NO. _____

In the Supreme Court of the United States

JOANN S. HATCH,
Petitioner,
v.

MEGAN J. BRENNAN, Postmaster General;
UNITED STATES POSTAL SERVICE,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A divided Panel of the Ninth Circuit below affirmed a trial court order granting summary judgment dismissing Hatch's claims for disability discrimination under 29 U.S.C. § 791 and 42 U.S.C. § 12112. The panel majority ignored Hatch's declaration testimony concerning a meeting with her supervisor, instead drawing inferences favoring the Postal Service from two letters in the summary judgment record. The first question presented is:

1. On a motion for summary judgment, whether the trial court may disregard or ignore a party's sworn testimony concerning a material historical fact based upon contradictory inferences arising from unsworn evidence in the summary judgment record.

The Ninth Circuit Panel also affirmed a trial court order granting summary judgment dismissing Hatch's claims for failure to provide reasonable accommodation under 29 U.S.C. § 791 and 42 U.S.C. § 12112. The Panel found that the Postal Service articulated a non-discriminatory explanation for Hatch's treatment, that a collective bargaining agreement required certain jobs be given to employees with greater seniority – and that Hatch failed to show the Postal Service explanation was pretextual. The second question presented is:

2. Under *US Airways v. Barnett*, 535 U.S. 391 (2000), to show that a proposed accommodation is ordinarily unreasonable, does the employer bear the burden of proving the accommodation would violate the rules of a seniority system or is the employer's burden simply one of articulating a non-discriminatory reason.

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JoAnn Hatch respectfully petitions for a writ of certiorari to review the Memorandum decision and judgment in this case by the United States Court of Appeals for the Ninth Circuit.

OPINIONS AND ORDERS ENTERED IN THIS CASE

The memorandum decision of the Ninth Circuit (App.1); the Order of the Ninth Circuit denying plaintiff's Petition for Panel Rehearing and Suggestion for Rehearing *En Banc* (App.25); and, the trial court's Orders Granting Summary Judgment (App.7,16) all are not reported.

BASIS FOR JURISDICTION OF SUPREME COURT

The Ninth Circuit filed its Memorandum decision on April 27, 2018 and its Order denying plaintiff's Petition for Panel Rehearing and Suggestion for Rehearing *En Banc* on July 6, 2018. This Court has jurisdiction to review the lower courts' decisions on a writ of certiorari under 28 U.S.C. § 1254(1).

RULES AND STATUTES INVOLVED IN THE CASE

Relevant portions of 29 U.S.C. § 791 and 42 U.S.C. § 12111 *et seq* are set forth in the Appendix at 27-44.

STATEMENT OF THE CASE

Facts Relevant to the Petition

JoAnn Hatch is an employee of the US Postal Service with more than 35 years of service. Subsequent to July 2005, Hatch was an "unassigned

regular" employee with the job title of Sales, Services and Distribution Associate. An unassigned regular employee has no assigned position. Rather, managers "create a position" for these employees by finding work for them to perform. An unassigned regular employee is guaranteed 40 hours of work and may not be sent home for lack of work under a collective bargaining agreement between the Postal Service and the union.

Hatch was diagnosed with multiple sclerosis in 2003. Hatch's multiple sclerosis causes symptoms such as instability when walking, weakness and excessive fatigue. Her restrictions include not standing continuously for 8 hours in a day, standing and walking intermittently and limited to 2 hours per shift, and intermittent lifting of weights up to 25 pounds. Because her condition is sensitive to heat, she needs to work in an air conditioned environment in summer months.

In 2004, she notified the Postal Service of her disability and requested accommodation. From 2005 through July 2010, the Postal Service reasonably accommodated Hatch by temporarily assigning her to vacant funded positions that were consistent with her medical restrictions. Hatch and her supervisor talked about vacant funded positions she would be capable of performing and that were temporarily vacant. She didn't apply or compete for these assignments and regularly worked 40 hours per week. When a vacant funded position was not available, her manager assigned her general clerical work within her medical restrictions until another position became available.

In February 2010, Hatch returned to the Vancouver Post Office from one such assignment in the Portland

Post Office. The Vancouver Postmaster, Lovendahl, asked to meet with her. What transpired in the February 2010 meeting was a central issue in Hatch's case.

According to Hatch's declaration, Lovendahl told Hatch her position was "going away." Lovendahl told Hatch to bid for every open position, submit a request for "light duty" because of her medical restrictions, submit a request to a Postal Service committee, the District Reasonable Accommodation Committee ("DRAC"), if she needed reasonable accommodation, and, update medical information documenting her restrictions.

Hatch testified Lovendahl "directed" her to submit the request for light duty and this was something she had "no desire to do."

Hatch did not understand how her position could "go away" since she was not assigned to a regular position; why she had to bid on positions; why she had to submit a request for "light duty" since she was accommodated for 5 years with no such request; or why she needed to go to DRAC for accommodations since she hadn't been required to do so to obtain an accommodation previously. Nevertheless, Hatch complied with Lovendahl's directive.

After the meeting, Lovendahl sent Hatch a letter dated February 9, 2010. Lovendahl's letter told Hatch to update her medical information and stated that she "may" request a light duty assignment under Article 13 of the union agreement and may request "resolution" through the DRAC process. On March 13, 2010, Hatch responded stating that it had "become necessary" for

her to request a light duty assignment under Article 13 of the union contract and to request reasonable accommodation. Hatch's letter closed stating she sought to create a "win/win" situation that would benefit both herself and the Postal Service.

