

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: KAREN SUTTON AND KIMBERLY HINTON, Petitioners
v. UNITED AIR LINES, INC.

CASE NO: 97-1943 c-2

PLACE: Washington, D.C.

DATE: Wednesday, April 28, 1999

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 KAREN SUTTON AND KIMBERLY :

4 HINTON, :

5 Petitioners :

6 v. : No. 97-1943

7 UNITED AIR LINES, INC. :

8 - - - - -X

9 Washington, D.C.

10 Wednesday, April 28, 1999

11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States at
13 10:03 a.m.

14 APPEARANCES:

15 VAN AARON HUGHES, ESQ., Denver, Colorado; on behalf of the
16 Petitioners.

17 EDWIN S. KNEEDLER, ESQ., Deputy Solicitor General,
18 Department of Justice, Washington, D.C.; for the
19 United States, as amicus curiae, supporting the
20 Petitioners.

21 ROY T. ENGLERT, JR., ESQ., Washington, D.C.; on behalf of
22 the Respondent.

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1 P R O C E E D I N G S

2 (10:03 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 now in No. 97-1943, Karen Sutton and Kimberly Hinton v.
5 United Air Lines.

6 Mr. Hughes.

7 ORAL ARGUMENT OF VAN AARON HUGHES

8 ON BEHALF OF THE PETITIONERS

9 MR. HUGHES: Mr. Chief Justice, and may it
10 please the Court:

11 Because this matter was decided by the lower
12 court on a motion to dismiss, for purposes of today's
13 argument, United cannot dispute the nature of the
14 discrimination that occurred here. Petitioners have gone
15 to great lengths to make themselves eminently qualified to
16 fill the piloting positions at issue here, but were
17 excluded from those positions by United based not upon
18 their actual abilities, but based only upon its
19 preconceived notion of what a person who shares their
20 impairment can and cannot do.

21 Now, United contends that even if it
22 discriminated in just this manner, it cannot be liable
23 under the Americans with Disabilities Act because, as a
24 matter of law, the ADA can never protect one with severe
25 but correctable myopia.

1 United's intuition that myopia is somehow
2 distinct from other correctable impairments does not
3 withstand serious scrutiny. Petitioners here are actually
4 disabled within the meaning of the ADA or, at a minimum,
5 they were regarded as disabled with respect to the ability
6 to work by United.

7 QUESTION: Is that raised in your petition for
8 certiorari, whether they were regarded as disabled?

9 MR. HUGHES: Yes, Your Honor, it is.

10 QUESTION: Whereabouts?

11 MR. HUGHES: The -- I believe it was the third
12 question presented in our petition, read as followed: Is
13 a commercial pilot regarded as disabled by a major airline
14 that refuses to employ her as a pilot for that airline due
15 to her poor vision?

16 QUESTION: As far as actual disability is
17 concerned, let me ask the same question that -- that we
18 put to counsel yesterday. If myopia, correctable myopia,
19 which requires nothing more than eyeglasses, is included
20 within the definition of disability, how do you account
21 for the fact that the act itself estimates there are some
22 43 million disabled people in America?

23 MR. HUGHES: Justice --

24 QUESTION: There would be many, many, many more
25 than that if -- if you are counting people who have to

1 wear eyeglasses.

2 MR. HUGHES: I agree, Justice Scalia, that there
3 are more than 43 million Americans who wear glasses. It
4 has never been our position that the mere fact of wearing
5 glasses or, indeed, the mere use of any corrective measure
6 is in itself a disability. Our position is that Congress
7 intended not to identify bright line categories of what
8 are and are not disabilities, but rather to require courts
9 to evaluate the severity of each person's impairment on a
10 case-by-case basis.

11 QUESTION: How do you find in the text of the
12 statute?

13 QUESTION: Where do you get that in the statute?

14 MR. HUGHES: The statute --

15 QUESTION: It's a nice idea. Maybe they could
16 have done that. How did they do it here?

17 MR. HUGHES: The statute requires that -- that
18 each impairment be substantially limiting with respect to
19 a major life activity, and moreover, the definition
20 requires a substantial limitation of the major life
21 activities of such individual. I read that as not
22 requiring the court to define each impairment and state
23 each impairment in every case is a disability or is not a
24 disability. That's a different approach that Congress
25 could have followed, but Congress didn't follow that --

1 that approach. Congress required each person's impairment
2 to -- to be evaluated.

3 There is no dispute in this case --

4 QUESTION: I'm not following you. You're saying
5 it's not substantially limiting if you use some
6 eyeglasses, but it is -- if it can be corrected with some
7 eyeglasses, but it -- it is substantially limiting if it
8 can be corrected with other eyeglasses?

9 MR. HUGHES: That's correct. The substantial
10 limitation --

11 QUESTION: I mean, the only limitation of
12 putting on eyeglasses is putting on the eyeglasses. I
13 mean, you know, whatever the -- the corrective
14 prescription is, the only limitation involved is putting
15 on the eyeglasses, whereupon you see as well as anybody
16 else. But you're saying some eyeglasses are different
17 from others.

18 MR. HUGHES: That's correct. I don't -- I
19 respectfully disagree that putting on the eyeglasses as
20 the substantial limitation is identical for each person
21 who wears eyeglasses. The substantial limitation is that
22 some persons cannot see without eyeglasses.

23 QUESTION: What's -- what's the difference
24 between someone, say, with 20/40 vision who puts on
25 eyeglasses and is corrected to 20/20 and someone who has

1 20 -- 20/200 vision and puts on eyeglasses and it's
2 corrected to 20/20? So far as their corrected state,
3 they're both the same.

4 MR. HUGHES: In the corrected state, that's
5 true. They're both the same, just as any person who --
6 who swallows a pill once a day and is able to function by
7 taking that medication is in the same boat. But it does
8 make a difference whether you're swallowing the pill to
9 avoid mild headaches in the afternoon as opposed to
10 swallowing the pill because you might have an epileptic
11 seizure.

12 QUESTION: Could you address the question of why
13 you should look to the uncorrected state rather than the
14 corrected state in order to determine whether the person
15 is disabled? At some point, would you -- are you going to
16 get to that?

17 MR. HUGHES: Yes, Your Honor, and I'll address
18 that right now.

19 Our reading of the statute is that the inability
20 to perform a major life activity without the use of
21 corrective measures is itself a substantial limitation.
22 Now, respondent United reads the statute differently and
23 says, if you can perform the major life activity by the
24 use of a corrective measure, then by definition you're not
25 substantially limited. Now, those are two alternative

1 readings of the statute.

2 I believe this Court has already gone a great
3 distance toward answering that question in Bragdon v.
4 Abbott when this Court instructed that the act deals not
5 with utter inabilities to perform a major life activity,
6 but substantial limitations on that.

7 QUESTION: Mr. Hughes --

8 QUESTION: I --

9 QUESTION: -- this seems to be a rather abstract
10 categorization. We have, as I understand it, a test
11 that's -- what is it? 20 over 120. That's how the
12 airline draws the line for the -- so --

13 MR. HUGHES: 20 -- 20 over 100, Justice
14 Ginsburg.

15 QUESTION: Oh, 100, yes.

16 Would you put all people who, without the
17 correction -- go from 100 to 400 -- all those people would
18 fit within the disabled category? Because there's
19 something different between a mere impairment and a
20 substantially limiting one.

21 MR. HUGHES: That's correct. And some persons
22 who don't have perfect vision, 20/20 vision, may not even
23 be impaired if they're within the norm. Some persons will
24 be impaired. Some persons will be impaired but not
25 substantially limited.

1 QUESTION: I would -- I'd like you to address
2 what the standard is in this case. It's 20 over 100.
3 Everyone who flunks that test would meet your definition
4 of substantially --

5 MR. HUGHES: I -- I can't say that as a matter
6 of fact. It will require a case-by-case determination. I
7 know that in this case the allegations are that these
8 particular plaintiffs cannot see without glasses. United
9 has conceded --

10 QUESTION: But what difference does that make in
11 terms of who is being protected? Here's a standard. A
12 number of people, all of whom are visually impaired, can't
13 make it. Why would -- and they're equally correctable.
14 Why would Congress want to say for the ones who are, say,
15 200, they are protected by this act, but the ones who are
16 only 100 are not?

