OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: VAUGHN L. MURPHY, Petitioner v. UNITED PARCEL SERVICE, INC.

CASE NO: 97-1992 C-2

PLACE: Washington, D.C.

DATE: Tuesday, April 27, 1999

PAGES: 1-54

ALDERSON REPORTING COMPANY

1111 14TH STREET, N.W.

WASHINGTON, D.C. 20005-5650

202 289-2260

LIBRARY

APR 29 1999

Supreme Court U.S.

RECEIVED
SUPREME COURT, U.S.
MARSHAL'S OFFICE

1999 APR 29 A 9:51

1 IN THE SUPREME COURT OF THE UNITED STATES

2 -X

3 VAUGHN L. MURPHY, :

4 Petitioner :

5 v. : No. 97-1992

6 UNITED PARCEL SERVICE, INC. :

7 -X

8 Washington, D.C.

9 Tuesday, April 27, 1999

10 The above-entitled matter came on for oral

11 argument before the Supreme Court of the United States at

12 11:11 a.m.

13 APPEARANCES:

14 STEPHEN R. McALLISTER, ESQ., Lawrence, Kansas; on behalf

15 of the Petitioner.

16 JAMES A. FELDMAN, ESQ., Assistant to the Solicitor

17 General, Department of Justice, Washington, D.C.; on

18 behalf of the United States, as amicus curiae,

19 supporting the Petitioner.

20 WILLIAM J. KILBERG, ESQ., Washington, D.C.; on behalf of

21 the Respondent.

22

23

24

25

1 C O N T E N T S

2 ORAL ARGUMENT OF PAGE

3 STEPHEN R. McALLISTER, ESQ.

4 On behalf of the Petitioner 3

5 ORAL ARGUMENT OF

6 JAMES A. FELDMAN, ESQ.

7 On behalf of the United States, as amicus curiae,

8 supporting the Petitioner 18

9 ORAL ARGUMENT OF

10 WILLIAM J. KILBERG, ESQ.

11 On behalf of the Respondent 28

12 REBUTTAL ARGUMENT OF

13 STEPHEN R. McALLISTER, ESQ.

14 On behalf of the Petitioner 53

15

16

17

18

19

20

21

22

23

24

25

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

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

2 (11:11 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument

4 next in Number 97-1992, Vaughn Murphy v. United Parcel

5 Service.

6 Mr. McAllister.

7 ORAL ARGUMENT OF STEPHEN R. McALLISTER

8 ON BEHALF OF THE PETITIONER

9 MR. McALLISTER: Mr. Chief Justice, and may it

10 please the Court:

11 Vaughn Murphy's extraordinary hypertension is

12 permanent and incurable. It places a constant stress on

13 his cardiovascular system and on major organs such as his

14 heart, his kidneys, and his eyes. There's no dispute in

15 this case that without medication Vaughn Murphy's

16 hypertension limits virtually all of his life activities,

17 and substantially so.

18 The fundamental question in this case is whether

19 the Americans With Disabilities Act applies to Vaughn

20 Murphy at all. With all due respect to the lower courts,

21 the ADA applies to Vaughn Murphy for two reasons. First,

22 he has an actual disability, because his hypertension

23 substantially limits his major life activities. Second,

24 UPS regarded him as disabled when it fired him.

25 Satisfying either of those two statutory alternatives

1 establishes only that the ADA applies to Vaughn Murphy and
2 that his suit against UPS should proceed to the additional
3 inquiries that the statute contemplates.
4 QUESTION: You say that your first point is that
5 he's covered by the ADA because his hypertension limited
6 major life activity. Are you talking about his
7 hypertension as medically corrected, or in its original
8 state?
9 MR. McALLISTER: In its unmedicated states,
10 Chief Justice.
11 QUESTION: Well, if we were to decide that the
12 statute contemplates looking at it in the medicated state,
13 is he still limited in his major life activities even
14 medicated, because as I understand it, it doesn't fully
15 correct his condition.
16 MR. McALLISTER: That's correct, Justice
17 O'Connor. The lower courts both concluded that with
18 medication he had no limitations whatsoever. We
19 respectfully disagree with that, but for purposes of your
20 decision, we --
21 QUESTION: You would suggest that we make the
22 assumption --
23 MR. McALLISTER: Yes.
24 QUESTION: -- then that in his fully medicated
25 state he can function.

1 MR. McALLISTER: They make that assumption, yes.
2 QUESTION: Mr. McAllister --
3 QUESTION: But you say that even if that's --
4 even if we look at it from the standpoint of his medicated
5 state, if he's regarded by the employer as being disabled,
6 that's enough, of course, under the statute.
7 MR. McALLISTER: Yes, it is.
8 QUESTION: Mr. McAllister, your client can be
9 rendered better, and you say we should assume not
10 disabled, by regularly taking medicine. What about those
11 whose disability is eliminated by some more permanent
12 physical method, for example, getting a replacement hip?
13 You know, without that replacement hip, I would be totally
14 unable to function, but I have the replacement hip, or I
15 have a heart bypass. Now, should we -- what should we
16 regard the criterion as to whether the person is disabled
17 or not?
18 MR. McALLISTER: Justice Scalia, two points in
19 response to that. There may be certain corrections that,
20 because they are permanent and, in essence, perfect,
21 basically eliminate the underlying impairment, so then the
22 person would not be under the first prong.
23 QUESTION: Why should that make a difference,
24 then? I don't see why it should make a difference if you
25 can be -- let's assume you can be rendered perfect by just

1 taking a pill every day. Your assertion is that in the
2 one hand taking a pill every day does not cause you to be
3 no longer disabled, but getting a replacement heart valve
4 or something like that does.
5 MR. McALLISTER: With all due respect, Justice
6 Scalia, we believe there is a difference between those two
7 things. One, the corrective measurement is permanent, and
8 although Vaughn Murphy has to take his medicine every day
9 he has to have variations at times in how much he takes,
10 which medication --
11 QUESTION: So what? The fact is, every day --
12 my hypothetical is, you render it perfectly normal. I
13 mean, we're leaving aside the question of whether he's
14 still disabled after taking the pill. I assume he's
15 perfectly normal just by taking the pill every day. I
16 can't see why it makes any sense to call one person
17 continuing -- to be continuingly disabled and the other
18 person not, just because the one remedy is by some
19 physical means and the other one is by taking a pill every
20 day. In terms of the purposes of the act, why should it
21 make any difference?
22 MR. McALLISTER: Justice Scalia, it would -- the
23 question seems to be premised on the notion that there is
24 a perfect correction in a case like Vaughn Murphy. In
25 many of these cases there's not a perfect correction.