From March 2010 until July 22, 2010 Hatch's supervisors assigned her full-time general clerical work on passport application acceptance, post office box mail distribution, certified mail second notice preparation, filing attendance reports, entering customs forms into a database and filling in when secretaries were on breaks or absent.

In July 2010, the Postal Service conducted a "Function Four" audit of the Vancouver Post Office. The audit occurred during the period July 12 to July 14, 2010. The audit team formed the opinion that the Vancouver Post Office was overstaffed by the equivalent of 5 full-time employees.

On July 22, 2010, a supervisor sent Hatch home 4 hours into her 8 hour shift. When she questioned this instruction, she was told, "we don't have to work you when there isn't enough productive work available within your medical restrictions." After July 2010, Hatch was no longer regularly scheduled for 40 hours of work, was repeatedly sent home after arriving or called off before arriving, at work. The work she performed during the period March 2010 through July 22, 2010, (passport application acceptance, post office mail box distribution, filing attendance reports, certified mail second notice preparation, filing attendance reports, entering custom forms into a database, and filling in for secretaries on break) continued to be available and needed to be done.

Supervisors gave preference in the assignment of this work to other employees who were not disabled. Supervisors repeatedly told Hatch there was not enough productive work for her to perform. When she would arrive at work after being non-scheduled or sent home, she would find evidence that on the days the supervisors claimed there was no work, in fact, work was backlogged and needed to be done. As a result of the method of scheduling Hatch and giving preference to others in assignments, Hatch suffered reduced work hours and lost pay.

There were other non-disabled unassigned regular employees working in the Vancouver Post Office. These employees were regularly scheduled for full-time work, not sent home after arriving at work and not called off before arriving at work. For non-disabled unassigned regulars, managers scheduled them for full-time work and "created a position" for them by finding work for them to perform.

In late 2010, a Clerk position was abolished and the work assigned to that position still needed to be done. Rather than assigning Hatch to perform the work, the work was reassigned to non-disabled full-time regular employees. In some cases the Postal Service paid overtime to non full-time employees rather than offer the work to Hatch.

As Lovendahl directed, Hatch sought accommodation through DRAC but DRAC did not provide a good faith interactive process. While Hatch was accommodated for 5 years through assignment to vacant, funded positions that were temporarily available, DRAC did not search for vacant funded positions that were available for temporary

assignment. Once DRAC became involved, Hatch's managers, (Lovendahl and Arthur), took the position they had no responsibility to provide reasonable accommodation. Once DRAC became involved the Postal Service stopped looking for vacant, funded positions that were available for temporary assignment. When Hatch identified vacant funded positions and asked for such assignments, her requests were denied.

In February 2011, Hatch was still experiencing reduced work hours. Lovendahl sent a letter to Hatch informing her that she was "permanently unable to perform the essential duties" of positions, there were no available positions to assign her to and her options included "retirement, disability retirement or resignation from the Postal Service." The letter advised Hatch she must make a decision on these options and if she failed to do so, her employment could be terminated. Hatch rejected Lovendahl's options, asked for assignment to temporary vacancies and pointed to a vacant position that was available to be temporarily filled.

Throughout the period extending from March 2010 through 2013, Hatch followed Lovendahl's direction that she bid on open positions. Her efforts were markedly unsuccessful.

In March 2011, a Mail Processing Clerk position was available to be filled. Hatch did not know of the availability of this position when it was posted for bid. No one bid on the position and thus the position was available to be filled. On March 25, 2011, Hatch made a written request to Lovendahl requesting her assignment to the position as a reasonable

accommodation. Lovendahl declined to assign Hatch and instead assigned the position to Jeffrey Ledbetter, a non-disabled unassigned regular employee who did not submit a bid for the position.

In July 2011, Hatch bid on a Sales/Service Associate/Distribution Clerk position at the Vancouver Post Office. She was the senior bid on the position. The Postal Service required her to submit additional medical information to show she was capable of performing the position and to appear in front of DRAC. Hatch waited for more than 2 months for a decision on whether she would receive the position. In November 2011, the Postal Service awarded the Sales Associate/Distribution Clerk position to another employee. Subsequently the Postal Service advised Hatch that the Postal Service did not believe she could perform the essential functions of the position

Because Hatch continued to suffer reduced work hours, she continued to bid on open positions. In November 2011, Hatch bid on and was awarded a Sales and Service Associate/Distribution Clerk position at Orchards Retail and Cascade Park Retail. She again went through a process of submitting medical documentation to show she could perform the position. On April 12, 2012, the Postal Service advised Hatch it was going to provide her with a "temporary accommodation" by placing her into the position while management evaluated whether she could perform the position. In July 2012, the Postal Service temporarily assigned Hatch to a vacant funded position as the PM Registry Clerk. By March 2013, Hatch still was not allowed to start work on the position she successfully bid in November 2011.

She continued to bid on open positions. She bid on and was awarded a Lead Sales and Service Associate position in March 2013. Rather than placing Hatch in the position and allowing her to start work, the Postal Service placed Hatch in a "deferment" period on May 6, 2013 where it allowed her to perform parts of the job for periods of time. Ultimately, the Postal Service refused to place her into the position claiming Hatch was "slow," and had to do tasks "over and over" to get them done.