17 MR. HUGHES: Congress clearly did intend to draw
18 a line where not everyone would be covered, and I believe
19 substantial limitation requires that we analyze the
20 severity of each person's impairment. I know --

21 QUESTION: Does substantial limitation take into
22 account the job market, or is it substantial limitation in
23 the abstract because this definition covers all the titles
24 in -- in the ADA?

25 MR. HUGHES: As far as whether substantial

1 limitation covers the job market --

2 QUESTION: In other words, what I'm getting at
3 is it might make -- I don't -- I'm not -- I don't think
4 we've got this, but it might make sense to say your
5 limitation is substantial if you can't do the job without
6 putting the glasses on even though your eyesight is
7 imperfect. And -- and so, we draw a pragmatic line. But
8 I'm guessing that -- that even on your theory, that is not
9 how we would judge what is substantial because I think
10 we're dealing with a general definition here which is not
11 limited simply to the employment category.

12 MR. HUGHES: That's correct. Substantial --

13 QUESTION: So -- so, that leaves us then at sea
14 as to -- as to what the criterion for substantial should
15 be, and I take it you're not saying that substantial is
16 anything which is different from the uncorrected average
17 in the population. And substantial, we've just said,
18 cannot be determined in relation to what is necessary to
19 do the job. So, what does it mean? Where are we?

20 MR. HUGHES: We're at the point of having to
21 analyze on a case-by-case basis the severity of each
22 person's impairment which certainly doesn't create the --
23 a bright line test that --

24 QUESTION: No, but that -- that doesn't take --

25

1 QUESTION: How do you judge severity? You say
2 you don't judge severity by ability to do the job. Then
3 what do you judge it by? You pick a number? 100, 200,
4 300?

5 MR. HUGHES: You judge it by the person's
6 ability to perform that life activity. Here we're --
7 we're looking at seeing. So --

8 QUESTION: I thought you said no. I thought you
9 said it's not judged by the ability to perform the job.

10 MR. HUGHES: It's not judge by the ability to
11 perform a job, unless we're talking about the major life
12 activity of working. If we're talking about the major
13 life activity of seeing, it's judged by can you see, can
14 you do the things that a person with normal eyesight can
15 do.

16 QUESTION: Well, but -- there again, I don't
17 know where that gets us to draw the line. I have
18 difficulty reading restaurant checks in dim light.

19 (Laughter.)

20 QUESTION: Does -- you know, there is -- there
21 is an activity -- a life activity of reading in which in
22 some circumstances I have difficulty. Substantial?

23 MR. HUGHES: That is a limitation. It's
24 certainly not a substantial limitation.

25 QUESTION: Why not?

1 MR. HUGHES: Well, on a case-by-case --

2 QUESTION: The waiter thinks so.

3 (Laughter.)

4 QUESTION: But why not? Seriously.

5 MR. HUGHES: Well, because I believe if you can
6 see for most contexts, if there's one particular, isolated
7 context where you have some difficulty, like reading a
8 menu in dim light, I would anticipate that a court would
9 not find that to be a substantial limitation on your
10 ability to see.

11 QUESTION: Oh, but -- but being -- not being
12 able to read at all -- I mean, I cannot read without
13 reading glasses, and I would not be able to function in
14 this job or in any job I've ever had. You know, I've been
15 a teacher. I've been -- all jobs that required reading.
16 Now, there are a lot of Americans like that whose job
17 requires reading, maybe 100 million. 100 million anyway.
18 Are they all covered by the Americans with Disabilities
19 Act?

20 MR. HUGHES: The inability to read without
21 glasses would be one example of a limitation of your
22 ability to see. Whether that's a substantial limitation
23 is open to question.

24 QUESTION: If you have substantial limitation -

25 -

1 QUESTION: What's your answer to the question?

2 QUESTION: -- that's on a -- on a case-by-case
3 basis, that seems to contradict the finding of and the
4 purpose of Congress which is to say there is a discrete
5 and insular minority here who are subjected to
6 stigmatizing treatment in society. That whole concept
7 seems to drop out of your reading of -- of the statute.

8 MR. HUGHES: I don't -- I don't believe so, Your
9 Honor, because I believe that the number of people who
10 honestly can't perform life activities without corrective
11 measures -- I don't assume that that's a staggering
12 number. We'll never know because most of those people
13 never experience discrimination. And certainly this case
14 does not violate Congress' intentions with respect to the
15 ADA.

16 QUESTION: Well, I think one of the things
17 that's bothering the Court is that we assume that a
18 significant number of legislators and Congressmen had
19 severe myopia and we can't imagine that they thought they
20 were disabled when they enacted this law. I think that's
21 something that's in the back of -- of our minds as we're
22 asking these -- these questions today and yesterday.

23 MR. HUGHES: I don't agree with that for two
24 reasons. One is what I've attempted to articulate, which
25 that -- is I think the severity of a person's impairment

1 is critical under the statute.

2 Secondly, this is a -- a case where at a minimum
3 petitioners were regarded as being limited in the ability
4 to work, and so it's difficult for me to conceive that
5 this isn't --

6 QUESTION: Well, were they regarded as limited
7 in their ability to do a single job, to wit, as a pilot
8 for United?

9 MR. HUGHES: I don't believe so. I believe they
10 were limited in the ability to perform a class of jobs,
11 all of the jobs requiring the same skills, training, and
12 ability.

13 QUESTION: Well, a class of jobs for United?
14 They -- they were working as regional airline pilots, were
15 they not?

16 MR. HUGHES: That's correct, Justice O'Connor.

17 QUESTION: Are they still?

18 MR. HUGHES: One of the two is still working for
19 a regional airline, yes.

20 QUESTION: So, what we're dealing with here is a
21 specific job as pilot for United, are we not?

22 MR. HUGHES: No, I don't believe that's the
23 case. What we're dealing with is specifically United's
24 perceptions. United's perception was that these
25 petitioners were unfit --

1 QUESTION: Well, I'm looking at EEOC's
2 regulation which attempts to define whether one is
3 substantially limited in the major life activity of
4 working, and it says, the inability to perform a single,
5 particular job does not constitute a substantial
6 limitation in the major life activity of working. Is that
7 what we have here?

8 MR. HUGHES: Your Honor, with respect to the
9 actually disabled prong, which is what that -- that
10 language goes to, yes, it is the case that petitioners are
11 not actually disabled with respect to the ability to work
12 because they're able to work in other positions in the
13 same class of jobs.

14 QUESTION: So, that's not your claim and that's
15 not the -- the complaint.

16 MR. HUGHES: That's correct.

17 QUESTION: It -- it is instead a substantial
18 limitation on the ability to see? Is that -- or what is
19 it? Would you explain?

20 MR. HUGHES: Yes. We have -- we have two
21 independent arguments. One is that we were actually --
22 that my clients were actually substantially limited in the
23 ability to see. The second is that they were regarded by
24 United as being substantially limited in the ability to
25 work. And in the regarded as prong, it's the employer's

1 perceptions that are at issue. That's --

2 QUESTION: Well, but on the regarded as prong,
3 it again is related to a single, particular job, pilot for
4 United.

5 MR. HUGHES: Your Honor, we're not -- I don't
6 believe we're talking about a single job. If United had
7 said you can't fill this position or these particular
8 positions, but you can fill these other positions, that
9 would be a different example. Or if --

10 QUESTION: Well, the only job applied for was
11 pilot for United. Now, is that a -- a single job within
12 the meaning of the EEOC reg?

13 MR. HUGHES: Let's not misunderstand, Justice
14 O'Connor. We're talking about thousands of jobs at United
15 within the entire spectrum of the relevant class of jobs.
16 So, United barred us -- barred my clients from all such
17 jobs, and there's no distinction between United's jobs and
18 piloting positions with any other airline.

19 QUESTION: Well, the question isn't what United
20 barred them from. The question is how did United regard
21 them.

22 MR. HUGHES: That's correct.

23 QUESTION: Did United regard them as
24 unemployable by any major airline? It certainly didn't.
25 United acknowledged all through this that we have set

1 higher standards. How can you say that United regarded
2 them as disabled in that meaning?

3 MR. HUGHES: I don't believe that that's the
4 appropriate inquiry, whether United recognized that there
5 might be other employers who didn't share its perceptions.
6 If that were a defense, one could never bring a claim for
7 being regarded as disabled --

8 QUESTION: Oh, sure. Sure, it could. I mean,
9 somebody would -- would turn someone down who has HIV, for
10 example, and -- and because of the -- what -- what is the
11 phrase that's used in connection with the regarded as
12 clause? Because of myths and shibboleths? No, it isn't
13 shibboleths. What -- there's --

14 QUESTION: Stereotypes.

15 QUESTION: Stereotypes is the word.

16 (Laughter.)

