negligible, so it's not -- you know, it's not a hardship on the employer. Why is that?

MS. CENTER: Well, I think there are several reasons that the agency, the EEOC has come to that conclusion, which I agree with. First of all, the listed accommodation is reassignment to a vacant position. Congress did not say promotion, and reassignment describes a lateral transfer, ordinarily.

QUESTION: Well, but this is a vacant higher position. They didn't exclude that. This is a vacant position at a higher level. Why wouldn't that be included?

MS. CENTER: Further, the EEOC regulations explain that the purpose of the reasonable accommodation is to enable the disabled employee to enjoy the privileges of employment along with similarly situated disable -- nondisabled employees, to enjoy equal benefits, and if there's a promotion it's sort of -- it's contrary to that principle.

QUESTION: Oh, but so is what you're urging here, this -- you're ending up giving the person here

seniority rights, which exceed those of other employees who have been there a certain amount of time.

MS. CENTER: Well, in this case the job that Mr. Barnett ended up with was equal in terms of, a) he would have been employed, and b) at the same pay and, et cetera, the same level --

QUESTION: I understand, but --

MS. CENTER: -- as he would have gotten but for his disability.

QUESTION: But you can't urge that your system assures that the disabled not be given any benefits that other employees would not get. You're giving him a benefit that they wouldn't get. They wouldn't be allowed to stay in that job, so why can't you do the same thing for a promotion?

I mean, the other side has a criterion. Their criterion is, it is -- reasonable accommodation is limited to accommodation to the disability, so you provide him with a working space that will accommodate the fact that he can't stand up for too long, or you put him in another job at the same level that's vacant which doesn't require him to stand up. All of this accommodates the disability, they say.

Whereas the accommodation you're urging here has nothing to do with accommodating the disability. It has

to do with, I don't know, giving him a different job.

MS. CENTER: Right, the accommodation is --

QUESTION: They have a criterion. I don't understand what your criterion is, except, you know, do what is reasonable. Why isn't it reasonable to promote the disabled person if it -- it just costs a few more bucks. That's the only vacant job left. It's not hardship to the employer, so promote him. Why isn't that reasonable?

MS. CENTER: Well, it's -- in addition to the reasons I already gave you, the agency has construed reassignment to a vacant position to not include promotion, and --

QUESTION: Well, never mind the agency. Maybe the agency was unreasonable.

(Laughter.)

MS. CENTER: In this case, though, the accommodation that Mr. Barnett sought was not more seniority. The accommodation was reassignment to a vacant position and not --

QUESTION: I'm not talking about him, though. I'm asking for your theory of the case. What is it that makes an assignment not reasonable, or an accommodation not reasonable?

MS. CENTER: An accommodation --

QUESTION: Once you cut it loose from accommodating the disability, which is what the other side wants to do, once you cut it loose from that, why isn't everything up for grabs, including a promotion?

MS. CENTER: It's not cut loose from the disability. The reasonable accommodation has to be made, by the clear a statutory language has to be made to the physical or mental limitations of the disabled employee. Here, the reassignment enabled Mr. Barnett to retain -- would have enabled Mr. Barnett to retain his employment. It was because of his disability that he was unable to perform the job that he was relegated to when the positions were put up for bid, so it was through his disability --

QUESTION: Well, it can -- it can be a reasonable accommodation. The question is, is he entitled to it in the face of an employer's seniority plan that would put somebody else there instead?

MS. CENTER: Well, I think that he --

QUESTION: I think that's the question.

MS. CENTER: Well, there are -- I think he is entitled to that reasonable accommodation if all other possibilities are exhausted. If all of the prerequisites are met for reassignment, such as there is a vacancy, the disabled employee is qualified, and no statutory defense

such as undue hardship applies, I think he is entitled to the reassignment.

QUESTION: Even though some other employee on the basis of greater seniority than the respondents under the plan could take that slot?

MS. CENTER: Yes. I think he's entitled to that slot at that point.