On August 19, 2013, Vancouver Postmaster Scott Foster assigned Hatch to a PM Registry position on a permanent basis. Hatch did not bid on the position. Once Hatch was placed into the PM Registry position on a permanent basis, she stopped losing time from work and worked a regular 40 hour work week.

Proceedings Below

Plaintiff filed a formal complaint of discrimination with the US Postal Service on February 3, 2011; an amended complaint on February 28, 2011; and a second complaint on February 22, 2012. Plaintiff timely requested a hearing from the Equal Employment Opportunity Commission on May 29, 2011. On November 22, 2013, an EEOC Administrative Law Judge ruled in favor of defendant and against plaintiff. Subsequent to hearing, the Postal Service issued its final action on plaintiff's initial complaints on December 5, 2013. Plaintiff timely filed this action in U.S. District Court on February 25, 2014.

Hatch's federal court complaint asserted claims for disability discrimination under 29 U.S.C. § 791, claims for age discrimination under 29 U.S.C. § 633(a) and

claims for retaliation under 29 U.S.C. § 791(g), 42 U.S.C. § 12202(a) and 29 U.S.C. § 623(d). Hatch's disability discrimination claims included claims of disparate treatment, disparate impact and failure to provide reasonable accommodation.

On January 12, 2016, the District Court granted summary judgment on disability discrimination claims for different treatment, denial of reasonable accommodation and retaliation. The court noted that plaintiff objected to summary judgment on claims for disparate impact discrimination because those claims were not addressed in defendant's motion. The court expressed its intent to dismiss these claims *sua sponte* but permitted plaintiff to file a surreply in 10 days. App.23. After plaintiff filed her surreply, the court dismissed the disparate impact claims on February 26, 2016. App.13.

Plaintiff subsequently filed her Notice of Appeal to the Ninth Circuit. On appeal a Panel of the Ninth Circuit affirmed the district court order over a dissent by Judge Fisher on the disparate treatment claim.

On the disparate treatment and reasonable accommodation claims in the lower court, the trial judge applied *McDonnell Douglas Corp v. Green*, 411 U.S. 792 (1973). The trial judge found that the Postal Service's reason for Hatch's adverse treatment was that the collective bargaining agreement required the Postal Service to give full-time work to regular employees not on light-duty status; and stated that the ultimate issue was whether Hatch showed this reason was a pretext. App.20.

In his initial opinion, the trial judge acknowledged that Hatch testified her supervisor directed her to submit for light duty but concluded that Hatch's testimony could not "overcome" Hatch's March 3 letter requesting light duty work and describing her desire to create a "win/win" situation for herself and the Postal Service. App.21.

In his second opinion, after consideration of the disparate impact claims, the trial judge drew inferences in favor of the Postal Service from Hatch's letter stating that the letter, "….suggests that she had sufficient familiarity with the light-duty provisions of the 'National Agreement' (the CBA) to understand that the program does not guarantee full-time work and is voluntary for all employees whether disabled or not." App.12.

On appeal on the disparate treatment claim, plaintiff argued that the trial judge weighed credibility and resolved disputed issues of fact raised by Hatch's declaration testimony. Two members of the Ninth Circuit panel ignored Hatch's declaration testimony stating,

> "Hatch presented no evidence that the Postal Service put her on light duty status as pretext for discrimination. The letter she received from her supervisor simply informed her that *she 'may' seek light duty status*, among other options including requesting 'resolution through the District Reasonable Accommodation Committee.' And, Hatch's subsequent letter requesting light duty *describes her choice* as 'a win/win.'"

App.3. Emphasis added.

In dissent, the third Panel member, Judge Fisher, found Hatch's evidence of the February 9 meeting sufficient to create a genuine factual dispute:

> "Hatch's declaration, however, states she met with Lovendahl who 'directed' her to make the light duty request because of her medical restrictions even though she 'had no desire to do' so. This unambiguous declaration is sufficient to create *a triable issue over whether Hatch voluntarily made the request or felt compelled to do so because of her boss' directive*."

App.5. Emphasis added.

Judge Fisher reasoned that light duty status was an inferior position that does not guarantee full-time work. Judge Fisher noted Lovendahl's version of the meeting was not in the record; and absent Lovendahl's version, the Postal Service could not explain what motivated Lovendahl to tell Hatch she needed to request light duty, what Lovendahl meant when she said Hatch's position was "going away," or why Lovendahl said Hatch needed to "bid on every open position." App.5.

On the reasonable accommodation claim, the Ninth Circuit Panel concluded that,

> "[Hatch] presented no evidence that the Postal Service's explanation – that the collective bargaining agreement required that those job be awarded to employees with greater seniority - was pretextual. See *US Airways, Inc. v Barnett*, 535 U.S. 391, 416 (2002).

App.4.

REASONS FOR GRANTING THE PETITION

This case presents two questions of significance to the practice of employment law and the implementation of two important federal statutes, the Rehabilitation Act of 1973 and the Americans with Disabilities Act.

The first question concerns a recurring issue that has caused a conflict in the circuit courts: whether a trial court must credit sworn testimony in the summary judgment record when contradictory inferences can be drawn from unsworn evidence. The second question concerns the Ninth Circuit's failure to follow this Court's decision in *US Airways v. Barnett* in deciding an important issue affecting disabled persons right to reasonable accommodation in the workplace: how to resolve conflicts between an employee's request for reasonable accommodation and an employer's objection that the accommodation conflicts with the terms of a collective bargaining agreement. Both of these questions are addressed in more detail below.

