OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: ALBERTSONS, INC. Petitioner v. HALLIE KIRKINGBURG.

CASE NO: 98-591 c.2

PLACE: Washington, D.C.

DATE: Wednesday, April 28, 1999

PAGES: 1-54

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1 IN THE SUPREME COURT OF THE UNITED STATES

2 -X

3 ALBERTSONS, INC. :

4 Petitioner :

5 v. : No. 98-591

6 HALLIE KIRKINGBURG. :

7 -X

8 Washington, D.C.

9 Wednesday, April 28, 1999

10 The above-entitled matter came on for oral

11 argument before the Supreme Court of the United States at

12 11:05 a.m.

13 APPEARANCES:

14 CORBETT GORDON, ESQ., Portland, Oregon; on behalf of the

15 Petitioner.

16 SCOTT N. HUNT, ESQ., Portland, Oregon; on behalf of the

17 Respondent.

18 EDWARD C. DUMONT, ESQ., Assistant to the Solicitor

19 General, Department of Justice, Washington, D.C.; for

20 the United States, as amicus curiae, supporting the

21 Respondent.

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25

1 C O N T E N T S

2 ORAL ARGUMENT OF PAGE

3 CORBETT GORDON, ESQ.

4 On behalf of the Petitioner 3

5 SCOTT N. HUNT, ESQ.

6 On behalf of the Respondent 27

7 EDWARD C. DUMONT, ESQ.

8 For the United States, as amicus curiae,

9 supporting the Respondent 42

10 REBUTTAL ARGUMENT OF

11 CORBETT GORDON, ESQ.

12 On behalf of the Petitioner 52

13

14

15

16

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18

19

20

21

22

23

24

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

2 (11:05 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument

4 next in No. 98-8 -- 591, Albertsons, Inc. v. Hallie

5 Kirkingburg.

6 Ms. Gordon.

7 ORAL ARGUMENT OF CORBETT GORDON

8 ON BEHALF OF THE PETITIONER

9 MS. GORDON: Mr. Chief Justice, and may it

10 please the Court:

11 Our case addresses both the issue of disability

12 and the issue of qualification.

13 A functional analysis is required by a plain

14 reading of the statute and under this Court's decision in

15 Bragdon. Defining the impairment, simply naming the

16 condition, here monocularity, does not end that analysis.

17 A functional analysis establishes whether the impairment

18 substantially limits the major life activity.

19 The Ninth Circuit held that Mr. Kirkingburg is

20 disabled because he sees differently from other people,

21 not because he sees substantially -- in a substantially

22 restricted or a substantially limited manner. Mr.

23 Kirkingburg sees with one eye almost everything that an

24 average person in the general population sees with two

25 eyes. He lacks peripheral vision and he lacks some cues

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1 for depth perception. Here Mr. Kirkingburg claims that
2 his own mind has compensated and helped him in terms of
3 depth perception, by giving him an enhanced ability to use
4 monocular cues.

5 Viewing Mr. Kirkingburg's seeing functionally
6 then, he's not substantially limited in the major life
7 activity of seeing. He is impaired because he sees
8 differently.

9 QUESTION: Let -- let me talk about what we have
10 before us here for just a minute. I think your client
11 asked for summary judgment at the trial court level.

12 MS. GORDON: That's correct, Justice O'Connor.

13 QUESTION: And only on the grounds that the
14 respondent was not qualified for driving?

15 MS. GORDON: That's correct.

16 QUESTION: And did not ask for summary judgment
17 on the issue of whether the respondent was disabled.

18 MS. GORDON: That's correct.

19 QUESTION: And yet, on cert, we are to address
20 whether he was disabled.

21 MS. GORDON: That's I believe appropriately
22 before this Court because the Ninth Circuit ruled on that
23 question and found him to be disabled.

24 QUESTION: How could the Ninth Circuit have --
25 Ninth Circuit grants a summary judgment to the other side

1 or to -- grants -- says that the other side should get
2 summary judgment when they didn't ask for it and you
3 didn't ask for it?
4 MS. GORDON: That's correct.
5 QUESTION: Well, then isn't the obvious thing to
6 do, we say they're wrong on that and just send it back and
7 try it out?
8 MS. GORDON: I think the Ninth Circuit is
9 certainly wrong on that question, and this Court has
10 before it other issues that came up on cert.
11 QUESTION: The Ninth Circuit remanded. It
12 didn't -- it didn't throw it out. The Ninth Circuit
13 said --
14 MS. GORDON: The Ninth -- I'm sorry, Justice
15 Ginsburg.
16 QUESTION: -- go back and -- and do something
17 more on the qualified issue. You -- you went for summary
18 judgment. You skipped over disability. You skipped over
19 the perceived as or --
20 QUESTION: Regarded as.
21 QUESTION: -- regarded as. You went directly to
22 the third thing that the plaintiff has to show and said,
23 he can't show it but he's qualified. Right?
24 MS. GORDON: That's -- that's correct, and the
25 Ninth Circuit remanded on regarded as and on the

1 qualification issue --

2 QUESTION: Right.

3 MS. GORDON: -- and found against the company

4 and in favor of Mr. Kirkingburg on his disability

5 question.

6 QUESTION: That -- that's the only one that was

7 a judgment, not -- not a question open for the district

8 court. It was only --

9 MS. GORDON: That's correct.

10 QUESTION: And the -- so, if we were to say the

11 Ninth Circuit was wrong on that, then everything else

12 should go back. If we said the Ninth Circuit was wrong in

13 saying disabled means does it differently, if we just said

14 that -- that, why -- why is your -- are you entitled to

15 anything more than that?

16 MS. GORDON: Well, I think we're entitled to

17 more than that, Justice Ginsburg, because the

18 qualification standard is the standard that was tried to

19 the district court. The district court gave summary

20 judgment on that. It can be decided as a matter of law.

21 It was brought before this Court on a petition, and we

22 believe this Court can go ahead and decide that as well.

23 And the -- and the fact in this case is that

24 this employer had a qualification standard, which the

25 statute allows it to have, that was based in safety and it

1 was applied to everyone, but you had to have 20/40 vision
2 in each eye independently in order to drive a truck for
3 the company. That standard is the same standard that the
4 Department of Transportation, the DOT, has in its
5 regulations for truck drivers. There's nothing arbitrary
6 or capricious about that standard.
7 QUESTION: But -- but the Ninth -- the Ninth
8 Circuit, Ms. Gordon, said that the DOT provided waivers
9 under certain circumstances and the respondent got a
10 waiver?
11 MS. GORDON: Yes, Mr. Chief Justice. The
12 respondent later got a waiver. At the time that he was
13 let go by the company, he didn't have a waiver. And the
14 waiver is only a license to drive in an experimental
15 program that went into effect that -- earlier that year to
16 try to develop empirical data by which the Federal Highway
17 Association was trying to see if it had enough evidence to
18 lower the 20/40 each eye standard. It never got that
19 evidence. It never developed that, and the standard has
20 never been lowered.
21 QUESTION: And -- so -- and did the waiver
22 expire or --
23 MS. GORDON: The waiver has been grandfathered
24 in for people that got it during that period of time who
25 kept up their reporting procedures, and the record ends,

1 of course, at the point when discovery closed. So, it --

2

3 QUESTION: But we take this case on the basis

4 that the respondent did obtain a waiver from DOT and a

5 valid waiver at the time. Right?