QUESTION: And you don't equate that with the situation of a promotion?

MS. CENTER: No, it's not a promotion. It's a lateral transfer.

QUESTION: Let me be sure of one thing. The case arises on a summary judgment, and I thought the court of appeals held that you were entitled to a trial, not that you were entitled to summary judgment. Are you claiming you are entitled to summary judgment?

MS. CENTER: No, I'm -- I think that the employer is free to try and present a defense to our claim of failure to accommodate. Their defense would be undue hardship, or one of the other statutory defenses.

QUESTION: Does reasonableness go the jury, or is there a jury, do you think?

MS. CENTER: There would be a jury. I think in this case because reasonable accommodation -- because reassignment is one of the listed reasonable

accommodations, the judge could state that reassignment is a reasonable accommodation, but if you disagree with my, you know, construction of reasonable accommodation, then it could go to the jury, I suppose.

QUESTION: In your summary judgment proceeding, did you challenge, at all, the employer's description of the seniority system?

MS. CENTER: Yes, there was a challenge to that description.

QUESTION: I didn't see it. That is, as far as I could see there's an affidavit on the employer's side, and Rule 56(e) requires you to point to specific, you know, record evidence or affidavits, et cetera. I didn't see any.

MS. CENTER: Well, there wasn't -- I -- maybe I misunderstood the question, but there was in the record an effort to point out that they had made exceptions to the seniority system, that they had amended it --

QUESTION: As far as I could tell, what I have to assume about the system is that it's widespread, it's longstanding, it governs 14,000 employees, the only exception is an exception for catastrophic medical transfer, and the -- they say, I guess we have to take it as given, that it would require your view would require US Air to weigh and balance conflicting claims and personal

desires of all US Air agents, and it would interfere with, I guess, the alternative child care arrangements, educational endeavors, and the ability of other, the other employees to continue working for the company.

Now, those seem to me the facts. I didn't see any refutation of them --

MS. CENTER: There are additional facts --

QUESTION: -- and therefore I assume, for summary judgment purposes, I take those as a given, and if I'm not supposed to, I'd like to know right now.

MS. CENTER: There are additional facts, in addition to the catastrophic illness exception there is a significant modification to how to calculate furlough seniority. There is a change from department seniority to company seniority. In addition, as the petitioner has conceded, the personnel policy guide containing the seniority policy states on its face that it's not a contract, it's merely a --

QUESTION: No, that's given. I assume it's not.

MS. CENTER: And the grievance procedure, where by employees would bring these seniority matters to the company's attention, that grievance procedure says, you're not allowed to grieve something that's required by Federal law, and we get to decide what's required, so in that circumstance it seems to me not reasonable for an employee

to believe that the job assignment policy is going to trump a legitimate need for reasonable accommodation under a Federal law.

QUESTION: Given that statement, to get to this -- what I think of anyway as the heart of this matter, assuming I don't accept your view of reasonable accommodation, assuming that I accept the view that reasonableness includes the interest of other workers and perhaps the interest of management as well, all right, given that view of it, when you come up with the characteristics that I've mentioned and that you added to, why isn't it reasonable for the employer to say, look, if I give this person the job, there's an alternative chain I have to bump that really causes disruption in the company. It throws everything up for grabs.

I can't enforce a seniority system under that kind of regime, but even if I could, all these other workers here are going to be disrupted, too, and that's what makes my seniority system reasonable in the circumstance. Now, your reply to that is precisely what?

MS. CENTER: The sort of domino effect has been vastly overstated by this case by the petitioner. The actual impact of this sort of accommodation in this case and in other cases is to permit the disabled individual to have one assignment, and then replacing, on the list of

possible jobs for people to bid on, replacing that assignment would be the job that the person left, so each reassignment leaves a vacancy to be put on the list of jobs --

QUESTION: I don't understand that part of your answer, though I want to hear the rest, because if there are 7,000 jobs missing, then it will be 7,000 people at the end of the day without a job, and either you go down one chain and bump, bump, bump, bump, bump, or you go down a different chain and bump, bump, bump, bump, bump. The harm is precisely the same. It's a question of which people suffer it, so I don't see why there isn't a domino effect. It's this chain, or that chain.

