No. 97-1943

In the Supreme Court of the United States

OCTOBER TERM, 1998

KAREN SUTTON AND KIMBERLY HINTON, PETITIONERS

v.

UNITED AIR LINES, INC.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF IN REPLY TO RESPONDENT'S POST-ARGUMENT BRIEF, AND BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE

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MOTION FOR LEAVE TO FILE BRIEF IN REPLY TO POST-ARGUMENT BRIEF OF RESPONDENT

The United States and the Equal Employment Opportunity Commission as amici curiae respectfully move for leave to file the accompanying brief in reply to the post-argument brief of respondent, in the event the Court grants respondent's motion to file that brief. Respondent in this case has sought leave to file a post-argument brief, assertedly in order to call the attention of the Court to an EEOC regulation that, in respondent's view, is inconsistent with a statement made by the attorney for the government at the oral argument in *Albertsons, Inc.* v. *Kirkingburg*, No. 98-591. The accompanying brief is necessary to correct misstatements of the government's position in respondent's post-argument brief, and for that reason it would assist the Court in evaluating the contentions of the parties in this case.

Respectfully submitted.

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APRIL 1999

TABLE OF AUTHORITIES

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POST-ARGUMENT BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE

At oral argument in *Albertsons, Inc.* v. *Kirkingburg*, No. 98-591, counsel for the government was asked whether individuals could be subject to unjustifiable employment decisions based on physical characteristics, but nonetheless not be "regarded as" disabled. Counsel for the government responded that one example of such a case would be where adverse action was taken against an employee because the employee had blue eyes. Respondent contends that this answer was inconsistent with an EEOC regulation. The regulation cited by respondent provides that one way a covered entity may regard an individual as disabled is if the employee does not have an impairment, "but is treated by a covered

entity as having a substantially limiting impairment." Resp. Post-Arg. Br. 2 (quoting 29 C.F.R. 1630.2(*l*)).

The ADA's basic definition of disability provides:

> The term "disability" means, with respect to an individual—
>
> (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
>
> (B) a record of such an impairment; or
>
> (C) being regarded as having such an impairment.

42 U.S.C. 12102(2). Under the third prong of that definition, an employee is disabled if the employer "regard[s]" the employee as having "such an impairment." That is, (1) the employer must regard the employee as having an impairment and (2) the employer must regard that impairment as substantially limiting one or more of the major life activities of the employee. Each of those two requirements, in turn, leads to important limiting principles.

First, if an employer makes an employment decision based on an actual or perceived physical characteristic that does not in fact constitute an impairment for purposes of the ADA, the employer has not regarded the employee as having an impairment. The example of the individual with blue eyes illustrates that point. Eye color is not itself an impairment. See 29 C.F.R. 1630.2(h) (defining impairment as "[a]ny physiological disorder, or condition, cosmetic disfigurement, or anatomical loss").[1] Moreover, it is difficult to imagine a case

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[1] See also 29 C.F.R. Pt. 1630 App. § 1630.2(h) ("It is important to distinguish between conditions that are impairments and physi-

in which an employer—even an employer that makes an employment decision based on eye color—would view eye color as an impairment (*i.e.*, a disorder or defect). Accordingly, an employer who makes an employment decision based on eye color does not regard the employee as having an impairment. The same would be true of the example posed by respondent of a football team that refuses to hire a quarterback with "relatively short stature." Resp. Post-Arg. Br. 2. See 29 C.F.R. Pt. 1630 App. § 1630.2(h) (quoted in note 1, *supra*) ("the term 'impairment' does not include physical characteristics such as * * * height * * * that are within 'normal' range and are not the result of a physiological disorder").