1 QUESTION: That's the theory we're arguing the
2 case. In response to Justice O'Connor's question, we're
3 setting aside the question of whether he's not, you know,
4 continuingly disabled. I mean --
5 QUESTION: It's an easier case to think about,
6 perhaps, in thinking about one that will be argued later
7 this week, 20/20 vision if you wear glasses, but without
8 them, terrible, terrible handicap. Why shouldn't we look
9 at it as though the person were wearing glasses to
10 determine whether there's a disability?
11 MR. McALLISTER: Justice O'Connor,
12 fundamentally, to serve what we believe are the purposes
13 of the statute, the critical question here, first of all,
14 is whether this person is disabled. If they are not
15 disabled, because we look at the mitigating measures, we
16 never get onto any of the rest of the statutory inquiry.
17 QUESTION: Well, but I think the regarded as
18 feature protects the person who alleges the disability,
19 notwithstanding the corrective measures. Is the employer
20 regarding the person as disabled nonetheless? I mean,
21 that really hits at the heart of what the statute was
22 aimed at.
23 MR. McALLISTER: I agree with that, Justice
24 O'Connor. The regarded as prong is very important, and
25 it's particularly important in this case. It is not --

1 was not in our view properly interpreted by the lower
2 courts, so that you could take the view that if you look
3 at mitigating measures, Vaughn Murphy can do lots of
4 things, but the fact remains that UPS fired him solely
5 because of his high blood pressure. They regarded him as
6 disabled, and yet he got nowhere in the lower courts
7 because the lower courts said -- they relied on a DOT
8 regulation. Somehow that's separate from his high blood
9 pressure, and they didn't really think that he couldn't do
10 all these sorts of life activities.
11 QUESTION: Before we get to the regarded as,
12 though, let's talk a little more about, you know, whether
13 he's disabled or not, never mind the regarded as. What do
14 you do with the very first words of the statute, which
15 says, the Congress finds that some 43 million Americans
16 have one or more physical or mental disabilities?
17 Now, if, you know, corrective measures are not
18 counted, I am disabled in a major life function. I mean,
19 I could not do my current job, I could not do quite a few
20 other jobs without glasses, and if corrective measures are
21 eliminated, many more than 43 million Americans -- I mean,
22 I guess it's sort of nice to think that this is -- you
23 know, that a majority of Americans can claim the benefits
24 of the disabilities act. That's very comforting.
25 But Congress did say that -- I think they used

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

1 in this prologue, too, the famous words, discrete and
2 insular minority. Isn't that used in the prologue?
3 MR. McALLISTER: Yes, it is used in the
4 findings.
5 QUESTION: Well, how can you possibly say it's a
6 discrete and insular minority if people who, you know,
7 wear glasses and have all sorts of corrective measures for
8 what would otherwise be disabilities? It just doesn't
9 square with what Congress seems to be talking about here.
10 MR. McALLISTER: Justice Scalia, what Congress
11 was talking about was a large group, I think, rather than
12 whether or not it's a discrete and insular majority.
13 QUESTION: They said some 43 million Americans.
14 I mean, that's a --
15 MR. McALLISTER: IS a large group.
16 QUESTION: I mean, a lot of Americans wear
17 glasses and couldn't function without them. Many more --
18 MR. McALLISTER: More than 43 million. That
19 certainly is not some sort of a scientific finding. In
20 our view it suggested that they expected the statute would
21 apply relatively broadly. There may be some other ways --
22
23 QUESTION: No, I thought -- discrete and insular
24 minority, they said.
25 QUESTION: But Mr. McAllister, the concept of

1 disability requires some reference to the average.

2 MR. McALLISTER: Yes, it does.

3 QUESTION: And I presume that by means of that

4 referenced you would exclude from the class of the

5 disabled myopic people like Justice Scalia.

6 (Laughter.)

7 QUESTION: I refer to his glasses. I refer to

8 his glasses.

9 (Laughter.)

10 QUESTION: And if you --

11 QUESTION: Ask Justice Souter how long his arms

12 are.

13 (Laughter.)

14 QUESTION: I'll do even better than that. If

15 you exclude such people as Justice Scalia and me, by

16 reference to that -- to the criterion of average, is there

17 any reason to think that the 43 million doesn't work out

18 even on your theory?

19 MR. McALLISTER: On our theory, it may still

20 work out, 43 million. That is another explanation.

21 QUESTION: Well now, explain that, because I --

22 it's not immediately apparent to me.

23 MR. McALLISTER: The notion would be certainly

24 widely shared, relatively common impairments. The EEOC

25 has taken the position that the substantially limits

1 language means, compared to an average person, so if there
2 are lots of Americans who share this impairment on an
3 average sense, the average eyesight is not 20/20, it's
4 something worse than 20/20, so in an average sense,
5 someone who -- I don't know what numbers it would be, but
6 say 20/40 might not be substantially limited under the
7 statute.
8 QUESTION: Where do you get that out of the
9 statute? What words in the statute --
10 MR. McALLISTER: We don't get that out of the
11 statute --
12 QUESTION: I mean, a disability is a disability,
13 and without correction, I'm, you know, close to blind.
14 MR. McALLISTER: But the 43 million --
15 QUESTION: That doesn't count because a lot of
16 other people are the same way?
17 QUESTION: No, but everybody who wears glasses
18 is not close to blind. There are a lot of people who will
19 wear glasses to get to 20/20, but maybe 20/30, 20/40, and
20 without glasses they're not substantially impaired in
21 their life activities, even though they're better off with
22 glasses.
23 MR. McALLISTER: That's correct, Justice
24 Stevens.
25 QUESTION: Yes, but a lot more than 43 million.

1 QUESTION: A lot more than 43 --

2 QUESTION: I'm not sure.

3 QUESTION: I don't see how that works. I mean,

4 is -- imagine a person who has Justice Scalia's vision

5 without the glasses, but that person for some reason can't

6 wear glasses. I mean, do we really want to say that that

7 person is not disabled? Imagine a person who can't wear

8 false teeth for some reason, and has none. Is that person

9 not disabled? I would think so, but do you want to say

10 everyone with false teeth is disabled?

11 MR. McALLISTER: The --

12 QUESTION: I mean, I don't see how to get the

13 statute to work, and therefore I want to know your answer

14 to this question that you started with. If you were to

15 say you're right, your client in fact is disabled, is it

16 then necessary to say everyone who wears false teeth or

17 eye glasses is also disabled, or can you find a line that

18 separates out those two instances?

19 You started down that track. You used the word,

20 permanent. I've seen the word, easy, I've seen the word,

21 easily correctable, I've seen a lot of words floating

22 around. I want to know, in your opinion, is there a way

23 of drawing the line. What is it?

24 MR. McALLISTER: There is a line that can be

25 drawn, Justice Breyer, and the line would be between what

1 would be considered minor or trivial impairments and
2 serious impairments. It's effectively the line the Fifth
3 Circuit drew.
4 QUESTION: We're not here to draw lines. I
5 mean, I'm looking for a line that's in the statute. I am
6 sure you can draft a statute that would solve that
7 problem, but the issue is, does this statute have any such
8 condition in it, and if so, what language do you rely upon
9 that allows us to make this distinction.
10 MR. McALLISTER: In the --
11 QUESTION: I could write it in. I mean, that's
12 very nice. It's not the business I'm in.
13 MR. McALLISTER: In the findings, Justice
14 Scalia, the finding that UPS talks about in its brief to
15 some extent, Congress speaks to people who have
16 characteristics beyond their control, and there's a lot of
17 legislative history that makes clear they were not
18 concerned about minor, trivial impairments.
19 QUESTION: But Mr. McAllister, that appears in
20 the same paragraph that uses the classic suspect category
21 language, discrete and insular minority, politically
22 powerless. I think that there must be many hypertense
23 people among the politically powerful.
24 (Laughter.)
25 QUESTION: So if we take the --

1 QUESTION: Myopics of the world unite.
2 (Laughter.)
3 QUESTION: If we take the rather vague
4 definition of disability, and if we're trying to find out
5 what Congress meant by impairment, well, all these things
6 are impairments, but substantially limit one or more
7 activity, then why isn't it proper to go back to the
8 findings and purpose and say, well, there's a number here,
9 and that number would be just multiplied if we took your
10 view of what is a disability, and the group -- one thinks
11 of the children that were once herded off into a room for
12 special education as belonging in that discrete and
13 insular minority category, but not someone who may have
14 poor vision but be the brightest student in the class.
15 MR. McALLISTER: With all due respect, Justice
16 Ginsburg, Congress did not intend -- and this is replete
17 throughout the legislative history, I mean, just the way
18 the statute works as well -- did not intend this statute
19 to apply only to sort of traditional stereotypes about who
20 is or is not disabled.
21 Now, there are lines that can be drawn so that
22 it may be not all 100 million or however many people have
23 myopia are covered, and Justice Souter has suggested one
24 of those. It is, substantially limits can be made based
25 on an average assessment, which means not everyone with

1 near-sightedness is necessarily disabled.