I. THIS COURT SHOULD SET STANDARDS TO RESOLVE DIVISIONS BETWEEN THE CIRCUITS AND WITHIN THE NINTH CIRCUIT AS TO HOW TO APPLY *ANDERSON v. LIBERTY LOBBY, INC.*, 477 U.S. 242 (1986) WHEN SWORN TESTIMONY IS CONTRADICTED DIRECTLY OR BY INFERENCE WITH UNSWORN EVIDENCE IN THE SUMMARY JUDGMENT RECORD

Thirty-two years ago this Court set forth the trial judge's role and the standards for evaluating the nonmovant's evidence on summary judgment in

Anderson v. Liberty Lobby, 277 U.S. 242, 250 (1986). This Court subsequently reaffirmed the *Anderson* standard repeatedly over the intervening 32 year period. Nevertheless, the circuit courts struggle with implementing *Anderson* and did so in this case. Hatch's Petition in this case squarely and directly presents an issue on which the circuit courts are divided: whether lower courts may weigh, disregard or ignore sworn testimony based upon inferences from non-sworn evidence in the summary judgment record regarding a material issue of fact. In the unpublished Memorandum decision filed in this case, the Ninth Circuit Panel majority ignored sworn testimony concerning material facts to determine a material issue of fact on summary judgment - whether Hatch voluntarily requested light duty status or was directed to do so by her Postmaster. There is a conflict among four Circuit courts on the issue raised in Hatch's case; and the unpublished Memorandum decision in Hatch's case departs from clear Ninth Circuit standards following *Anderson*. Hatch's case is an ideal vehicle for resolving the conflicts between the circuits and within the Ninth Circuit.

A. THE NINTH CIRCUIT FAILED TO FOLLOW *ANDERSON v. LIBERTY LOBBY* AND FAILED TO APPLY ITS OWN CLEAR STANDARDS FOR EVALUATING EVIDENCE ON A MOTION FOR SUMMARY JUDGMENT

The trial judge's role in ruling on summary judgment motions is well defined in this Court's decisions. *Anderson v. Liberty Lobby*, 277 U.S. 242, 250 (1986), the leading case on point, declares that "[A]t the

summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Under *Anderson*, the judge's role on summary judgment is distinct from the jury's role:

> "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. *The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor*."

Emphasis added.

This Court has found it necessary to repeatedly confirm *Anderson's* axiom requiring belief of the nonmovant's evidence at summary judgment. See, e.g., *Eastman Kodak Company v. Image Technical Services, Inc.*, 504 U.S. 451, 456 (1992)(stating nonmovant's evidence is to be believed and nonmovant's version of disputed fact is presumed correct); *Groh v. Ramirez*, 540 U.S. 551, 562 (2004)(evidence of nonmovant is to believed and all justifiable inferences drawn therefrom). Nevertheless, the lower courts continue to experience difficulty implementing the standard.

Most recently, the Court applied *Anderson* in vacating a summary judgment decision in *Tolan v. Cotton*, 572 U.S. ___, 134 S. Ct. 1861 (2014). In *Tolan*, this Court vacated a Fifth Circuit decision affirming summary judgment in a claim for excessive force in

violation of the Fourth Amendment. The Court reasoned that:

> ". . . the Fifth Circuit failed to adhere to the axiom that in ruling on a motion for summary judgment, '[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor.'"

Tolan, supra, 134 S. Ct. at 1863, *quoting from Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Specifically, the Court concluded that the lower court "credited the evidence of the party seeking summary judgment and failed properly to acknowledge key evidence offered by the party opposing the motion." *Tolan, supra*, 134 S. Ct. at 1866.

In spite of repeated and clear guidance from this Court, the circuit courts struggle with implementation of *Anderson* at summary judgment. The circuit courts struggle to follow *Anderson* is apparent from the conflict between the circuits as to whether the trial court may disregard the nonmovant's sworn testimony based upon conflicts drawn from unsworn evidence in the record.

Following *Anderson v. Liberty Lobby*, the Ninth Circuit set forth clear standards for evaluating sworn testimony given in affidavits, declarations and depositions. On summary judgment, the Ninth Circuit has held that sworn statements made in affidavits and declarations are evidence entitled to credence. *Leslie v. Grupo ICA*, 198 F.3d 1152, 1157 (9th Cir 1999) *quoting from*, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). Emphasis added.

The lone exception in the Ninth Circuit is the "sham" affidavit rule. Under the sham affidavit rule, a party cannot create an issue of fact through an affidavit contradicting prior sworn deposition testimony. *Yeager v. Bowlin*, 693 F.3d 1076, 1080 (9th Cir. 2012). To apply this rule, the district court must make a factual determination that the contradiction is a sham, and the "inconsistency between a party's deposition testimony and subsequent affidavit must be clear and unambiguous to justify striking the affidavit." *Van Asdale v. Int'l Game Tech.,* 577 F.3d 989, 998 (9th Cir. 2009). In Hatch's case, neither the district court nor the court of appeals made a "sham" determination.

In the Ninth Circuit, the sham affidavit rule does not apply to inconsistencies between sworn testimony and unsworn documents or other evidence. Thus, a nonmovant's sworn declaration may not be discredited because of unsworn inconsistent statements in letters in the record. In *Leslie*, for example, the trial court granted summary judgment against a plaintiff concluding plaintiff's declaration testimony was "self-serving" and so contradicted by prior statements in letters as to be "unbelievable." The trial judge found "no reasonable jury" could credit the plaintiff's declaration. *Leslie, supra*, 198 F.3d at 1156. The Ninth Circuit reversed finding "disbelief" of declaration testimony due to inconsistencies with unsworn letters insufficient to support summary judgment. *Leslie, supra*, 198 F.3d at 1159.