17 QUESTION: Because of myths and stereotypes,
18 United thinks that a -- that a person with HIV can't
19 function either at United or anywhere else, and then bang,
20 you have them for regarding you as being disabled even
21 though you're not disabled.

22 But this is not that case. United says, you
23 know, you're welcome to go to other airlines, but we're a
24 cut above other airlines. We hire people only with really
25 good vision.

1 MR. HUGHES: I have a hard time understanding
2 why United couldn't make the same argument in that case
3 and simply say, we have a high physical standard. It
4 doesn't include people who are HIV positive, but other
5 airlines will hire you. So, therefore, we aren't
6 regarding you as disabled.

7 QUESTION: Well, if they could, it'd be hard to
8 convince a jury of that, but -- but if they did have that
9 view, they wouldn't be regarding you as disabled. They'd
10 be regarding you as just not good enough for United.

11 MR. HUGHES: I think you're right, and I think
12 you've put your finger on it, that you've got to convince
13 a jury of that. This is a factual question whether --
14 what United's perceptions were, how United applied its
15 perceptions. We've alleged that -- my clients have
16 alleged that they are not limited in their ability to
17 perform the relevant work, but that United believes that
18 they are, that there's a legitimate, job-related safety
19 requirement that prevents them from being airline pilots,
20 not just --

21 QUESTION: Wasn't there --

22 QUESTION: You -- you told me before, though,
23 that you were not relying on the major life activity of
24 working. Are you or aren't you? I'm confused.

25 MR. HUGHES: We are relying on the major life

1 activity of working with respect to the regarded as
2 disabled prong of the disability definition. Our claim
3 and our allegations are that United perceived these two
4 people to be unsuited for the positions of flying and not
5 just particular --

6 QUESTION: For positions that United --

7 MR. HUGHES: Well, that's all that United could
8 do. United doesn't have the power --

9 QUESTION: Well, they have other jobs too
10 presumably.

11 MR. HUGHES: Certainly United has administrative
12 positions or teaching positions, and at a minimum it's an
13 issue of fact whether those types of positions involve the
14 same training, skills, and abilities as piloting
15 positions. And I don't believe one could say that a
16 person who's been trained to be a pilot is limited -- is
17 not limited in the ability to work if they're told they
18 can't be a pilot any more than one who's been trained to
19 -- to be a lawyer is not limited in the ability to work if
20 they're told they can't practice law.

21 QUESTION: What do you --

22 QUESTION: Your -- your opponents claim that --
23 that below, and until you got to this Court, your claim
24 of regarding the job category was not all airline pilots,
25 but only pilots for global airlines.

1 MR. HUGHES: That's correct, Your Honor.

2 QUESTION: Is that -- that is correct.

3 MR. HUGHES: We stated a more narrow definition
4 of the relevant class. The Tenth Circuit disagreed and
5 defined the class more broadly. We accept the Tenth
6 Circuit's definition because our allegations still satisfy
7 that definition.

8 With the Court's --

9 QUESTION: Suppose the employer's point of view
10 is the reason I don't accept this corrective is this is a
11 risky business. Glasses can be broken. Contact lenses
12 can be lost. Glasses can become foggy at an urgent
13 moment. Under which notch would that defense fit?

14 MR. HUGHES: That will either be a demonstration
15 of a job-related requirement or a direct threat to safety.
16 Either of those would be a factual showing. It's contrary
17 to our allegations.

18 QUESTION: That's for the employer to show;
19 whereas, basic qualification is for the would-be employee
20 to show?

21 MR. HUGHES: Basic qualifications are for the
22 employee to show, but the -- the employer can still show
23 that it has a job-related physical standard.

24 Thank you, Your Honor.

25 QUESTION: Thank you, Mr. Hughes.

1 Mr. Kneedler, we'll hear from you.

2 ORAL ARGUMENT OF EDWIN S. KNEEDLER
3 FOR THE UNITED STATES, AS AMICUS CURIAE,
4 SUPPORTING PETITIONERS

5 MR. KNEEDLER: Thank you, Mr. Chief Justice, and
6 may it please the Court:

7 Respondent argues that although it made its
8 employment decision precisely on the basis of the
9 limitations imposed by petitioners' impairment without
10 mitigating measures, the ADA requires a court to ignore
11 those very same limitations and look only to petitioners'
12 ability to perform with corrective measures. We submit
13 that the ADA does not require that anomalous result.

14 The agencies charged by Congress with
15 implementing and interpreting the ADA --

16 QUESTION: Say again what you conceive the
17 anomaly to be, Mr. Kneedler.

18 MR. KNEEDLER: The -- the anomaly in this case
19 is --

20 QUESTION: Speak kind of a little bit slower.

21 MR. KNEEDLER: I'm sorry. The anomaly is that
22 respondent United made its decision not to hire the
23 petitioners precisely on the basis of their uncorrected
24 vision, but they are claiming that the ADA requires a
25 court to look only at their vision in its corrected state.

1 And we believe that -- that is --

2 QUESTION: Do you think -- do you think that the
3 statute should be interpreted so that it depends on how
4 the particular employer looks at the applicant? In case
5 one, if the employer looks at the applicant in the
6 uncorrected state, the act applies there? If it looks at
7 it in the corrected state, the act applies there?

8 MR. KNEEDLER: No. I'm not -- I'm not
9 submitting that.

10 QUESTION: All right. Then -- then United can't
11 really be chastised for creating an anomaly. All -- all
12 it's saying is that the act means one thing or the other.

13 MR. KNEEDLER: No. My -- my only point is, to
14 use this case as an illustration why the -- why it makes
15 sense for the act to look to the -- to the impairment in
16 its uncorrected state, that has been the interpretation of
17 the agencies which is entitled to Chevron deference under
18 this Court's decision in Bragdon. And that's also
19 supported by the text of the act which only mentions the
20 impairment and the substantial limitations that flow from
21 that impairment. There's no mention of mitigating
22 measures and --

23 QUESTION: How about the 43 million figure?

24 MR. KNEEDLER: The 43 million figure, Your Honor
25 -- there's no indication what Congress was referring to

1 when it looked at that. When one traces it back -- and
2 the -- the respondents -- or petitioners' reply brief
3 addresses this in some detail. You trace it back to
4 reports of the National Council on Disabilities, pages 9
5 and 12 and 13 --

6 QUESTION: Well, but 43 million is in there as a
7 fact.

8 MR. KNEEDLER: Right, right. As to that point,
9 we are certainly not saying that everyone who is
10 nearsighted as a disability under the act. And let me
11 explain why.

12 The -- the statutory phrase is whether someone
13 is substantially limited, and the way that the
14 implementing regulation sensibly defines substantially
15 limited is whether the individual is significantly
16 restricted with respect to that major life activity as
17 compared to the average person. So, it is necessary --
18 substantially limited is -- is a relative point. You have
19 to be substantially restricted as to the average person.

20 QUESTION: But where do you get that out of the
21 statute, that --

22 MR. KNEEDLER: From -- from the phrase
23 substantially limited. In order to --

24 QUESTION: Yes, but it doesn't answer whether
25 you view it corrected or uncorrected. I mean --

1 MR. KNEEDLER: No, no. I'm --

2 QUESTION: -- it just is not apparent from the
3 face of the statute --

4 MR. KNEEDLER: I -- I was responding --

5 QUESTION: -- that we wouldn't look at the
6 corrected --

7 MR. KNEEDLER: No. I was simply --

8 QUESTION: -- vision.

9 MR. KNEEDLER: -- responding to the Chief
10 Justice's point that 43 million speaks to that question,
11 and I think it does -- does not.

12 Here we have people who so far depart from the
13 norm that they are alleged to be legally blind.

14 QUESTION: If you use -- what's worrying is if
15 you say it should be uncorrected.

16 MR. KNEEDLER: Yes.

17 QUESTION: And then you read out of the statute
18 people who have glasses like this. I borrowed them from
19 Justice Scalia.

20 (Laughter.)

21 QUESTION: But I need them too.

22 QUESTION: That's not true.

23 QUESTION: I need them too.

24 (Laughter.)