2 QUESTION: Maybe we could deal with hypertense,

3 because that's --

4 MR. McALLISTER: Hypertension is the same way.

5 Hypertension is the same way. Hypertension begins

6 medically at 140 over 90. Vaughn Murphy unmedicated is

7 250 over 160, the most severe stage that the doctors

8 recognize. It may well be that a lot of the people around

9 140 over 90, or 150 over 100, are not substantially

10 limited, whether or not you consider mitigating measures

11 like medication. Vaughn Murphy --

12 QUESTION: Mr. McAllister, may I just ask you

13 why you -- you made a concession. Maybe you didn't. I

14 thought your position was that this man, even with the

15 medication, can't get himself down to normal because then

16 he'd have all these horrible side effects. The court of

17 appeals seemed to have that drop from view, and your

18 argument this morning seems to say you're ready to let it

19 drop from view.

20 MR. McALLISTER: Justice Ginsburg, we disagree

21 with the court of appeals' conclusion. It did conclude

22 that on medication he functions completely normally. We

23 disagree with that, but for purposes of this issue, we're

24 willing to accept some --

25 QUESTION: Well, wouldn't you want at least that

1 issue to be open on remand?

2 MR. McALLISTER: We would love to have that

3 issue open on remand.

4 QUESTION: Well now, what --

5 QUESTION: If you -- if you're not challenging

6 it here, and the court of appeals took a particular

7 position on it, I don't see how it could be open on

8 remand. It --

9 QUESTION: It's not in your questions presented

10 here.

11 MR. McALLISTER: That's why I said this morning

12 we're willing to accept and have this decided on the

13 grounds that he is functional --

14 QUESTION: Yes, that's pretty much your

15 position, yes.

16 QUESTION: But you did raise, I take it, and we

17 granted cert on the question whether there was a genuine

18 factual dispute about whether respondent regarded the

19 petitioner as disabled --

20 MR. McALLISTER: Yes, we did. Yes, we did.

21 QUESTION: -- and fired him for that reason, so

22 if we disagree with you on the first question and think

23 you do consider it in the medicated state, we might

24 conclude that the court below erred on the regarded as

25 prong.

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

1 MR. McALLISTER: Yes, Justice O'Connor, that
2 would be precisely our position.
3 QUESTION: Maybe you should say a few words
4 about the regarded --
5 MR. McALLISTER: I'd love to Justice Scalia.
6 QUESTION: I've stopped you. I 'm sorry.
7 MR. McALLISTER: The regarded-as prong is a very
8 important part of the definition for precisely the reasons
9 this case demonstrates. If you take into account the
10 mitigating measures, people like Vaughn Murphy may not be
11 covered under the first prong, but it's clear Congress
12 intended to cover, for example, diabetics, epileptics,
13 people who have mitigating measures one way or the other,
14 and in our view he is covered either under the first prong
15 or he's covered under the regarded-as prong.
16 UPS is arguing on the regarded-as prong is
17 basically he failed to meet a qualification standard that
18 we think was set basically by the Department of
19 Transportation, but in our view that's wrong. That is a
20 later issue in the statute. That should not have been
21 imported into the regarded-as prong, otherwise an employer
22 would always be able to at least assert that we didn't
23 fire or not hire this person because of their impairment,
24 we fired them because they failed to meet a job
25 qualification, and then the only way around that would be

1 to try to prove that's a pretext, but in our view that's
2 not how the statute works. The qualification issues,
3 Murphy's ability to do the job, whether or not he can
4 qualify under DOT regulations, which the Solicitor General
5 asserts that he may be able to as do we, is all later.
6 We never got to those later inquiries, so we
7 never had a chance to actually litigate whether or not he
8 could meet the Department of Transportation requirements.
9 That's what we'd like to get back to the lower courts and
10 do.
11 With the Court's permission, I'd like to reserve
12 the remainder of my time.
13 QUESTION: Very well, Mr. McAllister.
14 Mr. Feldman, we'll hear from you.
15 ORAL ARGUMENT OF JAMES A. FELDMAN
16 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,
17 SUPPORTING THE PETITIONER
18 MR. FELDMAN: Mr. Chief Justice, and may it
19 please the Court:
20 When Congress enacted the ADA, it intended to
21 cover people who have epilepsy or diabetes, people who can
22 only walk with the assistance of prosthetic devices, and
23 people like Mr. Murphy, who has a very severe case of
24 hypertension, intended to cover those individuals even if
25 they can take mitigating measures that alleviate some of

1 the hardships that are caused by their conditions. It is,
2 in fact, precisely because their conditions cause those
3 hardships that they take the mitigating measures. Now,
4 that doesn't mean that those individuals are going to win
5 every claim that they bring. It still has to be shown
6 that they can perform the essential functions of their
7 job.

8 QUESTION: What's your answer to the 43 million
9 finding of Congress? You know, it's a rather specific
10 number, 43 million.

11 MR. FELDMAN: Right, and I think that under
12 respondent's view of the statute there would be a lot
13 fewer than 43 million. I 'm not sure how many exactly
14 there are going to be, because I don't know any way to
15 count all of the claims that might come up under our view
16 of the statute.

17 QUESTION: Do you know how the 43 million figure
18 was developed. I don't use legislative history, but I
19 understand that you do.

20 (Laughter.)

21 QUESTION: And I understand that it came from
22 census --

23 MR. FELDMAN: It came from --

24 QUESTION: -- from census reports which contain
25 the question, you know, is your eyesight bad, and the

1 follow-up question, is it still bad with corrective
2 glasses, and that was not counted among the 43 million, if
3 that was the answer.
4 MR. FELDMAN: I'm not aware that actually the 43
5 million figure itself came from any specific source, or at
6 least I'm not sure exactly what it is. There are -- there
7 were a number of -- there was a number of different
8 studies that preceded congressional action, and it's clear
9 Congress did just take that number.
10 QUESTION: Didn't it come out of a speech on the
11 House floor by just one of the legislators?
12 MR. FELDMAN: I think maybe that -- that may
13 well be.
14 QUESTION: But that isn't a complete answer. If
15 someone had said 100 million, you know, there's a lot of
16 room for hyperbole, but 43 million, that suggests that
17 you've got some figure in mind that must have been derived
18 from somewhere.
19 MR. FELDMAN: Right. I think the --
20 QUESTION: You don't see 43 million people can't
21 be wrong. You say 100 million people can't --
22 (Laughter.)
23 MR. FELDMAN: I -- Mr. Chief Justice, I'm not
24 able to enlighten you any further as to the precise
25 sources of that particular number, but what I can say is