A non-movant's declaration also may not be disregarded or ignored on summary judgment in the Ninth Circuit. In *McLaughlin v. Liu*, 849 F.2d 1205 (9th Cir. 1988), for example, the Ninth Circuit reviewed

an order granting summary judgment to the Secretary of Labor against a defendant in an overtime case. On appeal, the plaintiff defended summary judgment arguing defendant's declaration testimony was contrary to defendant's payroll records, "implausible", and thus properly ignored on summary judgment. The Ninth Circuit reversed noting the plaintiff's interpretation would "abrogate the long-standing rule that credibility may not be resolved by summary judgment…" *McLaughlin, supra*, 849 F.2d at 1207. The court held that "[t]he evidence of the non-movant is to believed. . ." *Id. quoting from*, *Anderson v. Liberty Lobby, Inc.*, 477 US 242 (1986).

The Fourth Circuit joins the Ninth Circuit in holding that affidavit testimony may not be disregarded based upon inconsistent statements in letters or other unsworn evidence in the record. In *Shockley v. City of Newport News*, 997 F.2d 18, 23 (4th Cir. 1993), for example, the Fourth Circuit reversed a trial court decision in an overtime case holding that a sworn affidavit is not a 'sham' merely because it contradicts unsworn letters. The Fourth Circuit found that the meaning of an unsworn letter is a question of fact for resolution by the factfinder, not a basis for establishing undisputed facts. *Shockley, supra*, 997 F.2d at 23.

Nevertheless, the Seventh and DC Circuits depart from the rule in the Ninth and Fourth Circuits. The Seventh Circuit permits trial courts to disregard "self-serving" affidavits unsupported or contradicted by unsworn evidence in the record. In *Seshadri v. Kasraian*, 130 F.3d 798, 902 (7th Cir. 1997), the Seventh Circuit held that a trial court may reject

affidavit testimony at summary judgment contradicted by unsworn documentary evidence if the court finds that "no reasonable person" could believe the affidavit testimony. In the DC Circuit, the trial court may remove a factual question from the jury when the court concludes the plaintiff's testimony is self-serving, unsupported by corroborating evidence, and undermined by other credible evidence, physical impossibility or other persuasive evidence in the record. *Washington Metro. Area Transit Auth.*, 883 F.2d 125, 128 (DC Cir. 1989).

B. THE MEMORANDUM DECISION IN HATCH'S CASE CONFLICTS WITH CLEAR NINTH CIRCUIT STANDARDS AND IS AN IDEAL CASE TO PROVIDE STANDARDS TO THE CIRCUIT COURTS ON APPLYING *ANDERSON*

The decision in Hatch's case conflicts with Ninth Circuit standards; and, Hatch's case is an ideal case to resolve the conflicting standards in the lower courts. Hatch's case concerns a distinct historical fact: what transpired in a meeting between Hatch and her supervisor. The historical fact relates to factual inquiries material to the case: (1) Lovendahl's motive in seeking to transfer Hatch to a disadvantageous employment status; (2) and, whether Hatch desired such status or was directed to do so.

This Court has authorized a departure from *Anderson* in only one case, *Scott v. Harris*, 550 U.S. 372, 127 S. Ct. 1769 (2007). Unlike *Scott*, Hatch's case does not involve conflicts between sworn testimony and irrefutable, authenticated physical evidence such as an authenticated audio or video tape documenting an

incident or event. To the contrary, in Hatch's case, the sole of evidence of the historical fact is Hatch's declaration testimony and inferences drawn from two letters.

In February 2010, Hatch returned to the Vancouver Post Office from a temporary assignment to Portland. Over the past 5 years the Postal Service had accommodated Hatch's disability principally through temporary assignments to vacant funded positions. At a meeting on February 9, 2010, Hatch testified that Lovendahl "directed" her to request light duty, something she had "no desire to do." Hatch testified Lovendahl told her she needed to submit updated medical information regarding her restrictions; she needed to bid on every open position; and she needed to submit a request to a Postal Service Committee (the "DRAC") if she needed reasonable accommodation.

Hatch testified that she didn't understand Lovendahl's statement that her position was "going away" since Hatch was an unassigned regular employee who had no regular position or why she had to bid on "every open position." In a supplemental declaration, Hatch testified that Lovendahl misled her into submitting the light duty request stating "if I was told that . . . Lovendahl could use light duty status to reduce my work hours, I would not have requested light duty status."

The Postal Service sought summary judgment based upon inferences drawn from two letters in the record: one written by Hatch and one by Lovendahl. The first, a February 9, 2010 letter from Lovendahl to Hatch following the meeting states in pertinent part:

> "As we discussed this afternoon, we need an update from your physician regarding your current condition including any restrictions you may have that would prevent you from completing your duties. Please ask your physician to indicate whether the restrictions are temporary or permanent.
>
> You may submit a letter to me requesting a light duty assignment, per Article 13 of the National Agreement.
>
> Additionally, you may request resolution through the District Reasonable Accommodation Committee (DRAC) process."