25 QUESTION: And I couldn't function without them.

1 All right. Now, are you reading all people like
2 me out of the statute? Well, what's the answer?

3 MR. KNEEDLER: And our -- yes. And our --

4 QUESTION: All right. Now --

5 MR. KNEEDLER: -- position --

6 QUESTION: Now take a person just like me except
7 that person has the same vision I have without glasses
8 with glasses. That person is now read out of the statute
9 too.

10 MR. KNEEDLER: Well, it -- it depends. That
11 person might have --

12 QUESTION: He can't wear glasses.

13 MR. KNEEDLER: That person may have --

14 QUESTION: He has a defect because he can't wear
15 glasses. There are a lot of people who could be like
16 that.

17 MR. KNEEDLER: That person --

18 QUESTION: And wouldn't those people be
19 handicapped?

20 MR. KNEEDLER: That person may have -- have a -

21 -

22 QUESTION: Disabled.

23 MR. KNEEDLER: In -- in that particular case,
24 but that -- but in the ordinary case, a person whose
25 vision is not fully corrected to 20/20 may have a very,

1 very severe uncorrected impairment. In fact, that may --
2 that may well be the more common situation.

3 QUESTION: But I don't know all the disabilities
4 in the world, and it might be that people are disabled in
5 ways where most people can correct, but they can't.

6 MR. KNEEDLER: Well --

7 QUESTION: And now I'm concerned about what your
8 definition will do to those people.

9 MR. KNEEDLER: Well, as to those people,
10 certainly if an employer acts on the basis or -- or anyone
11 else covered by the act acts on the basis -- treats that
12 person as disabled, then the regarded as prong would --
13 would protect that person just as -- as it alternatively
14 protects that person here.

15 QUESTION: Why doesn't the regarded as prong
16 serve as the backdrop and so you -- you have no problem
17 looking at the corrected condition of the person?

18 MR. KNEEDLER: Well, the regarded as prong,
19 properly construed, does afford a great deal of
20 protection. We're not -- we're not disputing that,
21 although we are quite concerned about the manner in which
22 it has been construed by the lower courts and the way it's
23 suggested here. And if I could just address that for a
24 moment, just to make sure our position is understood.

25 When someone -- the allegation here is that

1 United -- and the regulatory definition, I should make
2 clear, as to the regarded as is whether the person is
3 treated as disabled by a covered entity, treated as being
4 substantially limited.

5 In this case the allegation is --

6 QUESTION: What's the difference between treated
7 as and regarded as?

8 MR. KNEEDLER: Well, let me explain perhaps by
9 illustrating in this very case. The allegation is that
10 United said that these petitioners are not qualified for
11 any piloting position with United, and it further alleges
12 that there is no difference between United's piloting jobs
13 and other commercial piloting jobs. So, if one looks at
14 the class of piloting jobs, United says, as to those
15 people within that class who we employ, you are not -- you
16 are not qualified. Therefore, United is treating them as
17 disabled for -- for that entire class of piloting jobs.

18 QUESTION: Well, that's not true for that entire
19 class. The example given in one of the briefs in these -
20 - in these cases of, you know, Ted Williams had -- had
21 20/10 vision in both eyes and a -- you know, a ball club
22 manager has a perfectly good outfielder whom -- whom he
23 could have played instead of Ted Williams, but he chooses
24 Ted Williams.

25 MR. KNEEDLER: Well --

1 QUESTION: And this other -- this other person
2 is very good and could well be fine in another team. Now,
3 because he chooses Ted Williams and rejects the other
4 fellow because he has only 20/30, does that mean he's
5 treating the other -- the other fellow as disabled? I
6 think that's ridiculous.

7 MR. KNEEDLER: Well, first of all, in that
8 example, I think the manager is going to choose the person
9 who hits the best and not who has the best eyesight.

10 (Laughter.)

11 QUESTION: No. This is a manner -- this is a
12 manager who plays the odds. It's when Ted was on the way
13 up.

14 (Laughter.)

15 QUESTION: Ted was on the way up. Nobody knew
16 how great he was at the time.

17 MR. KNEEDLER: No, but -- but --

18 QUESTION: You know the way managers play the
19 odds.

20 MR. KNEEDLER: No, but -- but --

21 QUESTION: They'll put in a left-hand batter and
22 all of that.

23 MR. KNEEDLER: I'm -- I'm -- our position isn't
24 -- isn't that it's automatically so, but -- but our
25 position is that when you have an employer who has jobs

1 that we have to take as a given, according to the
2 allegations in the complaint, are the same as piloting
3 jobs elsewhere, the employer is essentially necessarily
4 making a judgment about the class when he's making a
5 judgment about the particular employees --

6 QUESTION: He's not. He's -- that's just
7 absurd. It's just simply not true. I want Ted Williams.
8 I'm not saying this other -- this other fellow isn't a
9 perfectly good ball player, but if I have an opportunity
10 to get Ted, I'm going to take Ted. I'm going to turn this
11 guy down.

12 MR. KNEEDLER: This came -- this case comes up
13 on a motion to dismiss, and -- and certainly it is -- it
14 is relevant if the employer is making a judgment about
15 what is safe to drive an -- or pilot an airplane, which is
16 what this employer is doing --

17 QUESTION: Just certain airplanes, global --

18 MR. KNEEDLER: No. The allegation in the
19 complaint --

20 QUESTION: -- piloting positions.

21 MR. KNEEDLER: The allegation in the complaint
22 is United regarded them as unable to drive any -- pilot
23 any airplane.

24 QUESTION: Any -- any airplane.

25 MR. KNEEDLER: Any airplane.

1 QUESTION: Even though they were, in fact, at
2 the time pilots of a regional --

3 MR. KNEEDLER: The regarded as looks at how the
4 -- what particular employer treats the employee. And that
5 is consistent with --

6 QUESTION: And that was the allegation.

7 MR. KNEEDLER: Yes.

8 QUESTION: So, you say a motion to dismiss
9 should not have been granted.

10 MR. KNEEDLER: Yes. No, we're certainly not
11 saying that the -- that the record -- there is no record
12 -- establishes that the plaintiffs prevail here.

13 QUESTION: And the regulation says the inability
14 to perform a single, particular job, to wit, a pilot for
15 United --

16 MR. KNEEDLER: Right. It's --

17 QUESTION: -- is not --

18 MR. KNEEDLER: No.

19 QUESTION: -- a substantial limitation on work.

20 MR. KNEEDLER: A single job doesn't mean pilot
21 with United. What -- that's -- that's elaborated upon in
22 the explanatory guidance of the EEOC which serves to
23 distinguish between a specialized, particular job and a -
24 - and a class of jobs. And it doesn't look to whether
25 it's one -- a job with one employer or a number of

1 employers. You look at the job content. You may have --
2 if United had a Concorde and said, you can't fly the
3 Concorde, that might -- that would be the sort of
4 particular, specialized job that the regulation is
5 referring to.

6 QUESTION: So, for purposes of -- of the reg,
7 you assume that every other airline will do exactly what
8 this airline is doing for determining whether you meet the
9 class criterion. Is that --

10 MR. KNEEDLER: In general, yes. That's --

11 QUESTION: What happens to myths and
12 stereotypes? What happens to myths and stereotypes, which
13 was supposed to be the whole purpose of this provision?

14 MR. KNEEDLER: Well, that is -- that is the
15 driving force behind it, but that --

16 QUESTION: It isn't the driving force at all.
17 United knows very well that other airlines don't apply
18 this standard. They're not following any myth. They're
19 just saying, we want to higher standard.

20 MR. KNEEDLER: It is following a -- a stereotype
21 in -- in the sense that United is saying we don't regard
22 you, treat you as qualified to fly our airplanes safely.
23 That is -- or -- or as safely as we would like.

24 QUESTION: That's not a stereotype to say that I
25 don't like this particular type of thing. A stereotype is

1 -- is a view that, you know, a lot of people have, and if
2 -- if United had said, you know, all airlines regard you
3 that way, it would be something else.

4 QUESTION: Thank you, Mr. Kneedler.

5 Mr. Englert, we'll hear from you.

6 ORAL ARGUMENT OF ROY T. ENGLERT, JR.

7 ON BEHALF OF THE RESPONDENT

8 MR. ENGLERT: Thank you, Mr. Chief Justice, and
9 may it please the Court:

10 In 26 years of interpretation of the
11 Rehabilitation Act and the ADA, no appellate court has
12 ever held that any person with fully corrected
13 nearsightedness is disabled or handicapped. Several
14 appellate courts have reached a contrary conclusion and so
15 has the EEOC itself in a decision rendered the very same
16 year the ADA was passed.

