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IN THE SUPREME COURT OF THE UNITED STATES

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US AIRWAYS, INC.,
Petitioner
v.
ROBERT BARNETT

:
:
: No. 00-1250
:

- - - - -X

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.

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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

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

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

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

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

25 QUESTION: But your answer is that it wasn't

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

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

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

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

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

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

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

22 This is a system that, for US Airways, there are
23 14,000 customer service employees. Seniority is a system
24 that gets rid of the potential of favoritism --

25 QUESTION: Would you talk about what the system

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

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

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

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

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

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

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

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

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

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

14 MR. DELLINGER: That is correct. That is
15 correct.

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

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

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

1 enforceable.

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

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

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

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

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

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

4 QUESTION: Yes.

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

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

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

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

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

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

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

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

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

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

24 QUESTION: Something they always do.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

17 QUESTION: Mr. Dellinger --

18 MR. DELLINGER: Yes.

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

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

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

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

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

25 QUESTION: But did the statute have the word,

1 reassignment in it, as this one does?

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

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

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

1 example --

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

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

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

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

21 MR. DELLINGER: I think what reasonable
22 accommodation --

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

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

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

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

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

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

7 Now, let me say again what --

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

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

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

25 QUESTION: Well, it would go to that, but

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 matter of logic?

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

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

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

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

22 MR. DELLINGER: Not necessarily.

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

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

6 I'll reserve the remainder of my time.

7 QUESTION: Very well, Mr. Dellinger.

8 Ms. Center, we'll hear from you.

9 ORAL ARGUMENT OF CLAUDIA CENTER

10 ON BEHALF OF THE RESPONDENT

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

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

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

1 Third, even if you --

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

6 MS. CENTER: That's correct.

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

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

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

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

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

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

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

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

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

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

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

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

7 QUESTION: I understand, but --

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

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

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

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

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

2 MS. CENTER: Right, the accommodation is --

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

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

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

16 (Laughter.)

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

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

25 MS. CENTER: An accommodation --

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

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

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

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

20 QUESTION: I think that's the question.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

7 MS. CENTER: There are additional facts --

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

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

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

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

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

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

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

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

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

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

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

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

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

1 job.

2 QUESTION: Yes.

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

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

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

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

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

5 MS. CENTER: Well, the --

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

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

15 QUESTION: Yes, but if I reject that view of the
16 statute on the one I was taking, I'd still like to know
17 what the response is to what I think is the main point,
18 which is not the domino effect. If I paraphrase it, life
19 is very difficult in a big company when you lay off 7,000
20 people. It's terrible, and the one think that the 7, the
21 14,000 who remain have to be certain about is that there's
22 a fair system in place, and once we open it to this kind
23 of argument, well, it's over.

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

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

5 Now, your response to that is what?

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

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

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

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

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

1 to reassignment. They both would be entitled to
2 reassignment.

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

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

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

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

14 QUESTION: -- using your argument?

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

18 QUESTION: Why?

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

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

1 MS. CENTER: Excuse me.

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

5 MS. CENTER: That's correct.

6 QUESTION: So the argument's the same.

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

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

12 MS. CENTER: He has a back impairment.

13 QUESTION: What does that mean?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 QUESTION: Yes, but to the extent that you think

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

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

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

25 MS. CENTER: If you pulled out reasonable?

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

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

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

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

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

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

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

1 more --

2 MS. CENTER: Correct. I misunderstood.

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

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

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

18 MS. CENTER: I was --

19 QUESTION: Is there any textual basis for that?

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

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

1 MS. CENTER: Yes.

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

5 MS. CENTER: That's correct.

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

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

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

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

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

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

6 If we reject your client-centered interpretation
7 of reasonable, it's just the same thing.

8 Nondiscrimination, this statute goes beyond
9 nondiscrimination. It requires reasonable accommodation.
10 What's reasonable? Of course, you always have to take
11 into account the interests of other people.

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

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

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

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

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

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

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

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

19 MS. CENTER: Thank you.

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

22 REBUTTAL ARGUMENT OF WALTER E. DELLINGER, III

23 ON BEHALF OF THE PETITIONER

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

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

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

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

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

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

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

14 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
15 Dellinger.

16 MR. DELLINGER: Thank you.

17 CHIEF JUSTICE REHNQUIST: The case is submitted.

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