The second, a March 9 response from Hatch to Lovendahl, states in pertinent part:

> "It has become necessary for me to request light duty per Article 13 of the National Agreement within my restrictions as indicated in the enclosed letter from my physician and copies of previously submitted documentation. I am also requesting reasonable accommodation.
>
> I am seeking to create a win/win situation by providing labor the U.S. Postal Service needs while taking steps to ensure stability of my health."

Hatch was the sole witness who testified about the meeting. There is no evidence explaining Lovendahl's motives for telling Hatch her position was "going away"; that she needed to bid on each open position or that she needed to request light duty.

The unpublished Memorandum decision in Hatch's case conflicts with clear Ninth Circuit standards interpreting *Anderson*. Under *Leslie,* there is no basis for disregarding Hatch's testimony because there is no determination that her declaration was a "sham." Under *Liu*, a conflict arising from direct evidence of a material historical fact "may never be settled by a judge on a motion for summary judgment." Direct evidence concerning an historical fact is evidence that hinges on a witness' credibility and cognitive abilities. *Liu, supra*, 849 F.2d at 1209 n.9. Under *Liu*, a trial court may discount declaration testimony if it is "unspecific" or "immaterial." *Liu, supra*, 849 F.2d at 1209. However, neither the Panel majority nor the trial court found Hatch's declaration was unspecific or immaterial. To the contrary, Hatch's declaration testimony is direct evidence of an historical fact material to issues under the substantive law.

Under the substantive law, whether Hatch's light duty request was voluntary and Lovendahl's motive in directing Hatch to make the request, are material to multiple elements of claims in the case.

Under its contract with the Postal Service union, the Postal Service can only move an employee from unassigned regular status to light duty status if the employee "voluntarily" requests a light duty assignment. As Judge Fisher reasoned in dissent, light duty status is "an inferior position" because it does not guarantee full time work. App.5. On a claim for different treatment, an employer's mendacity is evidence relevant to pretext. *Reeves v. Sanderson Plumbing Products Co.*, 530 U.S. 133, 147 (2000). Lovendahl's motive in directing Hatch to request light

duty status has direct relevance to the question of pretext. "An employer cannot use a collective bargaining agreement to accomplish what it would be prohibited from doing [under the ADA.] S. REP. NO. 116, 101st Cong., 1st Sess. 32 (1989); H.R. REP. NO. 485(II), 101st Cong., 2d Sess. 63 (1990) reprinted in 1990 U.S.C.C.A.N. 303, 345.

On a claim for denial of reasonable accommodation, an employer's lack of good faith in interacting with the plaintiff is evidence relevant to the reasonable accommodation inquiry. *Barnett v. US Air, Inc*., 228 F.3d 1105, 1115 (9th Cir. 2000), *vacated and remanded on other grounds*, 535 U.S. 391 (2002). Given the 5 year history of accommodating Hatch in her unassigned regular position, Lovendahl's failure to disclose the inferior nature of light duty status has direct relevance to the employer's good faith in providing accommodation. *Barnett, supra*, 228 F.3d at 1115 (stating employer's or employee's failure to exchange essential information relating to accommodation is relevant to provide reasonable accommodation in "good faith.")

Hatch asserted claims under 42 U.S.C. § 12112(b)(3) of the Americans with Disabilities Act which precludes employers from using "methods of administration" that have the effect of discriminating on the basis of disability. An employer's conduct misleading a disabled individual into seeking an inferior employment status is relevant to the employer's use of "methods of administration" that have the effect of discriminating.

Finally, Hatch's declaration in conjunction with the record in this case could lead a reasonable jury to find

in favor of Hatch. On March 9, 2018, the Equal Employment Opportunity Commission made a decision on reconsideration in a class action administrative hearing entitled *McConnell v. Brennan*, EEOC Appeal Nos 072016006 & 0720160007. A copy of the *McConnell* decision is set forth in the Appendix at 56. In *McConnell*, the EEOC determined that the US Postal Service subjected a nationwide class of rehabilitation and limited duty injured on duty employees to disability discrimination by withdrawing reasonable accommodations from the disabled employees. The EEOC found in *McConnell* that discrimination occurred during a time period relevant to Hatch's case: May 2006 through July 2011. The EEOC found that the Postal Service discriminated against qualified "rehabilitation and limited duty" employees subjecting them to disparate treatment involving employees "having their reasonable accommodations withdrawn, as well as being subjected to disability-based harassment…" and being subjected to "no work available" determinations. *McConnell v. Brennan*, EEOC Appeal Nos. 0720160006 & 0720160007. App.58, 63, 65. In *McConnell*, the EEOC found from a "massive evidentiary record" that the Postal Service's "real reason" for its actions was to move injured on duty and rehabilitation employees back to "full duty" or onto a disability program for "eventual outplacement." App.63.

In Hatch's case, she was an unassigned regular whose disability was accommodated for a period of 5 years through temporary assignments to vacant funded positions or the simple assignment of general clerical work. Her supervisor misled her into requesting an inferior employment status. When Hatch objected to

having her hours reduced and made complaints, her supervisor sent her a letter suggesting she retire or go on disability retirement or she may be subject to termination of her employment. A factfinder could find that Lovendahl, just as the Postal Service did in *McConnell*, was withdrawing accommodations previously made to force Hatch back to a full duty bid position or into disability retirement.