17 QUESTION: Do we owe deference to the EEOC on
18 this point of how you view it?

19 MR. ENGLERT: On the corrected versus
20 uncorrected --

21 QUESTION: Yes.

22 MR. ENGLERT: -- absolutely not.

23 QUESTION: And why not?

24 MR. ENGLERT: For a number of reasons. One is
25 the EEOC's own reversal of position, 180 degree reversal

1 of position from the position taken contemporaneously with
2 the passage of the act.

3 Another reason is that this position is taken
4 only in interpretative guidance, not in a regulation,
5 which under this Court's cases is treated quite
6 differently.

7 A third reason is that the particular language
8 on which the EEOC and petitioners rely was added after the
9 comment period. Now, that doesn't invalidate it under the
10 APA and we've never argued that it's invalid under the
11 APA, but it does affect the level of deference under the
12 Skidmore test.

13 QUESTION: What was the status of that prior
14 case, the Kienast case, in 1990? Was that -- did the EEOC
15 ever explain why it was rejecting the position that it
16 took in that early case?

17 MR. ENGLERT: No. The Kienast case, as far as I
18 know, has been completely ignored by the EEOC up to and
19 including today.

20 QUESTION: Would it make sense -- earlier this
21 term we decided a case involving a handicapped child. You
22 know the one I'm thinking of.

23 MR. ENGLERT: Garret F.

24 QUESTION: Cedar Rapids.

25 MR. ENGLERT: Yes.

1 QUESTION: And I think in there we had some
2 language in respect to the agency might want to deal with
3 this and fully consider it and so forth. Would that make
4 sense here on the question of when or whether you take
5 corrected or uncorrected into account?

6 MR. ENGLERT: I think not on corrected versus
7 uncorrected, Justice Breyer, because I think the statute
8 is clear. The phrase -- the phrase substantially limits
9 -- substantially limits one or more major life activities
10 of such individual --

11 QUESTION: Yes, but it doesn't say whether
12 corrected or uncorrected or whether corrected always or
13 some circumstances.

14 MR. ENGLERT: It says none of those things
15 because that's not the concepts of the statute. The
16 concept of the statute is, does it or doesn't it
17 substantially limit? Present indicative tense.

18 QUESTION: All right. If we get by the present
19 indicative problem, you see, I would be concerned in terms
20 of the statute of many people who might have prosthetic
21 limbs, who might be taking enormous amounts of medicine,
22 who might -- you know --

23 MR. ENGLERT: Of course, Justice Breyer.

24 QUESTION: -- be the very victims of the
25 prejudice and myth that the statute is aimed at.

1 MR. ENGLERT: Of course.

2 QUESTION: And -- and they wouldn't even get in
3 the door.

4 MR. ENGLERT: No, that's -- that's not correct,
5 respectfully, Justice Breyer.

6 All it takes to be actually disabled under the
7 Americans with Disabilities Act is a limitation of one or
8 more major life activity -- a substantial limitation --
9 excuse me -- of one or more major life activity. It is
10 virtually inconceivable to me that those people would not
11 have even a single limitation on even a single -- single
12 substantial limitation on even a single major life
13 activity. One doesn't need to --

14 QUESTION: It would produce enormous litigation
15 on that point, and this is an unusual statute I take it;
16 whereas, our other discrimination statutes are open to
17 everyone to come in and say I'm discriminated -- I am a
18 member of the protected class discriminated against, and
19 you know, I'm black, I'm a woman. I'm discriminated
20 against unjustifiably.

21 MR. ENGLERT: Well, the key words --

22 QUESTION: Here you don't get in the door.

23 MR. ENGLERT: The key words -- excuse me.

24 QUESTION: You go ahead.

25 MR. ENGLERT: The key words are member of the

1 protected class.

2 QUESTION: Yes.

3 MR. ENGLERT: This statute is not like title VII
4 which protects black people, white people, men and women,
5 and people who are neither black nor white. It protects
6 everybody in other words.

7 This statute defines a protected class and in
8 that regard it's exactly like the Age Discrimination in
9 Employment Act, not title VII, in limiting its protection
10 to a particular class. If we have a 39-year-old who is
11 replaced by a 22-year-old with very strong evidence that
12 age was a motivating factor, he has no cause of action
13 under the Age Discrimination in Employment Act because the
14 statute was drawn not to solve the entire societal problem
15 of age discrimination, but to define a protected class and
16 say, once you get through that threshold, then we will
17 make the employer justify its decisions.

18 Here we have the same thing. This statute was
19 absolutely not designed to make every employer disregard
20 every physical criterion. It was designed to protect the
21 disabled from being the victims of physical criteria that
22 can't be justified.

23 QUESTION: This -- this is what I'm -- this is
24 the question I'm trying to get to, which is think of the
25 44 million. If I say 44 or 43 million, that calls a whole

1 argument to mind.

2 MR. ENGLERT: Yes.

3 QUESTION: The following occurred to me, that if
4 you open the door to the myopic people by looking only at
5 uncorrected state, 100 million people will not walk
6 through that door. Hardly anyone will walk through that
7 door, and the reason that hardly anyone will walk through
8 that door is that discrimination against people who are
9 easily correctable rarely exists. A handful of employers
10 take things like that into account. So, it isn't opening
11 the statute to 150 million people. It is opening the
12 statute to 43 million people, plus 10,000 --

13 MR. ENGLERT: No, Justice Breyer. I --

14 QUESTION: -- or a few thousand, or at most a
15 million. And therefore, it is totally consistent --

16 MR. ENGLERT: I --

17 QUESTION: -- with the legislative history to
18 look at uncorrected state.

19 All right. That's my question.

20 MR. ENGLERT: I must respectfully disagree with
21 you with respect to both the text of the statute and the
22 legislative history.

23 With respect to the text of the statute, the
24 finding of 43 million people is that there are 43 million
25 disabled Americans, not that there are 43 million disabled

1 Americans who have been or are likely to be discriminated
2 against, but that there are 43 million disabled Americans.
3 Having been discriminated against or being likely to be
4 discriminated against is not a criterion by which that
5 number was derived.

6 With respect to the legislative history, the
7 number can be traced back through Representative Coelho's
8 comment to the report of the National Council on the
9 Handicapped, On the Threshold of Independence. And this
10 is a very interesting study that in turn draws on a census
11 study, Disability, Functional Limitation, and Health
12 Insurance Coverage 1984-'85, which asks functional
13 questions, and the functional question it asks about
14 vision is do you have trouble reading ordinary newsprint
15 even with glasses?

16 We have -- for those who are inclined to
17 consider legislative history, we have a very powerful
18 indication that Congress had a view on this subject.
19 Congress relied on Census Bureau studies, the
20 recommendations of the National Council on the
21 Handicapped, which actually drafted the ADA. In fact, a
22 draft of the bill is in here and it closely resembles what
23 was in fact first introduced in Congress in 1988.

24 So, I think both the text and the legislative
25 history don't allow that distinction, Justice Breyer.

1 QUESTION: Mr. Englert, can I get back to
2 deference to EEOC? I'm -- I'm not persuaded by the two
3 reasons you gave for not giving deference.

4 One is that they've changed their position. So
5 what. I mean, in the old days, you know, before Chevron
6 we used to put great weight upon a change in position, but
7 I thought that we said in a number of cases the -- I mean,
8 that's -- that's why you elect different Presidents
9 because there's a lot of wiggle room in the statutes and
10 each administration is -- is entitled to wiggle the way it
11 wants to wiggle so long as it's within the scope of the
12 ambiguity contained in the statute.

13 MR. ENGLERT: Well, but -- but first of all, it
14 has to be an ambiguous statute.

15 QUESTION: That's true.

16 MR. ENGLERT: Second --

17 QUESTION: That's a different argument.

18 MR. ENGLERT: Second, you referred to Chevron
19 deference. This is not a case calling for Chevron
20 deference. This is a case calling for Skidmore deference,
21 which is a much lower standard.