1 that there -- that our view doesn't necessarily lead to
2 any larger number than that being disabled, and that
3 respondent's view clearly leads to a smaller number, I
4 think, a smaller number than that, people who can only
5 walk with prosthetic devices, who have epilepsy or
6 diabetes, the kinds of serious conditions that Congress
7 intended the ADA --
8 QUESTION: Why would they not be included in
9 respondent's count? I think they surely would be. You
10 mean that someone who can only walk with a walker is not
11 impaired, even with the walker, in major life activities?
12 MR. FELDMAN: No, but to take, for example, one
13 of the examples that's given in the EEOC's regulations, if
14 you take someone who can only walk with an artificial leg,
15 who has only a partial leg and needs a prosthetic device
16 in order to walk, I think respondents would be arguing
17 that person is not disabled, because if he straps on the
18 artificial leg he can actually walk pretty well.
19 QUESTION: He can't play tennis.
20 MR. FELDMAN: Well --
21 QUESTION: He can't play a lot of sport -- I
22 mean, they may argue that. I'm not sure they're going to
23 win.
24 MR. FELDMAN: Right, but I think --
25 QUESTION: Are you willing to concede that if we

1 come out -- if we come out the way you don't want us to
2 come out, that someone who has a prosthetic leg is not
3 disabled?
4 MR. FELDMAN: But -- no, but I -- no, I'm not,
5 but I --
6 QUESTION: I wouldn't think so.
7 MR. FELDMAN: No, I'm not, but I think the lower
8 courts, some lower courts, since the enactment but not
9 before the enactment of the ADA, have held that conditions
10 such as epilepsy and diabetes are not disabilities because
11 individuals can take medication for those illnesses, and I
12 do think that, as prostheses are getting better, and there
13 will definitely be arguments, and I think respondents --
14 QUESTION: Well, but you still have the
15 regarded-as prong, Mr. Feldman, to protect against
16 mistaken beliefs as to the person's ability, and I would
17 think that that would make the scheme work pretty well,
18 and then if he's regarded as disabled, despite the
19 corrective measures, you have a question of whether he's
20 qualified, nonetheless, and the scheme works.
21 MR. FELDMAN: That's --
22 QUESTION: I don't see why it's either necessary
23 or desirable to adopt your view of the meaning of the
24 first question.
25 MR. FELDMAN: Well, with -- if the Court were to

1 adopt a reasonable interpretation of the regarded-as
2 prong, which I don't think is the interpretation that in
3 my view respondent has advanced, it would take some of the
4 pressure off of the first prong, so insofar as that's
5 true, I'd agree with you.
6 Nonetheless, it still is true that I think
7 Congress, when it enacted the statute, used language about
8 substantially limiting a major life activity which I think
9 is open to either interpretation. The committee reports,
10 three different committee reports made quite clear that
11 that meant that mitigating measures were not supposed to
12 be included when you're considering whether someone has a
13 disability.
14 QUESTION: Turning to the regarded as for just a
15 second, supposing a company like this one has a flat rule
16 on blood pressure, that over a certain figure, you're
17 ineligible for the job. Would that mean, within your
18 understanding of regarded as, that they regard everybody
19 who doesn't pass that test as disabled?
20 MR. FELDMAN: Yes. Yes.
21 QUESTION: So that would mean --
22 QUESTION: It just means they can't do this
23 job -- I'm sorry.
24 QUESTION: That would mean, then, that any
25 physical, flat rule for job qualification would violate

1 the statute.

2 MR. FELDMAN: There -- no. There is a

3 qualification, and the qualification is, it has to be a

4 class of jobs or a range of jobs in a variety of classes.

5 If it's just a particular job, if there is someone who --

6 I mean, one of the examples in the pre-ADA case is an

7 accountant who has agoraphobia. If an employer has a job

8 only on the 37th floor and says, I'm not going to give you

9 that job because you have agoraphobia, that could

10 reasonably be seen as saying you're excluded from only a

11 particular job, and we're not viewing you as disabled in

12 the major life activity --

13 QUESTION: No, but in this case, is the limit

14 is a limit on blood pressure at a certain pair of figures,

15 it seems to me that if -- everybody who flunks that test

16 is in the view of the company is regarded as disabled

17 because they don't have the required physical

18 characteristic.

19 MR. FELDMAN: But I think that the company is

20 viewing those individuals as unable to -- if they're

21 otherwise the type of people they would be employing for

22 truck driver -- for a broad range -- a broad job category

23 like truck drivers or something --

24 QUESTION: Which would mean -- I mean, maybe

25 this is right. I'm just trying to think it through. It

1 would mean, it seems to me, that every physical
2 requirement, at least with regard to blood pressure, would
3 fall, and the company would have to be able to prove that
4 there's an independent reason for not hiring the person.
5 MR. FELDMAN: I don't think that that's true. I
6 don't think that that's true.
7 QUESTION: Why not? That's what I need help
8 with.
9 MR. FELDMAN: The reason it's not true, because
10 I think that companies would have to prove that those
11 kinds of qualifications for jobs, if they affect a broad
12 category of jobs, are things that can be justified under
13 the statute.
14 QUESTION: Being a truck driver is a major life
15 activity?
16 QUESTION: And of course the statute --
17 MR. FELDMAN: I beg your pardon?
18 QUESTION: Being a truck driver is a major life
19 activity? What about being one of these people that put
20 up skyscrapers and run along beams, and the company has a
21 rule, you know, if you have a mild agoraphobia you can't
22 do it, and you're saying he's excluded from a major life
23 activity. He can't -- I don't know. There's a name for
24 those people, whatever they are.
25 MR. FELDMAN: I think you look at the -- at

1 whether there's a class of jobs involved. You don't
2 look --
3 QUESTION: That's a class of jobs.
4 MR. FELDMAN: Right.
5 QUESTION: You're saying any class --
6 MR. FELDMAN: No.
7 QUESTION: Being excluded from any class of jobs
8 is being excluded from a major life activity.
9 MR. FELDMAN: No, I -- yes. I think being
10 excluded from --
11 QUESTION: I can't be an accountant.
12 MR. FELDMAN: Yes. Being excluded from a class
13 of jobs which are the natural jobs that you have the
14 training, skills and experience to do, I think that is
15 substantially limiting in the major life activity of
16 working.
17 As the Court said in Bragdon, the act doesn't
18 deal with utter inabilities, but just substantial
19 limitations.
20 QUESTION: Mr. Feldman, I thought that Mr.
21 Murphy's work activity was a mechanic, and nothing
22 involved in this case touches mechanic. It's only
23 driving, as I understand, so his major life activity, his
24 major work activity was fixing cars?
25 MR. FELDMAN: Fixing trucks.