6 MS. GORDON: Well, if -- this case was taken on

7 the petition for certiorari which questions the waiver as

8 a reasonable accommodation. I don't agree, respectfully,

9 Justice O'Connor, that you can say that this waiver was

10 valid at the time. That validity would imply, as the

11 Ninth Circuit majority said, that this person was deemed

12 to be safe in some way when, in fact, that's not what the

13 waiver program did. It simply gave people with diminished

14 visual abilities an opportunity to help the Government

15 prove whether they were safe or not. And in 1994 in the

16 Advocates case, the D.C. Circuit found that that waiver

17 program was invalid.

18 QUESTION: Do you acknowledge at -- at the time

19 the employee obtained the waiver, Albertsons could have

20 hired him to drive a truck if it had chosen to do so,

21 relying on the waiver?

22 MS. GORDON: I agree that the waiver gave him a

23 license to drive recognized by the Federal Government.

24 QUESTION: Is it your position that Albertsons

25 has a right to set a safety standard, in effect, with the

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1 same unreviewable autonomy that the regs give a -- a
2 manufacturer the right to set production standards? Is -
3 - is that basically your point?
4 MS. GORDON: I think that is -- that is the
5 position under the statute itself. A qualification
6 standard may be set by the employer, and the EEOC has
7 applied that both to safety type standards, such as this
8 one, and production type standards.
9 QUESTION: But you don't -- you don't concede
10 that there is, in effect, any reasonableness limitation on
11 the standards that you can set?
12 MS. GORDON: I think the reasonableness
13 limitations are twofold on the face of the statute. The
14 standard must be job-related and consistent with business
15 necessity, and the second test is whether it meets the
16 direct threat test if it's a safety issue. The standard
17 in this case meets both of those tests.
18 QUESTION: But doesn't this just mean there's
19 another issue for trial? I mean, if -- if there were no
20 waiver, your -- your client could say, well, I just relied
21 on the DOT and the DOT says they're not safe. And -- but
22 if there's a waiver, what the waiver means is DOT isn't
23 saying, given the nature of this program, they are safe.
24 DOT is saying we're not sure.
25 MS. GORDON: I think --

1 QUESTION: So, if DOT says you're not sure, then
2 your client thinks they're not safe, the other side thinks
3 they are -- their client is safe, and -- and therefore, we
4 have a proceeding in a court and work out who's right. I
5 mean, would that be the answer to this?
6 MS. GORDON: Possibly that would be the answer,
7 but I would suggest that the EEOC itself has given another
8 defense, and that is in the Technical Assistance Manual at
9 page 4-16, they say that if you have a Government
10 regulation that requires an employer to have a certain
11 standard, if the employer is following that standard,
12 which this employer was doing at that time and continues
13 to do, that that operates as a defense and you don't have
14 to look at the business -- the job-related and business
15 necessity test.
16 QUESTION: But is that -- have they taken into
17 account the very unusual situation where there is such a
18 reg, but then the agency itself gets a subgroup of people
19 and says, we don't really know whether it should or should
20 not apply here?
21 MS. GORDON: Yes. I --
22 QUESTION: I mean, I would imagine the EEOC reg
23 is silent on that point.
24 MS. GORDON: There are a lot of regulations on
25 the ADA that the EEOC has promulgated, but I haven't found

1 that example --

2 QUESTION: Exactly. So then, don't we have to

3 have the trial or the further proceeding?

4 MS. GORDON: I don't think so because I think

5 you can find, as a matter of law, that when safety is an

6 issue and an agency has issued a mandatory safety

7 requirement -- and again, the waiver program was not

8 deemed safe. When you're following a mandatory safety

9 requirement, I think the employer is -- is entitled to an

10 absolute defense.

11 If this employer is found not to be entitled to

12 an absolute defense, however, it can easily meet both the

13 job-related and business necessity test and the direct

14 threat test.

15 QUESTION: Ms. --

16 QUESTION: Well, unless unqualified can be

17 determined as a matter of law, this case would have to go

18 back. In other words, unless we could say, you're right.

19 This person is unqualified as a matter of law because we

20 ignore the waiver bit. We take as mandatory those fixed

21 requirements, and -- and we don't take that position. And

22 then you can prevail as a matter of summary judgment.

23 MS. GORDON: Certainly this Court can take care

24 of this case as a matter of law if you go with the

25 mandatory defense. If you go to the balancing tests

1 basically that are developed under the -- the direct
2 threat test, for instance, the record before this Court -
3 -
4 QUESTION: That wasn't the question.
5 MS. GORDON: I'm sorry.
6 QUESTION: Whether we can decide it as a matter
7 of law. The question was if we don't -- if we don't, then
8 it has to go back.
9 MS. GORDON: That's correct.
10 QUESTION: Can I ask another thing about --
11 about the status of -- of this case? In -- in your
12 questions presented in your petition, you -- you only ask
13 whether a monocular individual is disabled per se. You
14 did not -- you did not include a question about the
15 regarded as claim. And resolving that in your favor would
16 do you no good since the -- the court of appeals also
17 found that this individual was regarded as disabled.
18 Now, I note that in your petition, you -- you
19 expand on question number 1, and --
20 QUESTION: In the brief.
21 QUESTION: In the brief. I'm sorry. In the
22 brief, you expand on question number 1 so that it includes
23 not only disabled per se, but also whether he's regarded
24 as -- as disabled. But it seems to me that comes in a bit
25 late.

1 MS. GORDON: Our position on that is that it's
2 reasonably included in the first question presented.
3 QUESTION: In disabled per se?
4 MS. GORDON: Disabled per se. The definition of
5 disabled has three prongs.
6 QUESTION: Yes, but what -- what do the words
7 per se mean?
8 MS. GORDON: As a matter of law.
9 QUESTION: What do they add to the sentence
10 whether a monocular individual is disabled under the
11 Americans with Disabilities Act?
12 MS. GORDON: That's a direct --
13 QUESTION: Just sort of thrown in there for no
14 reason at all.
15 MS. GORDON: No. They were thrown in there
16 because of the Ninth Circuit's majority opinion and the
17 manner in which it was decided.
18 QUESTION: But doesn't per se mean disabled, not
19 regarded as disabled, but disabled? That's -- that's how
20 I took it.
21 But you -- you say -- but you -- you agree that
22 it's no use resolving just that first question unless the
23 second one is also before us. We have to find in your
24 favor on both of those questions to go any further.
25 MS. GORDON: Actually --

1 QUESTION: On -- on that issue I mean. Of
2 course, the -- you know, the qualified question would
3 still be here.
4 MS. GORDON: That's exactly right. We would
5 have to show both prong one and prong three.
6 QUESTION: But it's -- it's no use deciding in
7 -- in your petition -- to take the questions in your
8 petition, it's no use deciding 1a in your favor unless
9 we're also prepared to decide 1b in your favor. Right?
10 QUESTION: Well, I suppose you could say every
11 little bit helps.
12 (Laughter.)
13 MS. GORDON: You could say every little bit
14 helps, and --
15 QUESTION: Of the brief. The brief. The brief.
16 I'm sorry.
17 MS. GORDON: The qualified portion of our
18 defense certainly would take care of either one of those
19 first two questions.
20 QUESTION: Is -- is it right, if I -- just to
21 understand it, the term disability in the statute is
22 defined in terms of three prongs. So, you are disabled if
23 A or B or C.
24 MS. GORDON: That's correct.
25 QUESTION: And so, what your question raised is

1 whether the Ninth Circuit is correct in saying that your
2 client -- that their client was disabled under either A or
3 C.
4 MS. GORDON: That's right.
5 QUESTION: So, you say you raised it and weren't
6 particularly specific as to which prong you were pointing
7 to in the question.
8 MS. GORDON: That's right. We perhaps didn't
9 state it as artfully as we could have in our petition, and
10 we clarified it --
11 QUESTION: Did the Ninth Circuit use per se in
12 reference to one prong but not the other?
13 MS. GORDON: The Ninth Circuit made a per se
14 decision in terms of prong one. The manner in which they
15 analyzed it was a per se analysis, and that's --
16 QUESTION: Well, per se is a rather -- you mean
17 as a matter of law?
18 MS. GORDON: Yes. They basically said -- they
19 defined Mr. Kirkingburg as monocular. They relied on
20 secondary sources, and then they said people with --
21 people who see out of one eye rather than two are
22 substantially limited because they see differently. So, I
23 think they made a, what I consider, per se or matter of
24 law ruling on a monocular individual without doing the
25 functional analysis on this individual and what this

1 individual is able or unable to do.

