SUPREME COURT OF THE UNITED STATES

No. 00–1250

US AIRWAYS, INC., PETITIONER *v.*
ROBERT BARNETT

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

[April 29, 2002]

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, dissenting.

The question presented asks whether the "reasonable accommodation" mandate of the Americans with Disabilities Act of 1990 (ADA or Act) requires reassignment of a disabled employee to a position that "another employee is entitled to hold . . . under the employer's bona fide and established seniority system." Pet. for Cert. i; 532 U. S. 970 (2001). Indulging its penchant for eschewing clear rules that might avoid litigation, see, *e.g.*, *Kansas* v. *Crane,* 534 U. S. 407, 423 (2002) (SCALIA, J., dissenting); *TRW Inc.* v. *Andrews,* 534 U. S. 19, 35-36 (2001) (SCALIA, J., concurring in judgment), the Court answers "maybe." It creates a presumption that an exception to a seniority rule is an "unreasonable" accommodation, *ante*, at 11, but allows that presumption to be rebutted by showing that the exception "will not likely make a difference," *ante*, at 13.

The principal defect of today's opinion, however, goes well beyond the uncertainty it produces regarding the relationship between the ADA and the infinite variety of seniority systems. The conclusion that any seniority system can ever be overridden is merely one consequence of a mistaken interpretation of the ADA that makes all employment rules and practices—even those which (like a seniority system) pose no *distinctive* obstacle to the dis-

abled—subject to suspension when that is (in a court's view) a "reasonable" means of enabling a disabled employee to keep his job. That is a far cry from what I believe the accommodation provision of the ADA requires: the suspension (within reason) of those employment rules and practices *that the employee's disability prevents him from observing*.

I

The Court begins its analysis by describing the ADA as declaring that an employer may not "discriminate against a qualified individual with a disability." *Ante,* at 4. In fact the Act says more: an employer may not "discriminate against a qualified individual with a disability *because of the disability* of such individual." 42 U. S. C. §12112(a) (1994 ed.) (emphasis added). It further provides that discrimination includes "not making reasonable accommodations *to the known physical or mental limitations* of an otherwise qualified individual with a disability." §12112(b)(5)(A) (emphasis added).

Read together, these provisions order employers to modify or remove (within reason) policies and practices that burden a disabled person "because of [his] disability." In other words, the ADA eliminates workplace barriers only if a disability prevents an employee from overcoming them—those barriers that would not be barriers *but for* the employee's disability. These include, for example, work stations that cannot accept the employee's wheelchair, or an assembly-line practice that requires long periods of standing. But they do not include rules and practices that bear no more heavily upon the disabled employee than upon others—even though an exemption from such a rule or practice might in a sense "make up for" the employee's disability. It is not a required accommodation, for example, to pay a disabled employee more than others at his grade level—even if that increment is ear-

marked for massage or physical therapy that would enable the employee to work with as little physical discomfort as his co-workers. That would be "accommodating" the disabled employee, but it would not be "making . . . accommodatio[n] *to the known physical or mental limitations*" of the employee, §12112(b)(5)(A), because it would not eliminate any workplace practice that constitutes an obstacle *because of* his disability.

So also with exemption from a seniority system, which burdens the disabled and nondisabled alike. In particular cases, seniority rules may have a harsher effect upon the disabled employee than upon his co-workers. If the disabled employee is physically capable of performing only one task in the workplace, seniority rules may be, for him, the difference between employment and unemployment. But that does not make the seniority system a disability-related obstacle, any more than harsher impact upon the more needy disabled employee renders the salary system a disability-related obstacle. When one departs from this understanding, the ADA's accommodation provision becomes a standardless grab bag—leaving it to the courts to decide which workplace preferences (higher salary, longer vacations, reassignment to positions to which others are entitled) can be deemed "reasonable" to "make up for" the particular employee's disability.

Some courts, including the Ninth Circuit in the present case, have accepted respondent's contention that the ADA demands accommodation even with respect to those obstacles that have nothing to do with the disability. Their principal basis for this position is that the definition of "reasonable accommodation" includes "reassignment to a vacant position." §12111(9)(B). This accommodation would be meaningless, they contend, if it required only that the disabled employee be *considered* for a vacant position. The ADA already prohibits employers from discriminating against the disabled with respect to "hir-

ing, advancement, or discharge . . . and other terms, conditions, and privileges of employment." §12112(a). Surely, the argument goes, a disabled employee must be given preference over a nondisabled employee when a vacant position appears. See *Smith* v. *Midland Brake, Inc.*, 180 F. 3d 1154, 1164–1165 (CA10 1999) (en banc); *Aka* v. *Washington Hospital Center*, 156 F. 3d 1284, 1304–1305 (CADC 1998) (en banc). Accord, EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, 3 BNA EEOC Compliance Manual, No. 246, p. N:2479 (Mar. 1, 1999).