1 QUESTION: Yes, and -- which he could do at a
2 location, so I don't understand why this case as opposed
3 to some others maybe the one tomorrow where they couldn't
4 be pilots, but this, his major work, he can do. He just
5 can't drive --
6 MR. FELDMAN: Let me make -- let me distinguish
7 between two things. What the lower court held is that
8 because UPS viewed Murphy as unable to satisfy the DOT
9 safety regulations, it therefore did not regard him as
10 substantially limited in employment. That's the holding
11 of both of the lower courts below, and that's the only
12 holding that either of them --
13 QUESTION: The test isn't substantially limited
14 in employment, is it? I thought substantially limited in
15 a major life activity.
16 MR. FELDMAN: A major life activity. Working is
17 a major life activity.
18 QUESTION: Well, does unemployment -- an
19 unemployed person have no major life activity?
20 MR. FELDMAN: Well, not every individual may
21 have each of the listed major life activities. It -- but
22 certainly for Murphy working, and certainly for most of us
23 working is a major life activity, but what I'd like to
24 distinguish is between that holding, which is wrong, the
25 holding that because he can't satisfy the DOT regulation,

1 he therefore was not regarded as a major -- as a limited
2 in the major life activity of working, with a second point
3 which UPS has made in its briefs in this Court but which
4 wasn't reached in the courts below, and that's the
5 question of whether the class of jobs involved in this
6 particular case that UPS viewed Murphy as unable to do,
7 whether that was sufficiently broad.
8 That's an issue that hasn't -- that it seems to
9 me to be in dispute at this point, and neither court below
10 looked at the summary judgment record and made any
11 analysis on that point, and so therefore I think an
12 appropriate course with respect to that would be to remand
13 the case to the lower courts.
14 I mean, to be a little bit more specific, what
15 Murphy --
16 QUESTION: Thank you, Mr. Feldman.
17 MR. FELDMAN: Thank you.
18 QUESTION: Mr. Kilberg, we'll hear from you.
19 ORAL ARGUMENT OF WILLIAM J. KILBERG
20 ON BEHALF OF THE RESPONDENT
21 MR. KILBERG: Mr. Chief Justice, and may it
22 please the Court:
23 Before I go any further with my remarks, let me
24 provide the Court with some information that I believe was
25 requested in both Mr. McAllister and Mr. Feldman's

1 argument.

2 At page 13 of our brief and at page 21 of

3 respondent's brief in the United case is the legislative

4 history, the background of the 43 million number. I would

5 also point out that in our brief the citation is given as

6 135 Congressional Record 8901. It should be 8601. This

7 is -- I apologize to the Court. This is the result of my

8 impairment --

9 QUESTION: -- a lot of trouble, Mr. Kilberg. I

10 was really troubled by it.

11 MR. KILBERG: Well --

12 (Laughter.)

13 MR. KILBERG: I mention it, Justice Scalia, only

14 because I was pointing out my own impairment, which I deny

15 is a disability.

16 (Laughter.)

17 MR. KILBERG: I would also note, again with

18 regard to the 43 million figure, that there is a

19 substantial number of persons who are, as a result of

20 myopia or other correctable vision impairments, unable to

21 drive, and a number of courts of appeals have held that

22 driving is, in fact, a major life activity, so that number

23 would exceed 43 million in any event.

24 Unlike petitioner and his amici, who rely almost

25 exclusively on legislative history and deference

1 arguments --

2 QUESTION: May I ask, before you leave the 43

3 million, could you tell me, identify what you think are

4 the components of that class of 43 million? How do

5 they -- how --

6 MR. KILBERG: Certainly. This was a -- the 43

7 million figure was derived from census data. Congressman

8 Coelho explained the 43 million in a speech on the floor

9 of the House, and he explained that census data, which I

10 think he said projected some 36 million people -- the

11 actual number happened to have been 37 million, but he

12 said some 36 million people are disabled. That census

13 data in turn relied --

14 QUESTION: Yes, but there's no -- well, go

15 ahead. I'm sorry.

16 MR. KILBERG: It relied on a survey of Americans

17 which actually looked to functional limitations, and took

18 into account mitigation or ameliorations.

19 QUESTION: It seems to me -- you mean, that

20 survey was prepared by the Census Bureau?

21 MR. KILBERG: That survey was prepared -- yes.

22 That was a Census Bureau survey.

23 QUESTION: And is that Census Bureau survey

24 identified somewhere by name so I could read it if I

25 wanted to?

1 MR. KILBERG: It is identified in the
2 legislative history which is cited in our brief and in
3 United's brief. I believe it's the -- it was a study that
4 was called the Threshold of something. I can't remember
5 the full name at the moment.
6 QUESTION: What you cite on that page is
7 something called Bureau of the Census Disability
8 Functional Limitation of Health Insurance Coverage, 1984-
9 1985, P-70, that's what you're talking about?
10 MR. KILBERG: That's what I'm talking about.
11 QUESTION: Okay.
12 MR. KILBERG: That data, and then the way they
13 got to the 43 million --
14 QUESTION: Then my next question is, it says
15 there's 37, 3 million people with a functional limitation.
16 MR. KILBERG: Yes.
17 QUESTION: Can you give me some examples of the
18 functional limitation that made up that figure, or it's
19 just a ball park figure?
20 MR. KILBERG: It's a -- I suspect it's a bit of
21 a ball park figure, and then Congressman Coelho then added
22 to it by saying that the number has been growing, and so
23 he then estimated it to be 43 million as of the time of
24 the act, because this was 19 -- I believe 1980, or maybe
25 it was 1990 census -- no, it must have been 1980 census

1 data, and he was estimating --

2 QUESTION: For example, would I be able to tell

3 from that document whether someone who had -- say, was

4 legally blind, without glasses, had 2200 vision but who

5 could wear glasses and be corrected to 20/20, whether that

6 person would be in the figure or out?

7 MR. KILBERG: Yes, you would.

8 QUESTION: You could tell?

9 MR. KILBERG: Yes, and you would find that that

10 person was not counted.

11 QUESTION: Even if that person was legally

12 blind?

13 MR. KILBERG: That's correct, so long as the

14 person had correctable vision to normal.

15 Unlike --

16 QUESTION: If you look through there, would you

17 discover, for example, that people who have, let's say

18 prosthetic limbs, or the people who have high blood

19 pressure of an unusual nature -- I mean, really quite

20 high -- that they were counted or not counted? I mean,

21 could that be used as a basis --

22 MR. KILBERG: That would --

23 QUESTION: -- for going through and deciding

24 where and under what circumstances a corrective device

25 would or would not be counted in deciding whether a person

1 was disabled?

2 MR. KILBERG: No, Justice Breyer, not with

3 that --

4 QUESTION: Why not?

5 MR. KILBERG: Not with that degree of

6 specificity, but what you --

7 QUESTION: All right. If it can't, does it

8 nonetheless take an approach, so that an agency, seeing a

9 silence in the statute as to the counting of corrective

10 devices, or mitigating devices, that an agency, with that

11 as a guide, could create lists as to when you do count a

12 corrective device, when you don't count one, always with

13 the notion of combatting prejudice as the guiding goal?

14 Is that possible?

15 MR. KILBERG: But the statute here provides a

16 definition, and --

17 QUESTION: It doesn't say anything about

18 corrective device. I thought in respect to whether you

19 looked at substantial -- you know, substantial impairment

20 with corrective device, or without, was a matter on which

21 the statute itself was silent, though the history may make

22 a suggestion.

23 MR. KILBERG: No, I disagree. I believe the

24 statute --

25 QUESTION: Well, what does it say? Is, because

1 of is versus would?

2 MR. KILBERG: Well, we believe that this case

3 begins and ends with the language and structure of the

4 statute.

5 QUESTION: If I accept that you're right. If I

6 don't accept that, I'm still interested in your reaction

7 to the idea that it's up to the agency case by case, or

8 kind by kind, et cetera.

9 MR. KILBERG: Well, the -- we believe here that

10 prong 1 of the statutory definition defines disability as

11 an impairment that substantially limits the major life

12 activities of a particular individual.

13 Brought down to this case, it simply cannot be

14 said that Mr. Murphy's impairment substantially limited

15 his major life activities, because as a result of his

16 medication he does not suffer any limitations, and his

17 personal physician so testified, and that's -- in terms of

18 the joint appendix, I would refer the Court to 63a of the

19 joint appendix. Dr. Doubek, who is physician to Mr.

20 Murphy, said in deposition, he functions normally doing

21 every day activity that an every day person does.