2 How can we find someone is not disabled who sees

3 with only one eye and then turn around and say that that

4 same person is not qualified to drive a truck for a

5 company? The way we reach that analysis is this.

6 Mr. Kirkingburg sees almost everything that

7 other people see. The very things that he's lacking are

8 the elements that are so important in driving a truck for

9 the company. It's the peripheral vision and it's the lack

10 of some cues of depth perception that are particular to

11 this job. And that's how we get out of the, as it's

12 sometimes been described, as a catch-22 situation of

13 saying that this man is only impaired and yet impaired

14 enough that he can't do this job.

15 There is no reasonable accommodation that will

16 raise Mr. Kirkingburg's vision to the level that this

17 company requires. There is no ramp. There is no wrist

18 rest. There's no type of reasonable accommodation as it

19 is often thought of that will increase his vision in his

20 left eye.

21 QUESTION: Why isn't the company regarding him

22 as disabled?

23 MS. GORDON: The company isn't regarding him as

24 disabled for two reasons. First, they offered him other

25 employment. They didn't view him as unemployable. They

1 viewed him as unqualified for this particular job in the
2 manner I've just described in employing the qualification
3 standard. Also --
4 QUESTION: What was the pay differential on the
5 job that they did -- that they did say he could have?
6 MS. GORDON: They offered him the tire mechanic
7 job and the pay differential was a little more than a
8 dollar an hour. And you find that in the joint appendix
9 at page 396. The driver's salary was $14.21 per hour.
10 The tire mechanic's salary, $13.05 per hour.
11 QUESTION: That was driver in terms of the
12 driver in the yard as opposed to the driver on the
13 highway?
14 MS. GORDON: That's any driver.
15 QUESTION: Any driver?
16 MS. GORDON: Yes. The company's rule is the
17 same for any driver.
18 Okay. So, there is no reasonable accommodation
19 that will raise this man's vision with or without
20 correction to the level that the company requires.
21 Both the Motor Carrier Safety Act and the
22 Americans with Disabilities Act have recognized that an
23 employer has the right to set a qualification standard,
24 and the EEOC has expressly allowed an employer to follow a
25 standard that's required by law.

1 QUESTION: Don't you think truck driver is one
2 category of -- I just don't -- I just don't know how to -
3 - how to do the regarded as thing. You say it's -- it's -
4 - he's -- you think he would have been regarded as
5 disabled if he could function neither as a truck driver
6 nor as a -- what is it -- tire -- tire mechanic?
7 MS. GORDON: Tire mechanic?
8 QUESTION: That --
9 MS. GORDON: I think it would be a tougher --
10 QUESTION: What's the criterion? The company
11 would have had to not employ him? What if the company
12 offered him a job sweeping -- sweeping the -- the garage
13 floors at night after -- after the day's work is done?
14 Would that be enough to prove that they don't regard him
15 as disabled? So long as they offer him some job, they're
16 not regarding him as disabled?
17 MS. GORDON: I'm not sure that that isn't
18 correct, Justice Scalia. And the reason for that is the
19 way the test is set up, that if they don't perceive him as
20 substantially limited in the major life activities
21 certainly that have been raised in this case, working or
22 seeing, then they necessarily aren't perceiving him as
23 disabled.
24 QUESTION: No, but the category can't be as
25 broad as working, can it?

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1 MS. GORDON: Well, there are subcategories
2 within working. I would submit that they're not as narrow
3 as driving a truck for this one company.
4 QUESTION: Yes.
5 QUESTION: I don't know how to figure those
6 subcategories. I honestly don't. How do we decide how
7 broad or narrow? I mean, it's crucial to applying the
8 regarded as section, and how do you decide how broad or
9 how narrow the category is?
10 MS. GORDON: I would suggest that with reference
11 to driving as a subcategory of the major life activity of
12 working, that it may be helpful to look at all driving,
13 someone who can't do leisure driving, someone who can't
14 drive at all, so would be completely unemployable in any
15 category of driving. In this case, this particular man
16 had a steady history of employment, including driving, up
17 to the time that he came to this company and after he
18 left.
19 QUESTION: Under the Longshore and Harbor
20 Workers' Compensation Act, determinations are made as to
21 what work is available in the economy for the particular
22 individual. Is -- is that analysis suited to the ADA?
23 MS. GORDON: The --
24 QUESTION: It doesn't seem to me to quite fit
25 with its language.

1 MS. GORDON: The EEOC would suggest I think that
2 that is too broad if you look at the entire national
3 economy, and I can't say that I would disagree with that.
4 However, looking at a narrow category of jobs like truck
5 driver that requires visual acuity of 20/40 in each eye, I
6 think that is too narrow a category to say that this man
7 is precluded from engaging in the major life activity of
8 working.
9 QUESTION: Well, how are we supposed to work it
10 out? I mean, should it -- should we -- should we derive
11 -- this Court start deriving legal categories? Should the
12 EEOC do it? Should juries do it? I mean, working is --
13 is too broad. Truck driving in this yard is too narrow,
14 but who is going to set the -- the median?
15 MS. GORDON: Well, the median seems to -- as it
16 percolates up through the courts in regards to driving and
17 in regard to working as a major life activity, most of the
18 courts that have examined it are looking at it more
19 broadly than simply saying driving in one job category.
20 QUESTION: Are they doing it as a matter of law
21 or are they -- are they doing it as a matter of reviewing
22 reasonable jury discretion?
23 MS. GORDON: They're doing it as a matter of
24 law.
25 QUESTION: Well, the EEOC has, at least, offered

1 an interpretive guideline I assume or a regulation on the
2 subject.
3 MS. GORDON: Yes.
4 QUESTION: And it says, the inability to perform
5 a single, particular job does not constitute a substantial
6 limitation in the major life activity of working. But
7 then what do you do? The plaintiff says, well, I'm not
8 talking about that. I'm talking about seeing.
9 MS. GORDON: My answer to seeing, Justice
10 O'Connor, is that I think this record is clear that this
11 employer didn't perceive this individual as unable to see
12 or substantially restricted in seeing because the other
13 jobs offered him required someone can see.
14 QUESTION: But you do say that this was a
15 single, particular job.
16 MS. GORDON: I do say that the job of truck
17 driver for this company is a single, particular job, and
18 there are lots of other kinds, van driving --
19 QUESTION: And therefore, you don't get to the
20 is he qualified question, in effect.
21 MS. GORDON: You don't get -- you don't get to
22 the is he qualified question if he's found not to be
23 disabled and not to be perceived as disabled. That's
24 correct. The analysis would end there.
25 QUESTION: Of course, all of these cases involve