The Supreme Court should grant certiorari in this case. Thirty-two years after the Court's decision of *Anderson v. Liberty Lobby*, the courts of appeals continue to struggle to follow *Anderson's* direction. The issues in Hatch's case directly address questions where there is a division of authority among four of the circuit courts of appeals. The unpublished Memorandum decision in this case conflicts with clear, repeated standards for evaluating sworn testimony in the Ninth Circuit.

II. THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE LOWER COURT DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH A RELEVANT DECISION OF THIS COURT AND AFFECTS A LARGE GOVERNMENTAL WORKFORCE

The standards for evaluating claims that a reasonable accommodation violates an employer's seniority rules are an issue of importance to the implementation of the Americans with Disabilities Act. The Postal Service is a large government employer whose interpretation of laws and rules affects postal workers nationwide. The Ninth Circuit Panel in Hatch's case decided her claim for denial of reasonable

accommodation in a way that conflicts with the decision of this Court.

In *US Airways, Inc. v. Barnett*, 535 U.S. 391, 152 L. Ed. 2d 589 (2002), this Court set forth the legal standards on summary judgment for claims that a reasonable accommodation conflicts with an employer's seniority rules. In such cases, with respect to a proposed accommodation, the Court required the employers to "show a violation" of seniority rules as a matter of undue hardship. In Hatch's case, the lower courts applied the wrong legal standard to grant summary judgment on such a reasonable accommodation claim. In Hatch's case, the lower courts only required the Postal Service to "articulate" a violation of seniority rules under the *McDonnell Douglas v. Green* framework for proof of different treatment rather than "show a violation" under the *US Airways* standard.

A. THE NINTH CIRCUIT DID NOT REQUIRE THE POSTAL SERVICE TO SATISFY ITS BURDEN OF PROVING HATCH'S PROPOSED ACCOMMODATION VIOLATES SENIORITY RULES IN A COLLECTIVE BARGAINING AGREEMENT

Both in the district court and on appeal, Hatch asserted a claim for denial of reasonable accommodation. Hatch's reasonable accommodation claim was based upon evidence that she had been successfully accommodated through temporary assignments to vacant funded positions and the assignment of general clerical work available in the Vancouver office and she could have been accommodated by continuing this practice. She also

pointed to vacant funded positions which she asserts she should have been assigned as a reasonable accommodation.

The Ninth Circuit Panel summarily disposed of Hatch' reasonable accommodation claim to these other jobs finding:

> "Hatch also claims that the Postal Service discriminated against her by denying her various jobs. But, she presented no evidence that the Postal Service's *explanation* – that the collective bargaining agreement required that those jobs be awarded to employees with greater seniority – was *pretextual*. See, *US Airways v Barnett*, 535 U.S. 391, 416 (2002)."

App.3. Emphasis added.

When the Panel limited the Postal Service's burden on summary judgment to providing an "explanation" based upon the collective bargaining agreement while requiring Hatch to show "pretext," the Panel employed the *McDonnell Douglas v. Green* framework for proof of different treatment. The Panel applied the wrong standard of law to Hatch's reasonable accommodation claims because Hatch's reasonable accommodation claims should be decided using the analysis for reasonable accommodation claims under *US Airways, Inc. v. Barnett,* 535 U.S. 391 (2002), not the *McDonnell Douglas v. Green* framework for evaluating evidence of different treatment.

This Court set forth the burdens of proof applicable to summary judgment on claims for denial of accommodation that involve employer seniority rules in *US Airways, Inc. v. Barnett,* 535 U.S. 391 (2002). In

US Airways, the Court addressed whether "the [ADA] requires an employer to reassign a disabled employee to a position as a 'reasonable accommodation' even though another employee is entitled to hold the position under the employer's bona fide and established seniority system." *US Airways, Inc., supra*, 535 US at 396. The parties in *US Airways* held distinctly different views of whether the "fact that an accommodation would violate the rules of a seniority system always shows that the accommodation is not a 'reasonable one.'" *Id*. The assumption that formed the basis of the Court's opinion was proof of the existence of a violation of seniority rules:

> "We must assume that the plaintiff, an employee, is an 'individual with a disability.' He has requested assignment to a mailroom position as a 'reasonable accommodation.' We also assume that normally such a request would be reasonable within the meaning of the statute, were it not for one circumstance, namely that the assignment would violate the rules of the seniority system."

Barnett, supra, 535 U.S. at 403.

Ultimately, the Court resolved the issue in dispute holding:

> "…we answer that *ordinarily* the ADA does not require that assignment. Hence a showing that the assignment would violate the rules of a seniority system warrant summary judgment for the employer – unless there is more"

US Airways, Inc., 535 U.S. at 396. Emphasis added.

Upon the employer "showing a violation," the employee may point to special circumstances surrounding the particular case that demonstrates the assignment is nonetheless reasonable. *US Airways, Inc., supra*, 535 U.S. at 406. Special circumstances might alter the important expectations that are the basis for seniority rules, such as, the importance of seniority to employee-management relations and the significance of employee expectations of fair, uniform treatment. Such special circumstances could include proof that the employer retains the right to change the seniority system and exercises the right fairly frequently; or, proof that the system contains exceptions already such that one further exception is unlikely to matter. *US Airways, supra*, 535 U.S. at 405.

Under *US Airways*, the burden to show a "proposed accommodation would violate a rule of the seniority system" is a part of the employer's burden to show "undue hardship" under the ADA. 42 U.S.C. § 12112(b)(5)(A)(discrimination defined as not making reasonable accommodation unless the "covered entity can demonstrate that the accommodation would impose undue hardship.") The employer can "show a violation" through proof that the disabled employee seeks reassignment "to a position as a 'reasonable accommodation' even though another employee is entitled to hold the position under the employer's bona fide ad established seniority system." *US Airways, Inc., supra*, 535 U.S. at 395.