22 QUESTION: Yes, I think, Mr. Kilberg, that the

23 petitioner has said that is the way the case should be

24 accepted here, so I don't think that point is in

25 contention.

1 QUESTION: Mr. Kilberg, I assume that if we
2 reject your is argument, I mean, even if one assumes that
3 your is versus would argument is wrong, it is still your
4 position that the statute requires an either-or.
5 I mean, either corrective measures are included,
6 that's a plausible interpretation of the statue, or
7 corrective measures are not included, which may be a
8 plausible interpretation of the statute, but I don't see
9 any way to interpret it to say that corrective measures
10 are included sometimes, frequently used corrective
11 measures are included, but corrective measures are not
12 included sometimes.
13 MR. KILBERG: I agree there is --
14 QUESTION: Is there any way to get that out of
15 the language?
16 MR. KILBERG: No, there is no way to get that
17 out of the language, Justice Scalia.
18 QUESTION: That's what I want, exactly the
19 question I --
20 MR. KILBERG: I'm sorry, no.
21 QUESTION: -- put it, because the --
22 MR. KILBERG: I did not understand --
23 QUESTION: -- the way I -- what I wanted you to
24 focus on, just that question, is that isn't it very
25 frequently you find a statute which is silent on the

1 subject, and rather than reading it either-or, it becomes
2 up to the agency to say where, looking at the purpose of
3 the statute, you would do it this way, and where you'd do
4 it the other way.
5 Indeed, I gather in most cases in the Government
6 they do look at the person's condition without corrective
7 devices, but in the case of glasses, the Social Security
8 Administration looks at them with corrective devices, so
9 why do we have to say either-or? Why couldn't it be up to
10 the agency to say where and when and under what
11 circumstances?
12 MR. KILBERG: Because in this case, Justice
13 Breyer, the statute is clear. I believe the language of
14 the statute is subject to only one interpretation. The
15 term disability means, with respect to an individual, a
16 physical or mental impairment that substantially limits
17 one or more of the major life activities of such
18 individual.
19 QUESTION: Well, could the agency say that
20 substantially limits is very easily complied with, you
21 just put your glasses on and off, but in other cases,
22 medication has to be taken in a certain dosage, and you
23 have to be very, very careful about it, and so that
24 there's a distinction in the two? I'm just -- I suppose
25 they could try to tease that meaning out of the text. I

1 think it's difficult, but --

2 MR. KILBERG: It is difficult, Justice Kennedy.

3 I suggest it is more than difficult, it's impossible.

4 QUESTION: Yes.

5 QUESTION: I don't know why you'd want to get

6 into anything like that. The statute either is all or

7 not. I mean, you either correct it or you don't, and if

8 you look at it in its corrected state, you still have to

9 make an individualized determination, don't you --

10 MR. KILBERG: That's correct.

11 QUESTION: -- under the statute?

12 MR. KILBERG: That's correct.

13 QUESTION: It could be that someone takes

14 medication, but it doesn't totally cure the problem and

15 the person is still disabled, and you would look at the

16 individual circumstance, would you not --

17 MR. KILBERG: That is correct.

18 QUESTION: -- under the statute?

19 MR. KILBERG: That is correct, Justice O'Connor,

20 and indeed, one of the major inconsistencies in

21 petitioner's argument, or the EEOC's argument, is that

22 throughout the EEOC's regulations and their compliance

23 manual and so on, they talk in terms of actual effect,

24 actual impact, the results on an individual, which is

25 inconsistent with this notion that you don't take

1 mitigating measures into account.

2 QUESTION: I'm not giving up yet. That is to

3 say, is -- there's a lot of unfounded prejudice, perhaps,

4 against people with artificial limbs, or perhaps hearing

5 aids, even, or where you take medicine, i.e., I don't mean

6 prejudice. I mean, people just don't understand it, and

7 that's not true of glasses, and therefore you focus the

8 statute on those people who Congress was worried about,

9 those kind -- and you leave out of the statute those kinds

10 of ordinary sorts of things that really are not part of

11 the problem. That would be the rough outline of an

12 approach that tries to leave some of this up to the

13 agency.

14 MR. KILBERG: And I believe, Justice Breyer,

15 that the stat -- the Congress came to a similar conclusion

16 to yours, but they did it with prongs 2 and 3. They said

17 that you cannot discriminate against someone because they

18 have a record of a substantial limitation on a major life

19 activity, nor can you discriminate against someone because

20 you perceive them as having a substantial limitation on a

21 major life activity.

22 QUESTION: All right. If we're looking at what

23 they actually thought about that, those reports do talk

24 about hearing aids, and they talk about artificial limbs,

25 as if they meant it to come under 1, don't they?

1 MR. KILBERG: No.

2 QUESTION: They don't.

3 MR. KILBERG: I don't believe so, no.

4 QUESTION: But if -- Mr. Kilberg, if what we're
5 thinking about is the correction, and -- it was brought
6 up, well, what about a permanent correction through
7 surgery as opposed to a pill every day. Justice O'Connor
8 focused on the regarded-as.

9 Isn't the argument for the petitioner here that
10 whether I'm disabled or not, my employer, or would-be
11 employer, would not accept the correction, that the
12 correction was unacceptable so is treating me in my
13 uncorrected state, so maybe corrected state says I'm not
14 disabled, but the employer is treating me in my
15 uncorrected state, therefore is rejecting the correction,
16 therefore is regarding me as disabled? That's what I
17 thought was the argument that the petitioner was
18 attempting to advance.

19 MR. KILBERG: In the record here, however,
20 there's simply no evidence that UPS perceived Mr. Murphy
21 as being substantially limited in the major life activity
22 of working.

23 QUESTION: But isn't the question not whether
24 they perceived him in a subjective sense, but how they
25 treated him? Isn't that what regarded means, did they

1 treat him as if he were disabled?

2 MR. KILBERG: I don't believe so. The --

3 QUESTION: Don't believe they did treat him, or

4 don't believe that that's the --

5 MR. KILBERG: I don't believe that that's the

6 correct reading of --

7 QUESTION: So that you believe the reading for

8 regarded is in effect subjective state of mind?

9 MR. KILBERG: Yes, and I --

10 QUESTION: Then the results are going to be

11 extraordinarily disparate, I suppose, because in the

12 one -- I mean, take this case. Take this case. If, on

13 your view in their heart of hearts they said, oh, this

14 guy's just as disabled as he ever was, the statute covers.

15 If, on the other hand, they say, look, we're going to

16 treat him as disabled and we're going to do it because we

17 have a view, perhaps erroneous, perhaps correct, of what

18 DOT requires, then you're going to get a different result,

19 and it seems to me you would get kind of an odd patchwork

20 of application if you take your subjective view.

21 MR. KILBERG: The -- I believe the case law

22 under the Rehabilitation Act and under the Americans With

23 Disability Act is quite consistent on the point that it is

24 the subjective view. The question is, how did the

25 employer perceive the --

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

1 QUESTION: Well, I would think the employer's
2 treatment of Mr. Murphy itself is some evidence of their
3 attitude that he wasn't qualified, and I don't understand
4 how a summary judgment could have been rendered on that
5 issue on these facts. I would think that would be open to
6 litigation, and then you would have to ultimately
7 determine whether he was qualified or not.
8 MR. KILBERG: In this instance, Mr. Murphy had
9 been employed for 22 years as a mechanic. He had worked
10 all that time without ever needing a DOT health card.
11 Within 2 to 3 weeks of his having left employment with
12 UPS, he obtained another job as a mechanic without any
13 need for DOT health card.
14 I don't think there's any question that he's not
15 substantially limited in working. The question then
16 becomes, did UPS have a different perception. There was
17 no evidence put into the record with regard to the number
18 of employers like UPS who require mechanics to have a DOT
19 health card to be able to drive in interstate commerce.
20 The only evidence in the record is evidence that UPS put
21 in of its own expert which showed the number of jobs that
22 Mr. Murphy is perfectly qualified to handle.
23 UPS perceived Mr. Murphy as being unable to work
24 for it as a mechanic, a very particular job, because he
25 did not have a valid DOT health card, and therefore could

1 not engage in road tests and road calls.