1 a single, particular job. In -- in that -- you know, in
2 that respect, it's always a particular job that he's been
3 turned down for. But the question is, for purposes of the
4 regarded as, do we say that single, particular job is
5 representative of all truck driving jobs or all -- I don't
6 know. I really don't know how -- how to figure it out.
7 MS. GORDON: Well, clearly in this case, this
8 employer perceived him as able to work in other positions
9 for this employer, so it didn't perceive him --
10 QUESTION: And you'd say that's the criterion,
11 so long as that employer will give him another job. It
12 doesn't matter what job.
13 MS. GORDON: Well, that's one of the criteria.
14 QUESTION: Wow.
15 MS. GORDON: And another is to look at whether
16 this person is employable in that geographic area, which
17 is one of the things the EEOC directs us to look at.
18 QUESTION: Is it -- is it the same for every
19 individual, or is -- does the individual at issue somehow
20 determine how broad you define the category? I mean,
21 suppose a surgeon has spent his entire life studying and
22 -- and learning to -- to perform one little operation and
23 he has a disability that now makes it impossible for him
24 to perform that operation, or is regarded as not being
25 able to perform that single operation --

1 MS. GORDON: But --

2 QUESTION: -- even though he can do a lot of

3 other surgery. But the man's whole career has been based

4 on this thing.

5 MS. GORDON: Well, the guidelines --

6 QUESTION: The left nostril from -- from the

7 time he went to medical school.

8 (Laughter.)

9 MS. GORDON: The guidelines would say that we

10 look at his training, his skills, his other background and

11 talents, and I -- I would suggest that in that case, that

12 doctor could learn to operate on other close body parts.

13 QUESTION: But you acknowledge that the regarded

14 as decision requires you to look at the individual, not -

15 - it's not the same test for everybody. I couldn't say

16 for everybody trucking is the proper category -- truck

17 driving is the proper category. It may be the proper

18 category for some. It may not be for others. Is that --

19 is that right?

20 MS. GORDON: I think the correct analysis is to

21 look at the mental status of the employer and whether --

22 and what the perception of the employer was when you're

23 looking at the regarded as prong. That's where the focus

24 should be.

25 QUESTION: It's a purely subjective test.

1 MS. GORDON: A subjective test based on the
2 evidence in the record as to what that employer was doing
3 or thinking, yes.
4 QUESTION: What do you make of the regs that --
5 that speak of -- of regarding in terms of treating, i.e.,
6 it seems to be a functional objective test? Isn't --
7 isn't your -- isn't your answer inconsistent with the
8 EEOC's regs on the subject?
9 MS. GORDON: Well, not -- I don't believe
10 entirely because how you treat someone is indicative of
11 how you're thinking about the person.
12 QUESTION: It is but you may also -- I mean, you
13 may also apply a treatment test as a purely functional
14 objective test.
15 MS. GORDON: They treated him as if he were
16 substantially limited in a major life activity.
17 QUESTION: Yes, that's the --
18 MS. GORDON: Therefore --
19 QUESTION: It's -- you know, it's a bottom line
20 kind of test rather than an intent test.
21 MS. GORDON: I think it has to come back to
22 intent because the -- because of the use of the word
23 regarded in the statute.
24 QUESTION: Well, why mustn't it then go back to
25 the district court? Because it seems to me somebody could

1 extract or a juror could find, based on the statements,
2 he's legally blind. He's blind in one eye. And somebody
3 could say, what did you mean by that? Did you mean you
4 regarded him as disabled? The answer might be yes. One
5 can't say on this record that that's not so, that we --
6 that this is a man who's -- who is perceived as disabled,
7 that in the mind of the representative of the employer,
8 legally blind, blind in one eye equates to disabled, if
9 it's a subjective test.
10 MS. GORDON: On the facts in this record, that
11 statement was made after the decision was made to
12 terminate Mr. Kirkingburg's employment, and so the
13 statement itself is not causally linked to the -- to the
14 decision of the act that's now claimed to be
15 discriminatory.
16 QUESTION: But can't it explain why the decision
17 was made? The decision was made because, of course, he's
18 got only one eye he can see out of. He's disabled.
19 MS. GORDON: I think the -- the statement is
20 better understood as simply defining the -- the impairment
21 that this individual has. He is legally blind in one eye.
22 QUESTION: What does it mean to be legally blind
23 in one eye?
24 MS. GORDON: The -- the test for the difference
25 between an impairment up to some level and then above it

1 is 20/200.

2 QUESTION: Well, but who says the person is

3 legally blind? I mean, that -- that suggests there's some

4 law been passed that says people who have less than 20/100

5 vision are -- are blind. Is that so?

6 MS. GORDON: I haven't found it articulated and

7 I --

8 QUESTION: Then why do you use the term legally

9 -- or perhaps why does your employer -- why does your

10 client use the term legally blind?

11 MS. GORDON: In various materials, that is the

12 term that's applied.

13 QUESTION: Well, what materials?

14 MS. GORDON: Secondary studies. I can't point

15 you to one now, but it's not something that arose for the

16 first time in this case. It's a term that has been

17 generally used to depict someone who -- as a level of --

18 if you're uncorrected at that level.

19 QUESTION: You can't --

20 QUESTION: Well, but that's -- that's a very

21 circular explanation. It's a term that's been used to

22 denote someone who's legally blind.

23 (Laughter.)

24 MS. GORDON: I -- I agree it is.

25 QUESTION: So, is it driving statutes or benefit

1 statutes?

2 MS. GORDON: I think it may be the benefits and

3 the tax statutes, but I -- I can't cite you to one

4 particularly at this time.

5 Thank you.

6 QUESTION: You wish to reserve your time, Ms.

7 Gordon?

8 MS. GORDON: Yes, thank you.

9 QUESTION: Mr. Hunt.

10 ORAL ARGUMENT OF SCOTT N. HUNT

11 ON BEHALF OF THE RESPONDENT

12 MR. HUNT: Mr. Chief Justice, and may it please

13 the Court:

14 Hallie Kirkingburg can drive a commercial motor

15 vehicle safely in interstate commerce. He did it for 11

16 years before he was hired by Albertsons. When Albertsons

17 tested him at the time of hiring, they gave him an 18-

18 mile road test and certified he could drive safely.

19 During the 16 months that Mr. Kirkingburg drove for

20 Albertsons, his supervisors judged him to be a good, safe

21 driver.

22 It was only after Mr. Kirkingburg's vision

23 condition became known to Albertsons, through his need for

24 a vision waiver, that Albertsons asserted he posed a

25 safety risk.