In Hatch's case, the Panel and the trial judge both applied the wrong legal standard to Hatch's reasonable accommodation claim. Rather than requiring the

Postal Service to "show a violation" of seniority rules, the lower courts permitted the Postal Service "to explain" as a legitimate non-discriminatory reason its perception that Hatch's requested accommodations would violate the collective bargaining agreement; and then, required Hatch to demonstrate pretext . Under the *McDonnell Douglas v. Green* framework, the employer's burden with respect to a legitimate non-discriminatory reason is nothing more than a burden to "articulate" a reason, not to prove the reason. *Texas Department of Community Affairs v Burdine*, 450 U.S. 248, 256, 101 S. Ct. 1089 (1981).

Application of the two different standards results in dramatically different results in Hatch's case or any other case. In Hatch's case, for example, the Postal Service posted a vacant, funded Mail Processing Clerk position as open in March 2011. No employee bid on the position. After no employee bid on the position, Hatch asked Lovendahl to assign her to the position as a reasonable accommodation. Lovendahl declined to assign Hatch and instead assigned the position to another unassigned regular employee, Ledbetter. As indicated above, Ledbetter did not bid on the position.

The Postal Service articulated its perception that assignment of Hatch would violate seniority rules of the collective bargaining agreement – a perception that Hatch disputed. However, the Postal Service made no effort to prove that Hatch's assignment would violate the collective bargaining agreement or that any such violation was of a "rule of the seniority system." In short, there was an absence of proof that Ledbetter was "entitled" to hold the position under a bona fide and established seniority system. Rather, the Postal

Service simply stated that Hatch was not assigned because Lovendahl assigned the position to an employee with greater seniority.

Since the Postal Service made no effort to prove a violation of seniority rules in the bargaining agreement, the lower courts did not interpret the bargaining agreement to decide if the Postal Service carried its burden. Rather, the lower courts merely accepted the Postal Service's articulation of its reason without critical analysis.

Further, setting aside for a moment the Postal Service's failure to "show a violation of seniority rules," the fact that Ledbetter expressed no desire to have the position is evidence of a "special circumstance" sufficient to create an issue of fact as to the reasonableness of Hatch's proposed accommodation.

Similarly, one of Hatch's central arguments on the reasonable accommodation claim was that she should have been assigned to funded positions that were temporarily vacant; and that she should have been assigned general clerical work that was available and needed to be performed. These same methods were used from 2005 to 2010 to accommodate Hatch's disability. In the lower courts and on appeal, as with the Mail Processing Clerk position, the Postal Service asserted that it was contractually obligated to provide full-time work to regular employees in bid positions and unassigned regular employees not on light duty; and that it did not have enough productive work to justify full-time assignments to Hatch. Nevertheless, at no point did the Postal Service point to a specific provision of the collective bargaining agreement, establish the specific provision was a "rule of the

seniority system" and show that Hatch's proposed accommodation would place the Postal Service in violation of the agreement. At no point did the Postal Service show that Hatch's proposed accommodation would displace another employee from a position that he or she was "entitled" to hold under the employer's bona fide and established seniority system.

Finally, even if the Postal Service did make the required showing, Hatch introduced into the summary judgment record evidence that her union filed a grievance claiming the Postal Service was breaching the collective bargaining agreement by failing to provide Hatch with full-time work. With evidence in the record that the union disputed the Postal Service claim of a breach of the collective bargaining agreement, at a minimum, the lower courts needed to analyze the collective bargaining provisions at issue to determine if the Postal Service carried its burden of proof.

This Court should adopt standards from case law pre-existing *US Airways* as to the proof necessary to sustain the employer's burden. In *Buckingham v. US*, 998 F.3d 735 (9th Cir 1993), the Ninth Circuit decided a case under the Rehabilitation Act involving the Postal Service. Under *Buckingham*, to show that a reasonable accommodation violates the rules of a seniority system, the employer must show that the requested accommodation was "explicitly prohibited by the terms of the collective bargaining agreement" and would "usurp the legitimate rights of other employees. *Buckingham, supra*, 998 F.2d at 741. Further, not all provisions of a collective bargaining agreement are entitled to protection from the ADA's reasonable

accommodation provision. Rather, it is only "seniority rights" which receive special treatment. *Eckles v. Consolidated Rail Corp.*, 94 F.3d 1041, 1052 (7th Cir. 1996).

Finally, the Supreme Court should accept certiorari because the Postal Service is a large governmental employer whose implementation of federal law affects a significant number of employees nationally.

On March 8, 2018, the Equal Employment Opportunity Commission determined that the US Postal Service engaged in purposeful discrimination on a national basis against a class of employees with disabilities during the time period that Hatch alleges disability discrimination. See, *McConnell v. Brennan*, EEOC Appeal Nos. 0720160006 & 0720160007 at 1-2 (March 9, 2018). App.56. The EEOC's finding that this large governmental employer engaged in a national program of disability discrimination during the time applicable to plaintiff's case warrants review of the lower courts award of summary judgment to the Postal Service.

CONCLUSION

The petition for a writ of certiorari should be granted. The decision of the Ninth Circuit affirming the lower court order granting summary judgment should be reversed.

Respectfully submitted,

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