That conclusion does not conflict at all with the regulation cited by respondent. See Resp. Post-Arg. Br. 2 (quoting 29 C.F.R. 1630.2(*l*)(3)). That regulation makes clear that one way an employer may regard an employee as disabled is if the employee "is treated by [the employer] as having a substantially limiting impairment" that the employee does not actually have. See 29 C.F.R. Pt. 1630 App. § 1630.2(*l*) ("This situation could occur, for example, if an employer discharged an employee in response to a rumor that the employee is infected with Human Immunodeficiency Virus (HIV). Even though the rumor is totally unfounded and the individual has no impairment at all, the individual is considered an individual with a disability because the employer perceived of this individual as being dis-

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cal, psychological, environmental, cultural and economic characteristics that are not impairments. The definition of the term 'impairment' does not include physical characteristics such as eye color, hair color, left-handedness, or height, weight or muscle tone that are within 'normal' range and are not the result of a physiological disorder.").

abled."). But the employer must at least regard the employee as having an impairment before the employer can be said to regard the employee as having a "substantially limiting" impairment.

Second, respondent simply overlooks the fact that an employer may regard an employee as having an impairment that limits—but does not substantially limit—a major life activity. Where the major life activity of working is at issue, the term "*substantially limits* means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working." 29 C.F.R. 1630.2(j)(3)(i). Thus, in an "actual disability" case in which the employee asserts a limitation in the major life activity of working, the employee must show that the employee's impairment actually significantly restricts the employee's ability to perform "a class of jobs or a broad range of jobs in various classes." See 29 C.F.R. 1630.2(j)(3)(ii) (defining "class of jobs" and "broad range of jobs in various classes" inquiries); see also 29 C.F.R. Pt. 1630 App. § 1630.2(j), at 348-349 (EEOC Interpretive Guidance on when a person is substantially limited in the major life activity of working). Correspondingly, where the claim is that the employee is "regarded as" substantially limited in the major life activity of working, the question becomes whether the employer *regards* the employee as having an impairment that significantly restricts the employee's ability to perform a "class of jobs or a broad range of jobs in various classes."

Under these principles, where the employer regards the employee as having an impairment that significantly restricts the employee from performing the class of jobs the employee would ordinarily be expected to perform (*i.e.*, the class of jobs that the employee has the "training, skills and abilities" necessary to perform, such as airline pilot or truck driver), the employer regards the employee as substantially limited in the major life activity of working.[2] Where the employer regards the employee as precluded only from a single, unique position that is not broad enough to constitute a class (such as piloting a particular type of aircraft due to the unique qualities of that aircraft or being a quarterback on a football team), the employer may regard the employee as "limited" in the major life activity of working, but the employer does not regard the employee as "substantially limited" in that activity. See Br. for the United States and the EEOC as Amicus Curiae at 18 n.7. In such a case, the employee is not "regarded as having such an impairment" and is therefore not disabled under the "regarded as" prong of the statute.

In short, under the EEOC's regulations, an employer may make employment decisions based on physical

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[2] As the EEOC's Interpretive Guidance explains, this requirement ordinarily would be satisfied where, as is alleged in this case, the employer treats the employee as disqualified from all jobs with that employer that fall within the relevant class and the jobs with that employer do not differ in their essential attributes from such jobs with other employers. See 29 C.F.R. Pt. 1630 App. § 1630.2(*l*) ("An individual rejected from a job because of the 'myths, fears, and stereotypes' associated with disabilities would be covered under this part of the definition of disability, whether or not the employer's * * * perception were shared by others in the field.").

characteristics without being found to "regard" the employee as having a substantially limiting impairment within the meaning of the ADA. That would occur where the employer bases its decision on an actual or perceived physical characteristic that is not (and is not regarded as) an impairment within the meaning of the ADA. It would also occur where the employer bases its decision on a characteristic that is an impairment, but that does not substantially limit (and is not regarded as substantially limiting) a major life activity. If the major life activity at issue is working and the employer bases an employment decision on an impairment that in the employer's view restricts an employee in a particular specialized job, but not in a class of jobs or a broad range of jobs in various classes, then the employer does not regard the employee as having an impairment that substantially limits the employee in working. In that event, the employee does not have a "regarded as" disability under 42 U.S.C. 12102(2)(C), and therefore does not satisfy the threshold requirement for coverage under the ADA.

Respectfully submitted.

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