1 Mr. Kirkingburg is able to drive safely despite
2 his amblyopia and strabismus, his outward --
3 QUESTION: Let me ask this. If you put aside
4 all -- the waiver issue for just a moment, would you not
5 agree that even though he passed all those tests, if he
6 did not comply with a Federal standard, they would be
7 justified in terminating him?
8 MR. HUNT: Putting aside the waiver program,
9 yes.
10 QUESTION: Yes.
11 And then if the waiver program is not
12 necessarily binding on every -- every driver who doesn't
13 qualify because it ultimately was set aside, why does the
14 waiver program change the situation?
15 MR. HUNT: Well, to begin with, it wasn't
16 ultimately set aside. The Advocates court did set it
17 aside -- find it to be invalid, but it was then, when
18 remanded to the agency, reinserted in that all the waivers
19 were grandfathered in. They were revalidated. And in
20 fact, since then the program has continued and waivers
21 have continued to be granted. In fact, the Eighth Circuit
22 in Rauenhorst required the agency to consider granting
23 that plaintiff an individual waiver despite the fact that
24 the program's cutoff time for application had expired.
25 QUESTION: So -- so, it did. When he went to

1 the -- did your client go to his employer? His employer
2 says, I don't want you to work here anymore. And did your
3 client then say, but I have a waiver?
4 MR. HUNT: The way it occurred was when he came
5 back from an extended period of time off, he did not pass
6 the DOT certification exam, was informed by the examining
7 doctor that he needed to obtain a waiver. He then went to
8 the employer to obtain that waiver a day or 2 later. The
9 employer refused to accept the waiver, and 2 weeks later
10 terminated him.
11 QUESTION: Who had given him the waiver? The
12 employer or DOT?
13 MR. HUNT: DOT, through the Federal Highway
14 Administration.
15 QUESTION: So, he went to the employer. He
16 said, here, I have a waiver, and then he -- the employer
17 said, I don't care, and terminated him. That's your
18 statement of the facts.
19 MR. HUNT: No. He went to the employer and
20 said, I need a waiver, and the employer said, we will not
21 accept a waiver. You must meet the minimum standards, and
22 terminated him.
23 QUESTION: But then did he ultimately get a
24 waiver?
25 MR. HUNT: Yes, he did.

1 QUESTION: All right.

2 Suppose the waiver program were in effect, and

3 suppose Albertsons accepted him as a driver under the

4 waiver program. There's then an accident. A little child

5 runs out the curb and the allegation is his peripheral

6 vision was such that he didn't see the child and he should

7 have. Can Albertsons defend a negligence action for

8 negligent hiring of the monocular driver based on the DOT

9 waiver program? Is that an absolute defense?

10 MR. HUNT: I'm not -- I'm not certain that it

11 would be an absolute defense. It certainly would be a

12 defense they could present. And yes, I believe it should

13 be a defense.

14 QUESTION: Well, this -- would this be a

15 legitimate concern of the company, tort liability for

16 hiring a driver who may or may not be safe, was in a

17 category at least where the DOT was going to experiment

18 with him for a while?

19 MR. HUNT: Well, I don't think the may or may

20 not be safe is sufficient. Under the regulations, it

21 needs to be a significant risk. It needs to be an

22 immediate risk.

23 QUESTION: Well, the tort plaintiff in the

24 hypothetical case would -- would allege that Albertsons

25 was guilty of negligence in hiring somebody that had --

1 had less than adequate vision because of the peripheral
2 limitation.
3 MR. HUNT: And -- and I think the employer could
4 defend on the grounds that the -- the agency in charge of
5 determining safety standards had determined that the
6 individual who received the waiver, through an individual
7 assessment, was safe to drive.
8 QUESTION: But could the employer defend the
9 employment action? Could the employer defend under the
10 ADA by saying, I don't want to have to put this question
11 to the jury?
12 MR. HUNT: No.
13 QUESTION: I don't -- we don't want to hire the
14 driver and take the chance of having to defend in -- in
15 court.
16 MR. HUNT: I believe that that needs to be --
17 when they are asserting that sort of safety threat defense
18 under the ADA, under the statutory language, they must --
19 and under the terms -- this Court's ruling last term,
20 they need to rely on objective evidence, objective
21 scientific evidence to justify that safety risk.
22 QUESTION: Well, what if they've got objective
23 scientific evidence that shows just what Justice Kennedy's
24 hypothetical assumed, and that is that, in fact, there is
25 a -- a lack of a certain percentage of peripheral vision?

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1 Is -- is that enough? Can the company then say, all
2 right, our judgment is that that risk posed by the -- the
3 deficient peripheral vision, in relation to the
4 consequences, if someone driving one of these huge trucks
5 has an accident, justifies our imposition as a safety
6 standard or as a job qualification a -- a vision standard
7 that would exclude this person? There's an objective
8 basis, i.e., peripheral vision. There's also a judgment
9 about what is an acceptable risk. Is the company free to
10 make that judgment? I -- I don't mean absolutely free,
11 but would that be a reasonable judgment for the company to
12 make and -- and permitted under the statute?
13 MR. HUNT: I believe in that case it would --
14 they would meet the necessity of supplying objective
15 evidence to justify their direct threat defense.
16 That's not what happened in this case. There's
17 no evidence in this case that they justified it by
18 anything other than safety concerns, generalized safety
19 concerns.
20 QUESTION: So, their -- their failure in your
21 view was simply that they -- they were too blunt about
22 going about what they -- they were doing. And if -- if
23 this goes back for trial and the company does something
24 along the lines I've described, that would be sufficient
25 to pass muster under the statute.

1 MR. HUNT: Well, I think the company would have
2 to provide evidence that they had considered that
3 objective evidence that Your Honor refers to at the time
4 that it refused to accept the waiver. It would not be
5 sufficient to after the fact say, well, now that we're in
6 litigation, we've examined these various studies, and we
7 have found four out of the dozen or so that we've looked
8 at, and those support our position that we took several
9 years ago.
10 QUESTION: You mean if -- if new objective
11 evidence were discovered as a result of independent
12 scientific inquiry between the beginning of the action and
13 the time they put in the defense, they could not put in
14 the defense?
15 MR. HUNT: If -- if new -- if it's additional
16 information, I believe they could. If the record is that,
17 as it appears to be in this case, that there was no
18 consideration of objective scientific evidence, then I
19 don't think they could now find after the fact, oh, there
20 is scientific evidence. If they did have objective
21 evidence that they relied upon at the time of refusing the
22 waiver, then I believe your -- your hypothetical would be
23 appropriate and they could add it.
24 QUESTION: Why is -- why is your answer what it
25 is? Why couldn't they do it if they -- in the case in

1 which they -- they could have known about this evidence,
2 but that's not what they relied on at the time? Why are
3 they precluded from bringing that up as a defense? Why?
4 MR. HUNT: I believe it would come under the --
5 the sense of after-acquired evidence, that sort of
6 analogy, that you can't rely upon --
7 QUESTION: Well, is there anything in the
8 statute?
9 MR. HUNT: I can't think of anything in the
10 statute that would prevent them from adding that evidence.
11 QUESTION: Mr. Gordon, you --
12 MR. HUNT: It's Mr. --
13 QUESTION: Hunt.
14 QUESTION: -- would agree I take it that this -
15 - I'm sorry. Mr. Hunt. You agree that this statute is
16 not meant to protect everybody from unreasonable
17 employment decisions. It's only meant to protect the
18 disabled.
19 MR. HUNT: Correct.
20 QUESTION: I -- I worry about -- about the --
21 the proposition that the regarded as provision can eat the
22 statute, can essentially transform it into a statute that
23 outlaws all unreasonable employment decisions. Can you
24 give me an example of a case in which an employer makes an
25 unreasonable qualification for the job which is found not