This argument seems to me quite mistaken. The right to be given a vacant position so long as there are no obstacles to that appointment (including another candidate who is better qualified, if "best qualified" is the workplace rule) is of considerable value. If an employee is hired to fill a position but fails miserably, he will typically be fired. Few employers will search their organization charts for vacancies to which the low-performing employee might be suited. The ADA, however, prohibits an employer from firing a person whose disability is the cause of his poor performance without first seeking to place him in a vacant job where the disability will not affect performance. Such reassignment is an accommodation *to the disability* because it removes an obstacle (the inability to perform the functions of the assigned job) arising solely from the disability. Cf. *Bruff* v. *North Mississippi Health Services, Inc.*, 244 F. 3d 495, 502 (CA5 2001). See also 3 BNA EEOC Compliance Manual, *supra*, at N:2478 ("[A]n employer who does not normally transfer employees would still have to reassign an employee with a disability").

The phrase "reassignment to a vacant position" appears in a subsection describing a variety of potential "reasonable accommodation[s]":

> "(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and
>
> "(B) job restructuring, part-time or modified work schedules, *reassignment to a vacant position*, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities." §12111(9) (emphasis added).

Subsection (A) clearly addresses features of the workplace that burden the disabled *because of* their disabilities. Subsection (B) is broader in scope but equally targeted at disability-related obstacles. Thus it encompasses "modified work schedules" (which may accommodate inability to work for protracted periods), "modification of equipment and devices," and "provision of qualified readers or interpreters." There is no reason why the phrase "reassignment to a vacant position" should be thought to have a uniquely different focus. It envisions elimination of the obstacle of the *current position* (which requires activity that the disabled employee cannot tolerate) when there is an alternate position freely available. If he is qualified for that position, and no one else is seeking it, or no one else who seeks it is better qualified, he *must* be given the position. But "reassignment to a vacant position" does *not* envision the elimination of obstacles to the employee's service in the new position that have nothing to do with his disability—for example, another employee's claim to that position under a seniority system, or another employee's superior qualifications. Cf. 29 CFR pt. 1630, App. §1630.2(o), p. 357 (2001) (explaining "reasonable accommodation" as "any change in the work environment or in the way things are customarily done that enables an

individual with a disability to enjoy *equal employment opportunities*" (emphasis added)); *Aka* v. *Washington Hospital Center*, 156 F. 3d at 1314–1315 (Silberman, J., dissenting) (interpreting "reassignment to a vacant position" consistently with the other accommodations listed in §12111(9), none of which "even alludes to the possibility of a preference for the disabled over the nondisabled").

Unsurprisingly, most Courts of Appeals addressing the issue have held or assumed that the ADA does not mandate exceptions to a "legitimate, nondiscriminatory policy" such as a seniority system or a consistent policy of assigning the most qualified person to a vacant position. See, *e.g.*, *EEOC* v. *Sara Lee Corp.*, 237 F. 3d 349, 353–355 (CA4 2001) (seniority system); *EEOC* v. *Humiston-Keeling, Inc.,* 227 F. 3d 1024, 1028–1029 (CA7 2000) (policy of assigning the most qualified applicant); *Burns* v. *Coca-Cola Enterprises, Inc.*, 222 F. 3d 247, 257–258 (CA6 2000) (policy of reassigning employees only if they request a transfer to an advertised vacant position); *Cravens* v. *Blue Cross and Blue Shield of Kansas City*, 214 F. 3d 1011, 1020 (CA8 2000) (assuming reassignment is not required if it would violate legitimate, nondiscriminatory policies); *Duckett* v. *Dunlop Tire Corp.*, 120 F. 3d 1222, 1225 (CA11 1997) (policy of not reassigning salaried workers to production positions covered by a collective-bargaining unit); *Daugherty* v. *El Paso*, 56 F. 3d 695, 700 (CA5 1995) (policy of giving full-time employees priority over part-time employees in assigning vacant positions).