MS. CENTER: Right, but in terms of the particular chain, there's a list of jobs upon which the nondisabled employees can bid, and those would include all of the jobs that remain vacant after the reassignment, as well as the job that the disabled individual left, so the actual impact is modest. It's removing one job on the list and adding a different job on the list.

QUESTION: Well, isn't it like musical chairs in a way? I mean, someone is going to lose out to the disabled person.

MS. CENTER: Someone may get a bob that they would -- a job where they would have preferred another

job.

QUESTION: Yes.

MS. CENTER: That's correct, but no one would lose their job because of the reassignment.

QUESTION: Well, it may be a job -- I mean, it depends. It may be a job that the person can't take, such as the person who had arranged from child care, and simply, the only other job available is one that the person cannot do. I mean, that's possible.

Why isn't it -- as I read this statute, I don't see anything in it which says that if -- there's plenty in it that says we're going to sacrifice some of the convenience of the employers to the needs of the handicapped, but I don't see anything in it that says we're going to sacrifice the expectations of coworkers to the handicapped. Why isn't it a perfectly feasible reading of reasonable accommodation to mean an accommodation that, among other things, does not defeat the reasonable expectation of fellow employees?

MS. CENTER: Well, you could conclude that, but I think it's -- if you look at the statutory structure, if you looked at the list of reasonable accommodations, if you look at the governing regulations, all of these provisions explain how the equities are weighed in the statutory --

QUESTION: What is there in any of them that shows that Congress envisioned not just putting some burden on the employer, but putting some burden on fellow employees?

MS. CENTER: Well, the --

QUESTION: I mean, it mentions vacancy only. I mean, it mentions vacancy because nobody's hurt if there's a vacancy, but somebody is hurt if there's a vacancy to which somebody has seniority entitlement.

MS. CENTER: Well, the plain language of the statute requires that the employer provide reasonable accommodation, and the defense is undue hardship, and so that's how the statute works. If there's no other possible accommodation --

QUESTION: Yes, but if I reject that view of the statute on the one I was taking, I'd still like to know what the response is to what I think is the main point, which is not the domino effect. If I paraphrase it, life is very difficult in a big company when you lay off 7,000 people. It's terrible, and the one think that the 7, the 14,000 who remain have to be certain about is that there's a fair system in place, and once we open it to this kind of argument, well, it's over.

Your client has a very bad back. I might think that's somebody that this act should protect, but when we

get to the reasonable accommodation stage, at that point, if all those people are in the act, I can't run my system, says the employer, because the claims for special exemption in the bumping will be endless.

Now, your response to that is what?

MS. CENTER: Well, if you disagree with our reading of the term, reasonable accommodation, the term still would require a case-by-case individualized analysis of whether it was reasonable in this situation, and what the petitioner wants is a per se rule for bona fide seniority policies, and that's completely contrary to the way that the statute works, which is case-by-case analysis.

QUESTION: -- say that your client could be bumped by someone who's more severely handicapped if he were in that position?

MS. CENTER: I think that each of the handicapped employees would be entitled to reassignment to a vacant position. If my client was in that position already, it would not be a vacancy, so it wouldn't be available.

QUESTION: Well, but I -- it's my understanding that these positions are deemed open at some point.

MS. CENTER: Well I think, then, that the client would be -- the more disabled individual would be entitled

to reassignment. They both would be entitled to reassignment.

QUESTION: Well, that's -- I think you've missed my point. Why wouldn't that person be as entitled to the position that your client occupies temporarily, when as a part of his or her reassignment or accommodation, reasonable accommodation?

MS. CENTER: There could be conflicting requests for accommodation, that's correct.