22 QUESTION: Why? Why -- why not --

23 MR. ENGLERT: Because it's interpretive
24 guidance.

25 QUESTION: Why not Chevron deference?

1 MR. ENGLERT: Because it's interpretive guidance
2 and not regulation, and in General Electric Company v.
3 Gilbert, this Court said, EEOC interpretive guidance
4 gets --

5 QUESTION: What was the date of General
6 Electric?

7 MR. ENGLERT: It predated Chevron. I don't know
8 the exact date.

9 QUESTION: Yes. I mean, that's old, old stuff.
10 I don't even know Skidmore deference anymore.

11 QUESTION: It's not that old.

12 (Laughter.)

13 MR. ENGLERT: Justice Scalia, I -- I would
14 suggest that there are different levels of deference.
15 Whether one refers to them as Skidmore deference and
16 Chevron deference or not, there are different levels of
17 deference for agency pronouncements of different
18 formality.

19 QUESTION: Why? Why?

20 MR. ENGLERT: Because --

21 QUESTION: We give deference to agencies who
22 have -- who -- whose position is not enunciated except in
23 litigation so long as it wasn't made up for this
24 particular case.

25 MR. ENGLERT: You can give some --

1 QUESTION: If an agency has -- has consistently
2 taken a certain position in -- in legislation, we've given
3 deference to it.

4 MR. ENGLERT: Consistently. Consistently.
5 There are levels of deference. There are gradations of
6 deference. Consistency is one of the factors to consider.

7 QUESTION: What a wonderful world this is.

8 MR. ENGLERT: Formality.

9 QUESTION: There are all sorts of gradations? I
10 mean, if I accept that argument from you, I'm going to
11 accept the argument about, you know, all different levels
12 of myopia that -- that your opponent makes. It's about
13 just as imaginative.

14 MR. ENGLERT: No. I think the case law pretty
15 firmly supports --

16 QUESTION: Bragdon certainly suggests -- last
17 term talks both about Skidmore deference and about Chevron
18 deference, does it not?

19 MR. ENGLERT: Yes. And -- and the Court's
20 opinion, as I read it, said we need not resolve any of
21 these vexing deference questions because here everything
22 points in the same direction.

23 QUESTION: Mr. Englert, even if we were to agree
24 with you, that you look at vision in its corrected state
25 under the statute, there is a regarded as feature of the

1 statute. And this case was resolved on a motion to
2 dismiss, and was there no allegation that the respondent
3 regarded the petitioners as disabled?

4 MR. ENGLERT: Those words were used but there is
5 no allegation sufficient to withstand a motion to dismiss
6 on regarded as. No.

7 The -- the allegations of the complaint are
8 actually quite interesting. The petitioners --

9 QUESTION: Where -- where do you want us to
10 look?

11 MR. ENGLERT: Pages 24 and 25 of the joint
12 appendix.

13 In paragraph 38a, which I'll proceed to read,
14 they -- they assert, United asserts that its requirement
15 for uncorrected vision is a rational, job-related, safety
16 requirement. United thus believes that plaintiffs'
17 physical condition limits their ability to perform the
18 type of work at issue here.

19 Well, that's a very interesting allegation, the
20 type of work at issue here, and they admit in their own
21 complaint that United thinks it's a rational, job-related
22 safety requirement.

23 In paragraph -- subparagraph e on page 25, on
24 information and belief, United's policy originally was
25 modeled on military requirements for pilot training,

1 without independent supporting basis.

2 Well, they want to get into the absence of an
3 independent supporting basis, but they admit where our
4 standard came from. It didn't come from myth and
5 stereotype. It came from lots of other standards for
6 uncorrected vision for pilots. The Navy requires to this
7 day 20/30 uncorrected vision for pilots. The Air Force
8 requires 20/50.

9 QUESTION: Well, but in d, they allege that
10 United -- its position is based on stereotype, myth, or
11 unsubstantiated fears, that they have no data or evidence
12 indicating that the plaintiffs' visual acuity and use of
13 corrective lenses presents safety concerns.

14 MR. ENGLERT: Well --

15 QUESTION: I mean, that's -- that's also
16 alleged, isn't it?

17 MR. ENGLERT: It's also alleged, but intoning
18 the words, myth, stereotype, and unsubstantiated fears,
19 isn't enough when we have --

20 QUESTION: Well, we don't require that much on a
21 motion to dismiss --

22 MR. ENGLERT: No, but --

23 QUESTION: -- on the face of a complaint.

24 MR. ENGLERT: The court does not require that
25 much.

1 But these plaintiffs put in, to their credit,
2 some very honest allegations about where United's standard
3 came from. They want to say -- their key allegation is
4 United cannot substantiate its 20/100 standard. But
5 that's quite a different allegation from saying that
6 United's standard amounts to regarding everyone who
7 doesn't have 20/100 or better uncorrected vision as
8 disabled. Being regarded as not suitable for employment
9 as a pilot for United Air Lines is quite different from
10 being regarded as disabled.

11 QUESTION: That's exactly what's bothering me,
12 that if -- you might be right. If you are right, then the
13 regarded as prong is not really going to be a way to get a
14 lot of disabled people in the door, and if you are right
15 on that, then when you look to the first prong, there
16 might be a lot of deaf people, for example, deaf people
17 with hearing aids, who just can't even get through the
18 door because they will be said, well, you're not disabled
19 because that hearing aid works well enough. And then met
20 with totally irrational, say, reaction on the part of some
21 other employer, they will then lose because that employer
22 just regarded them as not good enough to work here, but
23 perfectly good enough to work somewhere else.

24 MR. ENGLERT: Well --

25 QUESTION: And it's that kind of interpretation

1 possibly that's worrying the EEOC.

2 MR. ENGLERT: Justice Breyer, to some extent
3 this gets back to our earlier colloquy about defining a
4 protected class and -- and then invoking the protections
5 of the statute. Just as not all age discrimination is
6 outlawed by the ADEA, not every irrational discrimination
7 involving a physical impairment is outlawed by this
8 statute.

9 QUESTION: Well, how -- how do you read this
10 regarded as prong? I mean, they've alleged that United's
11 position is based on stereotype, myth, or unsubstantiated
12 fears, and that it blocks plaintiffs from an entire class
13 of employment and so on. Now, how could they have been
14 more specific in their allegations? This is a motion to
15 dismiss.

16 MR. ENGLERT: Well, they were -- they were --

17 QUESTION: Why is this not sufficient under the
18 regarded as?

19 MR. ENGLERT: Because they were even more
20 specific. They -- the class of employment that they
21 allege was global airline pilot, and even they concede now
22 that that's not a class of employment. So, that's one of
23 the facial defects in their complaint.

24 Another facial defect in their complaint is that
25 although they talk about myth, fear, and stereotype, their

1 own complaint makes it very clear, Justice O'Connor, that
2 what they are complaining about is that United has not
3 substantiated standards that it derived from somewhere
4 else. The FAA had a 20/100 standard until 1990 -- 20/100
5 uncorrected standard until 1996, and the briefs, by the
6 way are slightly in error. They say 1994 but it was 1996.

7 QUESTION: Mr. Englert, what in your opinion
8 would qualify? What would be an example of something that
9 would be -- someone who would be regarded as disabled by
10 an employer?

11 MR. ENGLERT: There are many examples. One of
12 them would be, Mr. Chief Justice, if -- if it is rumored
13 that someone is HIV positive but that person is not in
14 fact HIV positive and the employer takes adverse action on
15 that basis. The employer is regarding that person as
16 disabled.

17 QUESTION: Well, what about someone, say, who
18 has an artificial leg and -- but, nonetheless, is
19 perfectly able to drive and can drive as well as -- meet
20 any driving test? Yet, the -- the employer says, you
21 know, I just don't want to take a chance with you. Is --
22 is he regarding that person as disabled?

23 MR. ENGLERT: He may be. The first question is,
24 is that person actually disabled? Because all that person
25 has to show is any one major life activity that is

1 impaired -- that is substantially limited by his
2 impairment.

3 QUESTION: Well, but this -- this thing works
4 great for him. I mean, he can do -- he can do -- he
5 passes all those tests. And yet, this particular employer
6 says, well, you know, I know you do, but I -- I just want
7 really grade A people, not meaning any disrespect to the
8 guy, but I just don't want to take a chance.

9 MR. ENGLERT: Mr. Chief Justice, in the
10 hypothetical situation where a person with a prosthetic
11 limb actually has no substantial limitation in any major
12 life activity, none at all, I would --

13 QUESTION: Supposing I have an artificial finger
14 and he's afraid I can't honk the horn.

15 (Laughter.)