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1 to be a justifiable qualification for the job on the basis
2 of some physical characteristic, height, vision, whatever,
3 in which that unreasonable qualification would not be the
4 basis for a regarded as disabled claim?
5 MR. HUNT: To be honest with you, I have trouble
6 following all the details of that question -- of that
7 hypothetical.
8 QUESTION: I am worried about the fact that
9 whenever an employer establishes a physical characteristic
10 for the job, which turns out to be an unreasonable one and
11 therefore would not qualify for the -- for the bona fide
12 qualification defense under this statute, whenever that's
13 the case -- it's an unreasonable qualification -- the
14 person turned down for employment would be able to say,
15 you used a physical characteristic that was not proper,
16 and therefore, you were regarding me as disabled, and
17 therefore, you are liable to me.
18 In other words, I'm -- I'm worried that this is
19 transforming the statute into a statute that says
20 everybody in the country is protected from unreasonable
21 employment decisions based on physical characteristics. I
22 would like to give -- you to give me a case in which under
23 your theory of the -- of the regarded as clause, there is
24 an unreasonable physical characteristic qualification
25 imposed by the employer, one that would not satisfy the

1 defense which, nonetheless, will not qualify as the
2 employer's regarding the individual as disabled.
3 I can't explain it any clearer than that. It's
4 a very complex thought.
5 (Laughter.)
6 MR. HUNT: I -- I believe this case presents
7 that -- that situation where they regard him as legally
8 blind even though he's not legally blind. It's not
9 appropriate -- it's not reasonable for them to make that
10 assumption.
11 QUESTION: Is there any case where that -- where
12 it wouldn't work out that way? Is there any case where an
13 employer makes, in good faith perhaps, a qualification for
14 his job that is a physical characteristic in which the
15 employee will not be able to say by establishing a
16 physical characteristic, you have regarded me as disabled.
17 And therefore, it's your burden to show that this is a
18 necessary qualification.
19 QUESTION: Well, how about Hooters Restaurant
20 and it says, we only hire women with size 40 or more bras?
21 I mean, is that one that --
22 MR. HUNT: I -- I --
23 QUESTION: -- on regarded as?
24 MR. HUNT: I think the -- I think the -- excuse
25 me, Your Honor.

1 The -- I'm having trouble thinking of an
2 example --
3 QUESTION: Well, the Ted Williams example would
4 be --
5 QUESTION: I would like quickly to return to
6 this case. In -- in this case, let's assume -- everybody
7 admits he's blind in one eye. Some people say legally
8 blind. Let's assume that in asking whether he's disabled,
9 we find that he is -- is not prevented -- substantially
10 limited in a major life activity. The regarded prong
11 doesn't take you any further, does it? If you make that
12 assumption.
13 But let's assume he's -- he's not disabled under
14 the act. Then in this case, since everybody knows that he
15 was blind in the one eye, and that that's what -- the
16 regarded prong doesn't take you any further, does it?
17 MR. HUNT: I believe it does because in addition
18 to the blind in one eye perception, there is the legally
19 blind perception. And the legally blind perception, under
20 Rehabilitation Act precedent, would be substantially
21 limiting. In other words --
22 QUESTION: But -- but if -- but if he's not
23 under -- prevented from a -- limited in a substantial life
24 activity.
25 MR. HUNT: He would still have to be. I mean,

1 rather, he'd have to be --

2 QUESTION: Then -- then I don't see how the

3 regarded prong helps you. This is in part in answer to

4 Justice Scalia's concern. And I think this is a case

5 where that issue comes up, and -- and where you are not

6 helped by the regarded as prong.

7 MR. HUNT: Well, I think --

8 QUESTION: You tell me if I'm -- I'm wrong,

9 please.

10 MR. HUNT: Well, I think legally blind, although

11 there is a question as to what exactly legally blind

12 means, but I think the perception of someone being legally

13 blind and then treating that person by -- by eliminating

14 their employment, by terminating them completely from

15 employment is a substantial limitation. They -- they

16 still have to -- the way they treat them has to be

17 substantially limiting. The way they perceive them -- the

18 impairment to impact them has to be substantially

19 limiting.

20 QUESTION: Well, then, why don't you qualify

21 under the basic definition of disability? Why do you need

22 the regarded as prong?

23 MR. HUNT: There's -- there's a potential

24 difference in monocular vision versus legally blind.

25 Monocular vision is the one eye issue. The statement that

1 the Ninth Circuit relied upon that we offer as evidence
2 that he's perceived to be disabled includes a reference to
3 legally blind which is not reference to one eye. So --
4 so, if the Court were to find that monocular vision is not
5 an actual disability, the regarded as would still provide
6 a means to find that he was disabled.
7 QUESTION: Is -- is -- can I go for one second
8 to the other part of the case, which is the -- the
9 question of this test? Will you assume, for the sake of
10 argument, that an employer, who comes in and points to a
11 DOT reg saying this kind of person is not safe, wins
12 whether that reg is justified or not justified. It can't
13 be gone into in a million different cases. If you don't
14 like it, go to DOT and get it changed. Assume that for
15 the sake of argument.
16 MR. HUNT: Yes.
17 QUESTION: All right. Assuming that, I take it
18 that the argument that there is no need for a further
19 proceeding on this is there was such a reg, and in fact,
20 the waiver program was an effort to see if it should be
21 changed. So, the employer says, fine, if they decide the
22 answer to that question is change it, I'll change my
23 position. If they decide the answer to that question is
24 don't change it, I was right all the time. But I don't
25 have to do anything as long as the reg is in place whether

1 they have an experimental program to decide whether to
2 change it or not to change it.
3 Now, what's your response to that?
4 MR. HUNT: First of all, it's not an
5 experimental -- the waiver program is not experimental as
6 to the safety of the individuals who are assessed by the
7 Federal Highway Administration and granted a vision
8 waiver. It's experimental only in that it is hoping to
9 gather statistical evidence from which it can then adjust
10 the standard minimum requirements.
11 So, there's no -- there's no -- the basis for
12 the -- Albertsons to say, well, we can rely on these basic
13 minimum requirements when the agency itself has said, no,
14 to comply with the ADA, as we've been instructed to do by
15 Congress, we have determined that this set of individuals
16 who meet these specific criteria are safe to drive, that
17 in that situation, the employer cannot simply rely on the
18 standard minimum requirements as its justification for a
19 safety concern.
20 QUESTION: Well, then the experimental program
21 becomes -- becomes a mandatory program. Any employer who
22 doesn't want to get sued has to apply for a waiver. And
23 all of a sudden what was meant to become an -- was meant
24 to be an experiment becomes -- becomes the standard.
25 MR. HUNT: Again, it was not meant to be an

1 experiment as to the -- allowing those particular drivers
2 to drive.
3 QUESTION: I know, but it was meant not to apply
4 to all drivers. It was meant to be a small segment of
5 drivers, but you're telling me that any employer with a
6 brain in his head ought to -- ought to apply to -- to get
7 a waiver. And that means that everybody would -- would be
8 in the experimental program.
9 MR. HUNT: No, and --
10 QUESTION: Maybe we should have an experimental
11 program for people who don't get waivers.
12 QUESTION: There were very tight standards for
13 who -- who can be in the program. Didn't they have to
14 have a very good safety record a certain number of years?
15 MR. HUNT: Indeed, the standards, Justice
16 Ginsburg, to get into the program were stricter than it
17 was to drive in general.
18 QUESTION: So, a lot of people who drive a lot
19 and get a ticket every now and then wouldn't qualify for
20 it.
21 MR. HUNT: There was a requirement of 3 years of
22 safe driving with no suspensions, no revocations, no
23 disqualifying traffic violations. So, the people -- it's
24 not for anybody who can receive a waiver. It's only for
25 people that established that they're safe drivers through

1 an individual assessment conducted by the Federal Highway
2 Administration.
3 QUESTION: Mr. Hunt, before you finish, with all
4 that's unclear about this case, there's one I think that
5 we could at least focus on and say it's wrong or right.
6 It's the Ninth Circuit's you do it differently, so you're
7 disabled. You do it differently from a person who has two
8 eyes, even if you do it as well, if you do it differently.
9 Are you supporting that position?
10 MR. HUNT: I think the -- I think that statement
11 by the Ninth Circuit needs to be read in context of the
12 entire paragraph. The Ninth Circuit finds that Mr.
13 Kirkingburg's sight, his seeing is restricted due to the
14 loss of peripheral vision and due to the change and impact
15 on depth perception. If you read -- and then it cites to
16 the EEOC regulations regarding how -- regarding
17 substantial limitation and the fact that it's a difference
18 in manner, condition, or duration. And if you -- if you
19 combine all of that in context, the seeing differently
20 statement is too broad, but in context I believe means
21 that you still have to be substantially limited in the --
22 in a major life activity, as the court found.
23 Thank you.
24 QUESTION: Thank you, Mr. Hunt.
25 Mr. Dumont, we'll hear from you.