QUESTION: Would that person be entitled to that position --

MS. CENTER: There would be a number of ways to --

QUESTION: -- using your argument?

MS. CENTER: I don't believe that the more disabled employee would be entitled to bump the less-disabled employee. I think that --

QUESTION: Why?

MS. CENTER: Why? Because the employee that needs the accommodation continues to need the accommodation. The other employee also needs the accommodation.

QUESTION: But you could say that about the people who have the job in the first instance, couldn't you?

MS. CENTER: Excuse me.

QUESTION: The person who had that position and had his or her life worked out, day care, et cetera, et cetera, also needed that position.

MS. CENTER: That's correct.

QUESTION: So the argument's the same.

MS. CENTER: But the argument is that there's a Federal law in this case that requires reasonable accommodation, including reassignment.

QUESTION: Let me ask you this. What is your client's disability?

MS. CENTER: He has a back impairment.

QUESTION: What does that mean?

MS. CENTER: He has an orthopedic disability. He has pain, he has problems in his disks.

QUESTION: Has it been established that he in fact qualifies as disabled, or is that something we're just assuming arguendo at this stage of the case?

MS. CENTER: It's disputed. A summary judgment motion was denied on that issue, and so at this point I imagine we're assuming arguendo.

QUESTION: May I ask about a hypothetical that's running through my mind. Under your opponent's view, as I understand it, it would be at least theoretically possible that the job your client has occupied up to now, and he

wants to move because of his disability, would be the job most people on the seniority list would want if it were available, but they could nevertheless say they don't have to accommodate. Am I right on that?

MS. CENTER: Could you ask it one more time? I'm sorry.

QUESTION: It seems to me theoretically possible that he is -- because of his disability, he's leaving a job that is a very attractive job for a nondisabled person, and that everybody on the seniority list, if given the choice of jobs, would pick his job, that under your opponent's view it would nevertheless -- they could nevertheless refuse to accommodate him.

MS. CENTER: That's correct, and my client, Mr. Barnett's goal is not to get the plum job. Mr. Barnett's goal is to get a job that he can do despite his disability, so the purpose is not to prefer the disabled employee. The purpose is to enabled the disabled employee to retain employment and to accommodate their limitations.

QUESTION: But it does have the effect of giving a preference. That whole list of reasonable accommodations -- let's forget a seniority system. One of the accommodations is part-time. Suppose somebody who has an exhaustion problem, can't work a full day, and then there's somebody else who says, but I'm a single mom, and

I've got children at home, and they don't have to accommodate to me, I don't understand it.

Your answer is, well, there's a Federal law and it doesn't protect you, but that would create the same kind of friction in the workforce. People feel that they have been disadvantaged for no just reason, so -- but all those, what the statute lists as reasonable accommodations, every one of those could adversely affect someone who has in that person's view an equally good reason to get the break. It is a preference system.

MS. CENTER: That's correct. The petitioner concedes that the reasonable accommodation mandate requires employers to do certain things for disabled employees that they may choose not to do for nondisabled employees.

QUESTION: Sure, but preferring one -- I mean, giving someone a benefit that someone else doesn't get, such as allowing them to do a certain job sitting down when everybody else has to do it standing up, or what-not, that doesn't disadvantage the others. That doesn't destroy any of their expectations when they took the job, and the same thing with allowing somebody to work part-time. It doesn't help me any that somebody can work part-time now.

Sure, I'm not allowed to do it, just as I'm not

allowed to do the job sitting down, but it doesn't hurt me, whereas what happens here is that the person who had an expectation of seniority entitlement to a certain job has been frustrated in that expectation. It seems to me that's quite different. I mean, we're not talking about whether one employee can be preferred over another. Certainly, the disabled employee can be.

But the question is whether it's a reasonable accommodation when it requires you to harm another employee in that employee's job or in that employee's legitimate expectations, and I think that's really what's at issue here, whether it's just the employer that's going to be inconvenienced by this statute, or other employees as well. Why isn't it reasonable to say you cannot destroy the expectations of other employees? What in the statute shows that you can?