16 MR. ENGLERT: Well --

17 QUESTION: So that there wouldn't -- wouldn't be
18 any obvious major disability.

19 MR. ENGLERT: That does sound like a case for
20 regarded as.

21 But -- but let me -- let me suggest why this is
22 not a case for regarded as.

23 QUESTION: Yes, and particularly in -- in this
24 case, one of the stumbling blocks is that United did treat
25 the applicant in its uncorrected condition for the

1 regarded as prong. It regarded these people as being
2 uncorrected.

3 MR. ENGLERT: Well, the question is whether it
4 regarded them as having an impairment that substantially
5 limits one or more major life activity.

6 QUESTION: That's -- that's the next question,
7 but you -- you admit that it, of course, regarded them in
8 their uncorrected state.

9 MR. ENGLERT: No. I think it's sort of a
10 metaphysical statement. United --

11 QUESTION: Well, this whole act is metaphysical.
12 We've been here for 2 days.

13 (Laughter.)

14 MR. ENGLERT: But -- but until 1996, Justice
15 Kennedy, no Government authority had -- that I'm aware of
16 had ever said don't look at people in both their corrected
17 and their uncorrected state. If these people -- if the
18 plaintiffs had corrected to 20/30 but were 20/50
19 uncorrected, they would be ineligible to be pilots for
20 United or even to get an FAA certificate.

21 QUESTION: Okay, but let's take this case. They
22 -- they are corrected -- in their uncorrected, they're 20
23 over 100. With glasses, they're 20/20. And United says
24 you aren't disabled because when you wear glasses, you're
25 20/20, and then they say we don't -- but when we regard

1 you as eligible for the job, we're not going to take you
2 because you're actually 20 over 100. Why isn't that
3 regarding them as disabled? I think that's the problem
4 we're having with your position.

5 MR. ENGLERT: For just the reason that some of
6 your own earlier questions suggested, Justice O'Connor,
7 which is that eliminating someone from a single job is not
8 regarded as. Everyone agrees on that.

9 Now, the question is how much do you have to go
10 beyond a single job to make out a regarded as claim, and
11 we -- we get into questions about the level of generality
12 of class of jobs.

13 QUESTION: Well, we didn't take that question
14 here in this case, did we? The single job issue or not?

15 MR. ENGLERT: I believe the grant of cert in
16 this case was unrestricted, Justice O'Connor.

17 QUESTION: May -- may I ask in that connection
18 if the -- if the evidence or the allegation was that
19 United is just like 10 different -- all 10 major airlines
20 have the same rule. Would -- would then it satisfy the
21 regarded as job classification for you?

22 MR. ENGLERT: No, not if it's limited to major
23 airlines and -- and not if it's limited to pilot
24 positions. Those are two things that --

25 QUESTION: You don't think being ineligible for

1 -- an otherwise qualified pilot being denied the
2 opportunity to work as a pilot for the -- all the blue
3 ribbon airlines would be a -- disabling in a major life
4 activity?

5 MR. ENGLERT: Not if it's limited to just the
6 blue ribbons, no. Justice --

7 QUESTION: Didn't you quote a reg more or less
8 supporting your position?

9 QUESTION: What is it -- can I just finish this
10 for a second?

11 QUESTION: No. I'm sorry.

12 QUESTION: What is it? They have to be -- no
13 airline at all would hire them? Is that your view?

14 MR. ENGLERT: No. They have to be substantially
15 -- if they're relying on substantial limitation of the
16 major life activity of working --

17 QUESTION: It's sort of a market share antitrust
18 test? Is this what it is? Or how -- how do you define
19 the -- when it's enough in your view? I just want to get
20 your position.

21 MR. ENGLERT: They -- they must be excluded at
22 -- at the minimum from a class of jobs.

23 QUESTION: Well, the class of jobs --

24 MR. ENGLERT: The EEOC's own --

25 QUESTION: -- is being a pilot for all major

1 airlines.

2 MR. ENGLERT: No. Your Honor, the EEOC's own
3 interpretive guidance actually addresses --

4 QUESTION: I'm not -- I'm interested in your
5 view. I'm trying to understand your position.

6 MR. ENGLERT: In my view, being disqualified
7 from a position with every major airline is not enough,
8 and the EEOC --

9 QUESTION: But you want us --

10 QUESTION: So, it has to be every airline.

11 QUESTION: You want us to defer to EEOC
12 interpretive guidelines on this --

13 MR. ENGLERT: No.

14 QUESTION: -- but not on the other. It comes
15 from the same interpretive guideline.

16 MR. ENGLERT: Well, you -- you shouldn't defer
17 to it, but I think it is probative, for purposes of
18 argument, to note that the EEOC does give as an example of
19 something that is too narrow to be a class of jobs,
20 commercial airline pilot.

21 Let me ask the Court -- the Court's indulgence
22 to think about this example. Doug Flutie is a football
23 player who is short, and he has been a controversial
24 football player throughout his career because a lot of
25 people don't think you should have short quarterbacks in

1 the NFL. Now, if these plaintiffs were regarded as
2 disabled because United wouldn't hire them as pilots, then
3 I would respectfully suggest we have to hold that Doug
4 Flutie is regarded as disabled if the Washington Redskins
5 and every other team in the NFL won't hire him as a
6 quarterback.

7 He does not have an impairment, in fact, because
8 being short, especially short compared to pro football
9 players, is not an impairment. But he is regarded as not
10 suited for employment with that particular employer
11 because of his impairment or because -- because of his
12 height, because of his physical characteristic. Not
13 having an impairment is a classic example of not being
14 disabled and yet being regarded as being disabled.

15 QUESTION: Mr. Englert, are these --

16 QUESTION: How much broader would it have to be?
17 You say at some point just everybody thinking he's too
18 short does -- does constitute regarded as. It's just not
19 hiring in the NFL. What else is it? I mean --

20 MR. ENGLERT: Well, in the example, Doug Flutie
21 played in the Canadian football league for many years, and
22 I would suggest that in and of itself, that is enough to
23 defeat a regarded as claim.

24 But -- but, Justice Scalia, my position is
25 broader than that.

1 QUESTION: But what if all -- all professional
2 football -- all professional football leagues thought he
3 was too short?

4 MR. ENGLERT: Then he could be a coach.

5 (Laughter.)

6 MR. ENGLERT: And coach is a position for which
7 he is suited by ability, skill, and training, which is the
8 language in the EEOC's regulation --

9 QUESTION: Well --

10 MR. ENGLERT: -- its interpretive guidance.

11 QUESTION: -- like saying putative pilots could
12 gas planes. They could but that's not what they're
13 trained for.

14 MR. ENGLERT: It is something that is suited to
15 their experience, skills, and abilities which is the
16 language --

17 QUESTION: Can we go back to eyesight and this
18 simpleminded view of it, without getting into categories
19 of jobs? Do you agree that these plaintiffs without their
20 glasses would fit the definition substantially -- what is
21 it -- restricted or limited with regard to sight? They
22 can't see in front of them without their glasses. Would
23 -- just let's take them in their uncorrected state. Are
24 they -- do they fit the definition of being disabled?

25 MR. ENGLERT: They probably do, but even that's

1 not crystal clear, Justice Ginsburg, for this reason. One
2 has to compare them functionally and not just on the basis
3 of numbers, like 20/400 or 20/100, to the average member
4 of the general population.

5 QUESTION: Yes, well, it is functionally. They
6 can't do anything. They can't see in front of them. It
7 isn't safe for them to go out on the street.

8 Let's -- but this -- this is my basic problem
9 and it's been brought up in -- in the briefs. You take
10 this person in their corrected state on your analysis, but
11 then the employer says, I don't accept the correction. In
12 other words, the question I asked Mr. Kilberg yesterday I
13 think, if these women had had laser surgery so that they
14 could be 20/20, that would be a corrective that United Air
15 Lines would accept. But isn't it the case that what's
16 really going on here is they are disabled if their
17 correction is not accepted and United is not accepting the
18 correction?