1 ORAL ARGUMENT OF EDWARD C. DUMONT
2 FOR THE UNITED STATES, AS AMICUS CURIAE,
3 SUPPORTING THE RESPONDENT

4 QUESTION: Would you address the regarded as
5 prong and offer some views on how in the world we're
6 supposed to view the requirements under that and cabin it,
7 if we are?

8 MR. DUMONT: Well, I would say that with respect
9 to this case, Your Honor, the best way out of that problem
10 for this case is to say that what happened here was that
11 the employer clearly viewed respondent as substantially
12 limited in the life activity of seeing.

13 The anomaly that is presented here is what they
14 want to say is that this is a person who can see so well
15 that he's not even disabled within the cognizance of the
16 ADA, but so poorly that he can't drive a truck. And that,
17 with respect to the substantial life activity of seeing
18 is, we think, a fundamentally logically inconsistent
19 position.

20 Now, when you get into working --

21 QUESTION: Wait. I -- that doesn't seem so
22 self-evident to me. I mean, you could say the same thing
23 about airlines. He sees -- sees so badly that, you know,
24 that he's disabled, but -- I'm sorry -- doesn't see so
25 badly that he's disabled, but does see so badly that he

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1 can't fly a plane.

2 MR. DUMONT: Well, and I think --

3 QUESTION: Why is that -- what is there that's

4 absurd about that? I don't understand it.

5 MR. DUMONT: I think within some limits imposed

6 by the word substantially, that's the right analysis; that

7 if a company is going to take an employment action based

8 on -- based on -- admittedly based on a physical

9 limitation that goes to one of your major life activities

10 -- in this case it's seeing -- then they are in a poor

11 position to turn around and say that, nonetheless, your

12 vision is so good that you are not even substantially

13 limited enough to be within the coverage of the act.

14 QUESTION: It depends on how broad you think the

15 category of disqualification has to be in order to render

16 you substantially impaired. I can certainly say, you

17 know, this person doesn't see badly enough to be a -- or

18 this person's fingers aren't dexterous enough to be -- to

19 be disabled or he doesn't lack enough dexterity to be

20 disabled, but he -- but he, nonetheless, is disqualified

21 from being a brain surgeon. There's nothing inconsistent

22 with that at all.

23 MR. DUMONT: I think you're --

24 QUESTION: It depends on how broad the category

25 of the job is.

1 MR. DUMONT: With respect, I think you're
2 focusing on jobs, and that's the wrong focus here. What
3 I'm suggesting is that if you focus on the life activity
4 which here is seeing, not working, then I agree with you
5 that the statute requires us to say is there a substantial
6 limitation on seeing. But both with respect to somebody
7 who has 20/200 vision without her glasses and with respect
8 to somebody who, because of a physical difference in the
9 way his eye is constructed, in effect sees only out of one
10 eye, we think that it's fairly clear that those people are
11 -- are substantially limited with respect to seeing.
12 And not only that, but if an employer adopts an
13 employment standard which is based on precisely that
14 physical characteristic, the inability to see better than
15 this, what they are doing is to treat that person as
16 substantially limited in his seeing.
17 QUESTION: Are you -- are you saying, Mr.
18 Dumont, that as a matter of law, a person in Mr.
19 Kirkingburg's position who sees only -- is disabled?
20 MR. DUMONT: Not as a matter of law that he's
21 disabled. I would say that it comes close to being that
22 when you have an employer who has a qualification standard
23 that is based on a -- a minimum vision requirement and
24 takes action against an individual --
25 QUESTION: But that doesn't come to the head of

1 -- that's the qualification, isn't it? Or perhaps -- but
2 certainly not the determination of whether someone is
3 disabled.
4 MR. DUMONT: I think the two are very closely
5 related, and let me address that point this way.
6 Under the act, under the definition of
7 discrimination in the act, it is discrimination to use a
8 qualification test that has a disparate impact on a person
9 with a disability, which in this case is certainly true
10 about Mr. Kirkingburg if you believe that his limitation
11 comes within the definition of disability.
12 QUESTION: Except there's a defense if a
13 Government agency requires a certain standard, as the DOT
14 did here for vision for drivers.
15 MR. DUMONT: There's that defense --
16 QUESTION: You have to get a license, and
17 there's a defense if the person doesn't have that license.
18 Isn't that right?
19 MR. DUMONT: Absolutely. There is that defense
20 and there is also the defense that, although you are in
21 fact taking action on this characteristic, it's
22 legitimately related to the job, it's -- it's necessary
23 for safety. And you can win that way.
24 My point is that there is no reason to -- and in
25 fact, a good reason not to -- interpret the definition of

1 disability so narrowly that in these cases you stop the
2 person from getting in the door to the court. Because
3 what you're going to do when you're through that door is
4 have exactly the kind of a debate you ought to be having
5 which is this requirement --
6 QUESTION: But this statute -- this statute
7 wasn't meant to apply to all Americans. It was meant to
8 allow lawsuits only by a discrete and insular category of
9 people. And to simply say letting everybody in the door
10 is no problem because they're going to have to face these
11 later hurdles, I mean, it may make sense, but it's not the
12 way the act was written.
13 Could you answer the question that I asked
14 before to Mr. Hunt? Give me an example of a physical
15 qualification for a particular job that is unreasonable
16 which would not -- which would, nonetheless, not allow the
17 person who is denied the job on that basis to claim that,
18 under your theory, he was regarded as disabled?
19 MR. DUMONT: Yes, absolutely.
20 QUESTION: Okay. Good.
21 MR. DUMONT: Blue eyes.
22 QUESTION: Blue eyes.
23 MR. DUMONT: Blue eyes, which is not an
24 impairment.
25 I think actually the example of the quarterback

1 who's a little too short --

2 QUESTION: Blue eyes. But I say people -- I

3 don't think people with blue eyes can drive trucks. Okay?

4 MR. DUMONT: Right, which --

5 QUESTION: And, therefore, it's a -- it's a job

6 qualification and --

7 MR. DUMONT: That's right.

8 QUESTION: But you say under your theory, I

9 would not be regarding you as disabled because you have

10 blue eyes.

11 MR. DUMONT: Because it's not an impairment

12 which the statute requires.

13 Here's another example of something that is an

14 impairment.

15 QUESTION: Well, wait, wait. Why isn't it an

16 impairment? If -- if the substantial life activity is

17 driving trucks, I suppose it would be an impairment.