2 QUESTION: How come he worked for the prior 23

3 years without it? I mean, what had changed?

4 MR. KILBERG: It suggests -- he had not worked

5 for UPS. He had worked for other employers. It suggests

6 that other employers employing individuals as mechanics

7 did not require them to drive large vehicles in interstate

8 commerce to test --

9 QUESTION: What if actually DOT didn't require

10 what UPS thought it required?

11 MR. KILBERG: The issue would still be UPS's

12 perception. It may well be evidence of that perception,

13 but as to what DOT did or did not require, but the

14 underlying question always remains, did the employer

15 regard the individual as being substantially limited in a

16 major life activity, here the life activity of work? Did

17 they perceive --

18 QUESTION: Are you saying that if they had a

19 special rule, a very strict rule on blood pressure that

20 nobody else in the industry had, because they thought

21 that's a health requirement relating to safety and all the

22 rest, wouldn't one say that whether -- regardless of what

23 all the rest of the industry regarded as disability, that

24 UPS regarded anyone who did not meet that standard as

25 being disabled?

1 MR. KILBERG: They may be regarding that
2 criteria as a necessary criteria for their job. That's
3 more a perception of the job than it is a perception of
4 the individual.
5 QUESTION: Well, it's a perception of every
6 individual who fails the -- who doesn't meet the standard.
7 MR. KILBERG: And in those circumstances it
8 would be evidence that the plaintiff could put in to show
9 what the employer's perception might be.
10 QUESTION: Well, isn't this --
11 MR. KILBERG: -- but in this case there is no
12 such evidence.
13 QUESTION: Does it answer the evidentiary issue
14 itself? I mean, what would be your response to the
15 evidence which I think is in this record that they did
16 have that standard, he didn't meet it, ergo, he was
17 regarded by UPS as being disabled at least with respect to
18 this line of work?
19 MR. KILBERG: Because again there is -- the only
20 line of work that we would be talking about here if we got
21 to that point, the only class of job are mechanic's jobs,
22 which require someone to drive in interstate commerce. We
23 have no evidence in the record, there's no evidence on
24 which a reasonable jury could determine that that is a
25 substantial limitation on the life activity of working.

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

1 That merely suggests that this individual is not
2 qualified --
3 QUESTION: You mean, the availability of jobs in
4 other companies always is a defense to your saying, we
5 won't hire people with this characteristic?
6 MR. KILBERG: Indeed, even the EEOC in its
7 regulations looks to not only the number of jobs, but the
8 number of jobs in the geographic area. You have to show
9 that he was perceived as being substantially limited in a
10 number of jobs in that geographic area, jobs for which his
11 skills and training would permit him. Here, we have
12 nothing in the record like this.
13 QUESTION: Well, this wasn't UPS's regulation
14 anyway. It isn't --
15 MR. KILBERG: No. This is --
16 QUESTION: It isn't that UPS deemed him
17 unqualified because of blood pressure. It's that UPS
18 could not hire him because of a DOT regulation, wasn't it?
19 MR. KILBERG: That's correct. If UPS --
20 QUESTION: Would UPS have been in violation of
21 the law if it hired him?
22 MR. KILBERG: Yes, Justice Scalia. He would --
23 they would have been in violation of the law, and they
24 would have been subject to both civil and criminal
25 sanctions.

1 QUESTION: Well, it's hard to see, then, that
2 it's -- UPS' mere compliance with the law is any
3 indication of what UPS deemed. They were just obeying the
4 law. Is that conceded by petitioner?
5 MR. KILBERG: It is -- the petitioner takes the
6 view that there was an opportunity to depart from the DOT
7 guidelines.
8 QUESTION: That you could get a waiver from the
9 DOT, and that's hotly contested, and the -- I think the
10 other side, in all fairness, is taking the position that
11 the -- this person was qualified, indeed got a certificate
12 from the DOT saying he could drive.
13 There's one issue that seems to be blended,
14 blurred, and frankly I'm confused. It's come up in a lot
15 of the questions. Once you're in the category as regarded
16 as, then there's still the further question, are you
17 qualified to do the job? What is the difference between
18 those two standards? One is, does the employer regard you
19 as disabled? If the answer to that question is yes, we go
20 to the next step. The next step is, are you qualified for
21 the job?
22 Now, how are those two different?
23 MR. KILBERG: They really are separated.
24 There's some confusion because the court of appeals was
25 responding to an argument that petitioner had made below

1 that UPS had acted based upon myth and stereotype. The
2 court of appeals was seeking to make the point that
3 Justice Scalia just made, which is that the -- that UPS
4 was not acting on myth and stereotype, they were acting on
5 a Government standard.
6 But the issue, and the issue I think is clearly
7 dealt with in the district court decision, the issue is
8 what UPS perceived Mr. Murphy to be substantially limited
9 in, if anything, and here all UPS did was perceive
10 Mr. Murphy quite accurately as being unable to meet the
11 DOT criteria.
12 QUESTION: Well, let's --
13 QUESTION: Well, what you've said about the
14 standard, I can't believe that the standard for deemed
15 disabled is, you have to regard him as disabled for all
16 work of this sort in the industry.
17 That would enable a company to say, we have
18 special standards. I don't care, the rest -- everybody
19 else in the industry will hire asthmatics. We don't like
20 asthmatics. We're not saying -- we're not deeming you to
21 be disabled, because we acknowledge you can get a job in a
22 lot of other places. That would be okay.
23 MR. KILBERG: Well, indeed --
24 QUESTION: That would be okay.
25 MR. KILBERG: That would be okay.

1 QUESTION: Wow.

2 QUESTION: That seems very counterintuitive.

3 QUESTION: People don't --

4 QUESTION: That depends on how you interpret the

5 statutory requirement, a class of jobs.

6 MR. KILBERG: Yes.

7 QUESTION: And we have a case coming up that

8 gets us into that I think --

9 MR. KILBERG: Yes.

10 QUESTION: -- in a day or so.

11 QUESTION: Could we go back to Justice --

12 MR. KILBERG: That's correct.

13 QUESTION: I'm -- are you done?

14 MR. KILBERG: Yes.

15 QUESTION: Could we go back to Justice

16 Ginsburg's question? Let's assume we had a case in which

17 there -- we did not have the feature of the DOT

18 regulation, and the question was, number 1, did they

19 regard the person as disabled, and the answer was yes, was

20 the person qualified.