MS. CENTER: Well, it's true that in certain cases providing the reassignment to a vacant position ends up giving a priority to the employee over a nondisabled employee. That can happen, but that's not the purpose of the accommodation. The purpose of the accommodation is to enable the disabled employee to retain their employment, which directly serves the vocational and the equality goals of the act, and the reverse --

QUESTION: Yes, but to the extent that you think

reasonable, the word reasonable and reasonable accommodation requires what happens to other employees as well as a result of the accommodation, then you have a different question. If you approach it the way you do, that it refers only to what's reasonable for the disabled person, that's different, so we have to decide what reasonable accommodation really means, don't we?

MS. CENTER: And if you do decide that reasonable takes into account other employees, in this case the equities really favor Mr. Barnett, because Mr. Barnett is the one that faced job loss. The person who came in and bid on Mr. Barnett's job had no compelling need for the job. He was perfectly able to continue doing his existing job, and Mr. Barnett, by contrast, because the accommodation was denied, became inevitably unemployed, so the equities will frequently favor the disabled employee who faces job loss, even if you pull out reasonable separately like that.

QUESTION: I hate to belabor the point, Ms. Center, but the more disabled employee, someone who's severely disabled, if that person has to be accommodated and we only have to look at that person's needs in making our reasonableness determination, I don't understand why your client can't be bumped if he were in that position.

MS. CENTER: If you pulled out reasonable?

QUESTION: And only -- and you limited that determination to the disabled person who has to be accommodated.

MS. CENTER: Well, if you pulled out reasonable in that way, I think there'd be a difficulty arguing it would be reasonable to disrupt another effective accommodation that's already in place. It might be reasonable to do some other things --

QUESTION: But that's -- then your argument is only different in -- slightly from the argument that you have to take into consideration the disruption that's caused in others' lives when you disrupt the seniority system.

MS. CENTER: Well, I think that the disruption, as we state in our brief, can be considered in the undue hardship defense. It's a detailed defense that's drafted to consider all of these factors.

QUESTION: Well, could we consider the disruption to your client in the undue hardship category?

MS. CENTER: No. I think the disruption to my client in the job loss is the harm that results from the failure to accommodate.

QUESTION: But aren't you saying that in the case that Justice Thomas poses you do consider the disruption to your client as well as the interest of the

more --

MS. CENTER: Correct. I misunderstood.

QUESTION: Okay. Then why don't you do that across the board? In other words, why doesn't -- why shouldn't -- why don't you have to concede that reasonableness always takes into consideration the interest of other employees?

MS. CENTER: Because I think that's contrary to the structure of the statute. I think it's contrary to the description of reasonable accommodations. It's contrary to the regulations.

QUESTION: Yes, but can you find any textual basis in the statute that says when you're dealing with comparative interests of two disabled people you consider the interests of both in determining what is reasonable, but when you're considering the comparative interests of a disabled person and others, you don't consider both?

MS. CENTER: I was --

QUESTION: Is there any textual basis for that?

MS. CENTER: Perhaps I'm still misunderstanding, but I was answering the question assuming that my reading of the statute was rejected and that we were looking at equities in the word reasonable.

QUESTION: I see. You weren't conceding -- all right, just for argument.

MS. CENTER: Yes.

QUESTION: Do I misunderstand? I thought you had agreed earlier that it would never be reasonable to bump another employee.

MS. CENTER: That's correct.

QUESTION: Okay. So you're always talking about transfer to a vacant position. I don't understand the competition between two disabled persons. Each of them has to be given a vacant job. If the job's already filled, it doesn't matter whether it's filled by another disabled person or by a perfectly healthy person.

MS. CENTER: That's correct. It will often, I think, just be the chronology, who requests accommodation first, who gets reassigned, and then you go on to the next disabled employee if there is one and deal with their accommodation.