19 MR. ENGLERT: No. No, that's -- that's quite
20 the wrong way to look at it I would respectfully suggest,
21 Justice Ginsburg. You cannot make the actual disability
22 prong turn on the employer's perception. You can get into
23 the employer's perception in regarded as, as we have been
24 discussing, but in the actual disability --

25 QUESTION: That's why I mean to get into it. I

1 say, as they are -- from the employer's point of view,
2 people who don't have glasses to correct their vision --

3 MR. ENGLERT: But -- but that's -- if I may,
4 Justice Ginsburg, that's not correct either. The -- the
5 vision standard, which is derived from a longstanding FAA
6 standard, from the International Civil Aviation
7 Organization standard, even from an AMA recommendation
8 that the FAA rejected when it changed the rule -- the
9 vision standard requires that both corrected and
10 uncorrected be certain levels, 20/20 corrected, 20/100
11 uncorrected. So, it's not a matter of the employer
12 rejecting the corrected measure and saying we have no
13 interest in that. It's a matter of the employer saying,
14 our view of what it takes to be as safe a pilot as we
15 believe we should have on this airline is both of these
16 things.

17 So, to conceive of it as rejecting the
18 correction I think is neither factually accurate nor to me
19 consistent with the way the statute operates.

20 QUESTION: All right, but -- what -- it seems to
21 -- what your argument is driven by and what your answer to
22 Justice Ginsburg is driven by is you want to make sure
23 that, at the end of the day, United is in a position to
24 hold out, for very good reason, for what it believes is
25 the very safest pilot regardless of what these definitions

1 may be. You want the airline to be in the position of
2 saying if there's a 400 hitter out there, I don't have to
3 hire the 200 hitter.

4 But isn't it the case that the airline would be
5 in the position to hold out for the best, just as you want
6 it to do, even if we take your -- your opponent's view of
7 regarded and get these people in under the statute,
8 because if holding out for the very safest, the 400 hitter
9 of airline pilots, is in fact a -- a reasonable
10 qualification for an airline or if it is a reasonable
11 approach to the -- to the safety and health circuit
12 breaker in the statute, you'd still be able to do that
13 even though these people were regarded in the first
14 instance for getting into court as -- as being disabled?

15 MR. ENGLERT: I would hope so, Justice Souter,
16 but I can't have a lot of confidence that we would win
17 that because the EEOC takes the position that you have to
18 show a direct threat to safety. I disagree with that
19 position. But having --

20 QUESTION: Well, it's -- you're right. The --
21 the regs refer -- I think they finally get down to
22 substantial risk. And -- and you're quite right. My
23 question is assuming that what is a substantial risk is a
24 function not only of the likelihood of something going
25 wrong, but the -- the extent of disaster if something does

1 go wrong. So, you're right. I'm assuming that on that
2 criterion, you -- you would have a reasonable argument for
3 holding out for the -- for the 400 hitter --

4 MR. ENGLERT: And we should win, Justice Souter,
5 but -- but the confidence that we will win is what I'm
6 lacking.

7 Reasonable people disagree about the right
8 standard for pilots. I -- I mentioned that the AMA
9 suggested 20/200, and the FAA rejected that suggestion in
10 favor of looking just at corrected. Are we going to have
11 a battle of the experts at which United's -- United's view
12 is put into question because it won't hire nearsighted
13 pilots? This -- this ultimately is a safety issue.

14 QUESTION: May I ask a question going back to
15 the first issue, the disability? I know it's not an
16 eyeglass hypothetical, but I've been thinking about it.
17 Supposing a person needs a drug in order to -- to avoid
18 whatever the uncorrected condition is. He has to take a
19 pill of some kind, and he wants to be a truck driver. But
20 he can't afford to buy the pill. Do you look at him as
21 uncorrected or corrected?

22 MR. ENGLERT: Uncorrected.

23 QUESTION: You look at an uncorrected even
24 though if he got the job, he then would be able to pay for
25 the pill.

1 MR. ENGLERT: Yes. Our position is that the
2 verb substantially limits is meant to make an actual and
3 not a hypothetical --

4 QUESTION: And you can take into account the
5 economics of the particular applicant then.

6 MR. ENGLERT: You take into account the state
7 you find the person in.

8 QUESTION: Does a reasonable accommodation
9 require that you buy the pills or by the eyeglasses?

10 MR. ENGLERT: In general, according to the EEOC,
11 personal use items are not reasonable accommodations.

12 QUESTION: If these pilots don't -- didn't have
13 their glasses at the time they applied for a job -- they
14 had just been broken. They couldn't have -- they hadn't
15 had a chance to make an appointment with the eye doctor.
16 They'd be uncorrected -- they'd be disabled at the time of
17 their application.

18 MR. ENGLERT: No, Justice Stevens. The -- the
19 uniform interpretation of the statute is that the
20 impairment must be of long duration and not temporary for
21 it to qualify as -- as a disability.

22 QUESTION: Is -- is it -- do we have the only
23 choice? If we accept your view on eyeglasses corrected,
24 do we then have to say in the case of every other
25 condition, you also look corrected, or is there an

1 intermediate position?

2 MR. ENGLERT: Justice Breyer, I think you do
3 have to accept that position but I -- I certainly would
4 not dismiss out of hand the possibility that the Court
5 might think otherwise and that the Court might --

6 QUESTION: What would be the best intermediate
7 position?

8 MR. ENGLERT: The best intermediate position
9 would be that corrected versus uncorrected would be based
10 on the legislative history and that such conditions as it
11 appears were meant to be considered in their uncorrected
12 state according to the legislative history should be
13 considered in their uncorrected state.

14 QUESTION: What in particular in the legislative
15 history do you point to? Because I said yesterday in an
16 argument -- and I thought I was right -- that the
17 legislative history seems to point in each direction. The
18 -- the House and Senate Judiciary reports don't seem to be
19 very clear one way or the other. My recollection is that
20 the -- of the two Labor reports, one favored the corrected
21 view, one favored the uncorrected view. What do you point
22 to?

23 MR. ENGLERT: The same sources and they do point
24 in both directions. And I -- I agree with what Justice
25 Scalia I believe suggested yesterday, which is it's all or

1 nothing. But if one were to draw an intermediate
2 position, one could derive some of that from the
3 legislative history.

4 Thank you.

5 QUESTION: Thank you, Mr. Englert.

6 Mr. Hughes, you have a minute remaining.

7 REBUTTAL ARGUMENT OF VAN AARON HUGHES

8 ON BEHALF OF THE PETITIONERS

9 MR. HUGHES: Mr. Chief Justice, may it please
10 the Court:

11 Mr. Englert's statement that this ultimately is
12 a safety issue speaks volumes about what is at issue in
13 this case. This Court held in Arline and again in Bragdon
14 that -- that parties must produce objective evidence as to
15 whether there is a basis for a safety concern.

16 We've alleged that United perceives my clients
17 to be limited in the ability to fly any aircraft, whether
18 it's piloting, co-piloting, passenger routes, courier
19 routes. They can't do any of it under United's views.
20 Many other employers share the same view. Not all
21 employers. If they all shared the view, we'd have a good
22 claim under actually disabled, but United regards as -- as
23 disabled for that reason, and we've alleged that there is
24 no basis for this belief, that it's based purely on
25 stereotype, that there is no limitation between -- there

1 is no relationship between uncorrected vision and a
2 pilot's safety.

3 The FAA has always taken the same view. Even
4 when it had a 20/100 requirement, one could obtain a
5 waiver if -- if one's vision were correctable. And it's
6 only stereotype that states otherwise, and whether there's
7 a basis --

8 QUESTION: Why does that -- where -- how do you
9 get that? When one could just -- there wasn't any trial
10 here. One could think it could be. They think glasses
11 fog up. They get lost. Contact lenses get lost all the
12 time. People forget to take pills. That's not
13 stereotype, is it?

14 MR. HUGHES: Your Honor, we've alleged that it
15 is and we believe that's so because the objective evidence
16 is that there has never been a problem associated with
17 pilots with correctable vision. United apparently
18 believes the same. Our understanding is they have pilots
19 in their own fleet with the same vision.

20 QUESTION: Thank you, Mr. Hughes.

21 MR. HUGHES: Thank you very much.

22 CHIEF JUSTICE REHNQUIST: The case is submitted.

23 (Whereupon, at 11:03 a.m., the case in the
24 above-entitled matter was submitted.)

25

CERTIFICATION

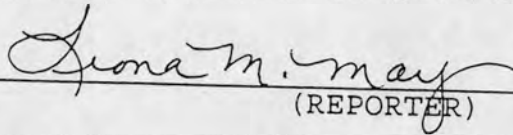
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KAREN SUTTON AND KIMBERLY HINTON, Petitioners v. UNITED AIR LINES, INC.

CASE NO: 97-1943

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