18 MR. DUMONT: No, because we look to the language

19 of the statute and some language -- some language is open

20 to interpretation and, in fact, requires interpretation

21 like substantially limit. Some language is pretty precise

22 like impairment. And impairment implies some deviation

23 from the norm, and I think it would be improper to call

24 having blue eyes an impairment.

25 Here's another example.

1 QUESTION: An occasional headache.

2 MR. DUMONT: Here's another example. Suppose

3 there's somebody who's missing the third toe from the left

4 on his left foot, and in fact you can demonstrate -- now,

5 I don't know whether this is true, but in fact you can

6 demonstrate that it has absolutely no effect on his

7 ability to do anything. Now, that person is impaired.

8 QUESTION: -- is right.

9 MR. DUMONT: That person is impaired, but it

10 would be unreasonable I think for any employer to base a

11 job qualification on that --

12 QUESTION: Be a little more realistic. What

13 about a person who gets occasional headaches? And he

14 occasionally gets a headache, and the employer says, I

15 don't want people who get any headaches. We're -- we're

16 fit and healthy in this firm. He's a health nut of some

17 sort --

18 (Laughter.)

19 QUESTION: -- and doesn't want anybody with

20 occasional headaches. I'd say that's somewhat irrational.

21 Does he fit within the statute in your opinion?

22 MR. DUMONT: I think it's a -- probably not

23 because you have --

24 QUESTION: Here's the example. By the way, is

25 there a need to get into any of this here? I don't

1 understand. It seemed as if at the beginning this --
2 whether it's like an occasional headache or whether it's
3 like some other more serious matter was a matter for trial
4 or for further proceedings. I've never heard of giving
5 summary judgment or granting it when it wasn't asked for,
6 and I guess it wasn't. So, are we just debating this
7 theoretically?
8 MR. DUMONT: I think we are and I think that's
9 all we want is to go -- all the respondent wants is to go
10 back for trial here.
11 Now, I do think you can say that the Ninth
12 Circuit may have spoken a little too broadly, exactly as
13 my colleague said. But I -- I would actually not agree -
14 -
15 QUESTION: You say a little too broadly. I
16 mean, ruled as a matter of law different manner equals
17 disabled.
18 MR. DUMONT: If it's different manner equals,
19 but I wouldn't say it's entirely the wrong inquiry. I
20 mean, I think the regulatory inquiry -- and that's where
21 that comes from is the EEOC's regulations -- the inquiry
22 is perfectly valid. To say that because a person who's
23 right-handed performs the same task as someone who's left-
24 handed in a different manner, that makes him disabled, I
25 think that is -- that might be within the Ninth Circuit's

1 definition broadly read. That would be improper.

2 But I think it is true to say that simply

3 because somebody has what anyone would recognize as an

4 impairment -- I mean, suppose you started off with a --

5 well, many people who lose an eye midway through life, for

6 instance, will go through a transition period where they

7 have very poor depth perception, very poor vision in the

8 very beginning because they're adjusting, and then they'll

9 get better and better as time goes by. Now, I think it -

10 - it would be wrong to pretermit the inquiry into the fact

11 that when they get to the end, they may see pretty much

12 functionally the same way for some -- for many purposes.

13 But it's wrong to pretermit an inquiry into whether the

14 fact that they have to do it through a different purpose

15 -- through a different manner is -- is substantially

16 limiting.

17 QUESTION: Suppose we say that under section (a)

18 of the statute there is no substantial limitation on the

19 life -- life activity. You lose -- the employee loses

20 under section (a). Is the regarded -- does the regarded

21 section in section (c) help at all?

22 MR. DUMONT: I certainly think it is helpful to

23 the extent that -- I would say as I said before. If -- if

24 the employer is in fact taking job-related action based on

25 its perception of the fact that you need to have a certain

1 kind of vision or certain other kind of physical
2 qualification to meet a safety standard, then it's
3 precisely the right inquiry whether that's true or not,
4 whether you really need that qualification, that physical
5 qualification, or not to do this job. But that is an
6 inquiry that you get to when you get into the guts of the
7 statute under --
8 QUESTION: That -- that has to help. I mean, to
9 say -- to say that the regarded as qualified doesn't help
10 once you're determined -- regarded as disabled doesn't
11 help once you've been determined not actually to be
12 disabled is to say that it has no function at all. It's
13 whole function is to cover those cases where the
14 individual is not in fact disabled, but is regarded as
15 disabled. So, it has to be somebody who does not really
16 genuinely qualify and, therefore, perhaps is not one of
17 the -- the median group that you say.
18 QUESTION: I think that's a criticism rather
19 than a question, Mr. Dumont.
20 QUESTION: I think it is.
21 (Laughter.)
22 QUESTION: Thank you, Mr. Dumont.
23 MR. DUMONT: Thank you, Your Honor.
24 QUESTION: Ms. Gordon, you have 2 minutes
25 remaining.

1 REBUTTAL ARGUMENT OF CORBETT GORDON

2 ON BEHALF OF THE PETITIONER

3 MS. GORDON: Thank you, Mr. Chief Justice.

4 I just have two brief points I'd like to address

5 responding to points made by Mr. Hunt.

6 First, he was talking about the waiver program

7 as a proxy for safety, and I would like to call the

8 Court's attention to some things in the Federal Register.

9 At 59 Federal Register 59388, the Federal Highway

10 Administration recognized that its study was flawed and

11 has admitted that some of the waiver drivers were sub-par

12 performers who individually may represent an unacceptable

13 risk to safety. That Federal Register entry was in

14 November of 1994 after Mr. Kirkingburg got his waiver.

15 Their own panel of doctors that advises the

16 Federal Highway Administration and other studies and

17 advisors over the years, as recently as October of last

18 fall, have advised the Federal Highway Administration not

19 to change the 20/40 each eye acuity standard. In fact,

20 that standard or a like standard has been in place since

21 1935, starting with good vision is important to safe

22 driving.

23 QUESTION: But how can you reconcile that with

24 the decision to allow all existing waivers to remain in

25 effect?

1 MS. GORDON: I can't.

2 QUESTION: Oh, okay.

3 MS. GORDON: I can't. In the same breath, the

4 Federal Highway Administration declared the current people

5 in 1996 to be sufficiently safe to grandfather them, and

6 -- and I can't reconcile that.

7 QUESTION: Close enough for Government work. I

8 think that's --

9 (Laughter.)

10 MS. GORDON: I would refer the Court to pages 12

11 to 16 of our reply brief where various criticisms are

12 taken of the Federal Highway Administration's protocol and

13 studies that were in effect and available to them and

14 noted in their -- in the Federal Register that they

15 ignored.

16 The other thing I'd like to address very quickly

17 is the fact that I do not believe that the comment, he is

18 legally blind or blind in one eye, is susceptible to

19 construing the term legally blind separate from the phrase

20 or blind in one eye.

21 Thank you.

22 CHIEF JUSTICE REHNQUIST: Thank you, Ms. Gordon.

23 The case is submitted.

24 (Whereupon, at 12:04 p.m., the case in the

25 above-entitled matter was submitted.)

CERTIFICATION

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ALBERTSONS, INC. Petitioner v. HALLIE KIRKINGBURG.
CASE NO: 98-591

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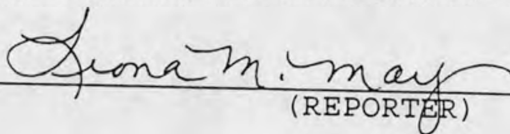
BY: 
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