QUESTION: And the reason you can't bump another employee is that that's unreasonable, is that --

MS. CENTER: No. The reason is that the accommodation listed is reassignment to a vacant position, and that vacant language was put in there to prevent bumping an occupied position, bumping an individual.

QUESTION: Well, if you -- what you've said, you're making of this statute in this respect something different from, in title VII, where you have past proven

discrimination, so the employer may have to give a remedy, that remedy may adversely affect other people, and the calculus that the Court has to make is, yes, they can be hurt, but not too much, and isn't that exactly what is going on here?

If we reject your client-centered interpretation of reasonable, it's just the same thing. Nondiscrimination, this statute goes beyond nondiscrimination. It requires reasonable accommodation. What's reasonable? Of course, you always have to take into account the interests of other people.

MS. CENTER: That's correct. If we -- if the Court rejects my view of the term, reasonable accommodation, you'd have to take into account all of those considerations, but you could not adopt, I don't believe, the per se rule suggested by the petitioner that neutral, you know, selection criteria are always going to trump the ADA.

For example, your part-time working scenario, that could be eliminated by a neutral rule that no one can work less than full-time, so that can't be the rule. If it's reasonable, pulled out and looked at in the different criteria, then it has to be case-by-case. It can't simply be deference to a neutral selection criteria.

QUESTION: When I got the case by case, I look

at the record here, and it doesn't seem to me as if your client wants to prove anything. They'll accept what the other side says about it as we discussed, and then we just have to decide in this case, is that enough or not. Is that right?

MS. CENTER: Well, I think there are a number of items in the record that show that the actual disruption to the employer, as well as the impact on other employees, would have been extremely modest, and that retaining Mr. Barnett in the job he'd been successfully performing for years was -- would have been an entirely reasonable accommodation, if you want to pull out reasonable.

QUESTION: It's not a matter of proof. We're at the pretrial stage.

MS. CENTER: Well, that's true, and there's certainly sufficient evidence under Reeves for our client to have a trial on that issue, should --

QUESTION: Thank you. Thank you, Ms. Center.

MS. CENTER: Thank you.

QUESTION: Mr. Dellinger, you have 2 minutes remaining.

REBUTTAL ARGUMENT OF WALTER E. DELLINGER, III

ON BEHALF OF THE PETITIONER

MR. DELLINGER: Mr. Chief Justice, when it comes to filling positions, which is fundamentally different, I

think, than adding other elements, there's nothing anomalous about a per se rule, nor is that inconsistent with giving individualized considerations. The rehab act and title VII both said that you don't displace seniority systems.

In Hardison v. TWA, this Court did not say you have to ask whether the more senior employee's reason for needing the Saturday off was either trivial or serious. When it comes to positions, there is a good reason for letting the more senior employee choose the more desirable position. I don't think either the line managers or the Ninth Circuit engaging in an individual case-by-case assessment could possibly make that a workable system.

The notion that there's no one who's going to be hurt reduces to this, that when the more senior employee claims the position under the regular operation of the statute, their response is to say, well, that more senior employee can always go and be a cargo handler on the night shift. We don't know that. We don't know if that would work.

In effect what you're doing when you promote somebody to a greater seniority priority is that you are promoting, and we do know that however reasonable it might be in a particular case, if you did an intensive case-by-case thing to say, why don't we promote this person to the

secretarial supervisor, that itself is never required, because we think that in a sense you're really going to lose your way in trying to manage a company if you move away from bedrock proposition that an employer is never required to choose the less-qualified or the less-senior person once they've made all the other accommodations. That would be a major social change.

There is an argument that someone who loses one position because of a disability ought to have a priority claim for another position even over someone who is more qualified or more senior for it. That would be a major policy change that we -- for which there are arguments for and against. The Congress --

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Dellinger.

MR. DELLINGER: Thank you.

CHIEF JUSTICE REHNQUIST: The case is submitted.

(Whereupon, at 12:03 p.m., the case in the above-entitled matter was submitted.)