Even the EEOC, in at least some of its regulations, acknowledges that the ADA clears away only obstacles *arising from* a person's disability and nothing more. According to the agency, the term "reasonable accommodation" means

> "(i) [m]odifications or adjustments to a job application process *that enable* a qualified applicant with a

> disability *to be considered for* the position such qualified applicant desires; or
>
> "(ii) [m]odifications or adjustments to the work environment . . . *that enable* a qualified individual with a disability to perform the essential functions of that position; or
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> "(iii) [m]odifications or adjustments *that enable* a covered entity's employee with a disability *to enjoy equal benefits and privileges* of employment as are enjoyed by its other similarly situated employees without disabilities." 29 CFR §1630.2(o) (2001) (emphasis added).

See also 29 CFR pt. 1630, App. §1630.9, p. 364 (2001) ("reasonable accommodation requirement is best understood as a means by which barriers to . . . equal employment opportunity . . . are removed or alleviated").

Sadly, this analysis is lost on the Court, which mistakenly and inexplicably concludes, *ante*, at 6, that my position here is the same as that attributed to US Airways. In rejecting the argument that the ADA creates no "automatic exemption" for neutral workplace rules such as "break-from-work" and furniture budget rules, *ante*, at 5-6, the Court rejects an argument I have not made.

II

Although, as I have said, the uncertainty cast upon bona fide seniority systems is the least of the ill consequences produced by today's decision, a few words on that subject are nonetheless in order. Since, under the Court's interpretation of the ADA, *all* workplace rules are eligible to be used as vehicles of accommodation, the one means of saving seniority systems is a judicial finding that accommodation through the suspension of *those* workplace rules would be unreasonable. The Court is unwilling, however, to make that finding categorically, with respect to all seniority systems. Instead, it creates (and "creates" is the

appropriate word) a *rebuttable presumption* that exceptions to seniority rules are not "reasonable" under the ADA, but leaves it free for the disabled employee to show that *under the "special circumstances" of his case*, an exception would be "reasonable." *Ante*, at 13. The employee would be entitled to an exception, for example, if he showed that "one more departure" from the seniority rules "will not likely make a difference." *Ante,* at 13.

I have no idea what this means. When is it possible for a departure from seniority rules to "not likely make a difference"? Even when a bona fide seniority system has multiple exceptions, employees expect that these are the *only* exceptions. One more unannounced exception will invariably undermine the values ("fair, uniform treatment," "job security," "predictable advancement," etc.) that the Court cites as its reasons for believing seniority systems so important that they merit a presumption of exemption. See *ante*, at 12.

One is tempted to impart some rationality to the scheme by speculating that the Court's burden-shifting rule is merely intended to give the disabled employee an opportunity to show that the employer's seniority system is in fact a sham—a system so full of exceptions that it creates no meaningful employee expectations. The rule applies, however, even if the seniority system is "bona fide and established," Pet. for Cert i. And the Court says that "to require the typical employer to show more than the existence of a seniority system might well undermine the employees' expectations of consistent, uniform treatment . . . ." *Ante,* at 12. How could deviations from a sham seniority system "undermine the employees' expectations"?

I must conclude, then, that the Court's rebuttable presumption does not merely give disabled employees the opportunity to unmask sham seniority systems; it gives them a vague and unspecified power (whenever they can

show "special circumstances") to undercut *bona fide* systems. The Court claims that its new test will not require exceptions to seniority systems "in the run of cases," *ante*, at 11, but that is belied by the disposition of this case. The Court remands to give respondent an opportunity to show that an exception to petitioner's seniority system "will not likely make a difference" to employee expectations, *ante,* at 13, despite the following finding by the District Court:

> "[T]he uncontroverted evidence shows that [petitioner's] seniority system has been in place for 'decades' and governs over 14,000 . . . Agents. Moreover, seniority policies such as the one at issue in this case are common to the airline industry. Given this context, it seems clear that [petitioner's] employees were justified in relying upon the policy. As such, any significant alteration of that policy would result in undue hardship to both the company and its non-disabled employees." App. to Pet. for Cert. 96a.

* * *

Because the Court's opinion leaves the question whether a seniority system must be disregarded in order to accommodate a disabled employee in a state of uncertainty that can be resolved only by constant litigation; and because it adopts an interpretation of the ADA that incorrectly subjects all employer rules and practices to the requirement of reasonable accommodation; I respectfully dissent.