21 Don't the two questions in effect merge, because

22 if they regard the person as disabled, I assume they are

23 doing it for an illegitimate reason. If the person is

24 qualified, that in effect is another way of saying the

25 reason was illegitimate, so could you give me an example

1 of a case in which the employer would fail the deemed --
2 the regarded prong and win on the qualification prong?
3 MR. KILBERG: Fail the regarded prong and win on
4 the qualification.
5 QUESTION: In other words, it was -- you
6 regarded the person as disabled, but it was perfectly --
7 given the definitions of disabled, but the person was
8 nonetheless not qualified.
9 QUESTION: Well, that might be this very case,
10 if the statute contemplates that an employer can rely on
11 other Government regulations or employment requirements
12 such as the requirement of DOT that no driver can have
13 hypertension above a certain level.
14 QUESTION: But the assumption of the question
15 was that we get DOT out of here. How do the two -- how do
16 those two standards work if we don't have a Government
17 regulation superimposed on this, that the employer can
18 say, well, I'm not doing the deeming, DOT is doing the
19 deeming. Assume no DOT. How does it work?
20 MR. KILBERG: You would have to have a situation
21 where the employer perceived the individual as being
22 substantially limited in a major life activity, and the --
23 presuming that the individual was not, but the
24 individual -- HIV might be a good case of that, where the
25 individual -- the employer assumes, regards the individual

1 as being unable to function.

2 The tuberculosis case, the Arline case that this

3 Court dealt with some years ago, might be an even better

4 example, because that was, as I recall, a regarded-as

5 case, where the school district regarded the individual as

6 being unable to function because she had a contagious

7 disease, tuberculosis. The Court dealt with the

8 qualification issue separately in that case, as I recall,

9 by remanding to the lower court to determine whether in

10 fact there was a direct threat.

11 QUESTION: But I would think that in every case

12 in which the Court ultimately said yes, the person is

13 qualified, the Court would in effect be saying, your basis

14 for deeming the person unqualified was an illegitimate

15 basis. That's why I -- the two seemed to me to be

16 virtually inseparable unless you get, as Justice O'Connor

17 said, a kind of a third party criterion working as your

18 reason for defending against the regarded.

19 MR. KILBERG: Well, but certainly employers can

20 set physical standards. Numbers of employers have set

21 physical standards with regard to lifting, for example,

22 and the courts have accepted those as not being indicative

23 of disability and said those are perfectly legitimate

24 standards. You may need 25 pounds to lift, to be able to

25 lift 25 or more pounds, and have done that at the initial

1 stage, and individuals who cannot lift more than 25 pounds
2 have not been regarded as being disabled, because that's
3 not viewed as a substantial limitation on a major life
4 activity.
5 QUESTION: Mr. Kilberg, do I understand your
6 argument correctly to say that people who have diseases
7 with dread names but are very well controlled by a pill a
8 day, like an epileptic, like a diabetic, that they would
9 be the same, they would not be disabled for purposes of
10 this statute?
11 MR. KILBERG: To the extent that the
12 ameliorative measure -- in this case, we're talking about
13 pills -- in fact put them on the other side of the line.
14 That is to say, with their medication they were not
15 substantially limited in a major life activity. Some of
16 those conditions you name can be very severe, so that even
17 with medication --
18 QUESTION: So that hypertension could be in that
19 category.
20 MR. KILBERG: It could be in that category. It
21 is not with regard to Mr. Murphy.
22 QUESTION: May I ask this question, just for
23 your comment? Given the uncertainty, particularly on the
24 regarded as point, and the possible ambiguity on the
25 other, would you comment on your view as to whether it

1 would be appropriate to look at legislative history in
2 this case?
3 MR. KILBERG: No.
4 (Laughter.)
5 QUESTION: No, you won't comment?
6 MR. KILBERG: The answer is yes, I would
7 comment, and no, I don't believe that we need to look at
8 the legislative history.
9 QUESTION: And why not, other than offending
10 Justice Scalia?
11 MR. KILBERG: Well --
12 (Laughter.)
13 MR. KILBERG: The -- for a -- first --
14 QUESTION: And good reason.
15 MR. KILBERG: First, because the statute is
16 clear. The plain meaning of the statute is clear.
17 QUESTION: If regarded as is perfectly clear,
18 too.
19 MR. KILBERG: And I believe it's clear on
20 regarded as. If you turn to the legislative history, what
21 you're going to see is a mixed record, with the Senate
22 reports supporting respondent's position, UPS' position,
23 and with the House reports being somewhat mixed, but at
24 least having language that petitioners can use to argue
25 their case. We don't think that it's necessary in this

1 case to go beyond the plain meaning of the statutory
2 language.
3 QUESTION: But if we do go beyond it, and I
4 agree with you, I looked at the legislative history, and I
5 think it takes you in each direction. I can't get any help
6 from it. If we agree with you on the legislative history,
7 we don't agree with you on plain meaning, why don't we
8 defer?
9 MR. KILBERG: The -- frankly, because the
10 agency's interpretation itself doesn't have the power to
11 persuade. It's internally inconsistent, it's inconsistent
12 with their own regulations.
13 QUESTION: Well, we may say that -- I'm not
14 saying this, but we may say they have done a far less than
15 perfect job in the consistency of their regs, and I -- you
16 know, I understand your argument there, but there isn't
17 any question the position that the agency is taking in
18 relation, not only to this case, but to cases of a class
19 like this, and isn't that enough for some degree of
20 deference if we're looking for a tie-breaker?
21 MR. KILBERG: In fact, even there, Justice
22 Souter, you have to say that the agency is taking
23 diametrically opposed positions. The agency takes the
24 position that mitigating measures may be taken into
25 account if they're harmful. Petitioner and the Solicitor

1 General take the opposite position on that.

2 The agency took a different position in a case

3 it ruled upon 3 months before the ADA was passed, the

4 Kienast v. Frank case, which is cited in our brief, where

5 the agency said, in ruling upon a case coming to it from

6 the Postal Service, that mitigating measures were to be

7 taken into account, so the agency frankly is all over the

8 place. I don't see --

9 QUESTION: And in that case there were no side

10 effects from the mitigating measure that would have

11 justified it on their theory.

12 MR. KILBERG: No. The mitigating measure in

13 Kienast v. Frank was eye glasses.

14 QUESTION: I see.

15 MR. KILBERG: And the position that the EEOC

16 took was that -- I forget whether it -- it was Ms.

17 Kienast, because Frank was the Postmaster General, that

18 Ms. Kienast was not disabled because she was able to wear

19 glasses.

20 QUESTION: Thank you very much, Mr. Kilberg.

21 Mr. McAllister, you have 2 minutes remaining.

22 REBUTTAL ARGUMENT OF STEPHEN R. McALLISTER

23 ON BEHALF OF THE PETITIONER

24 MR. McALLISTER: Mr. Chief Justice, and may it

25 please the Court:

1 I'd like to make just one point about the
2 regarded-as prong, and that is the difference and the
3 importance between the disability determination and the
4 qualification standards question. The problem for Vaughn
5 Murphy is UPS raises the qualification standard as -- the
6 reason they did not regard him as disabled, they simply,
7 in their view, regarded him as unqualified. That should
8 not be part of the disability determination.
9 That's what the next step is about, does he meet
10 the DOT regulation, or does he not, but that is not a
11 question of whether or not Vaughn Murphy was regarded as
12 disabled.
13 Unless there are further questions, thank you.
14 CHIEF JUSTICE REHNQUIST: Thank you,
15 Mr. McAllister.
16 The case is submitted.
17 (Whereupon, at 12:10 p.m., the case in the
18 above-entitled matter was submitted.)
19
20
21
22
23
24
25

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

VAUGHN L. MURPHY, Petitioner v. UNITED PARCEL SERVICE, INC.
CASE NO: 97-1992

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY: Leona M. May
(REPORTER)