SUPREME COURT OF THE UNITED STATES

No. 00–1250

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

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

[April 29, 2002]

JUSTICE O'CONNOR, concurring.

I agree with portions of the opinion of the Court, but I find problematic the Court's test for determining whether the fact that a job reassignment violates a seniority system makes the reassignment an unreasonable accommodation under the Americans with Disabilities Act of 1990 (ADA or Act), 42 U. S. C. §12101 *et seq*. (1994 ed. and Supp. V). Although a seniority system plays an important role in the workplace, for the reasons I explain below, I would prefer to say that the effect of a seniority system on the reasonableness of a reassignment as an accommodation for purposes of the ADA depends on whether the seniority system is legally enforceable. "Were it possible for me to adhere to [this belief] in my vote, and for the Court at the same time to [adopt a majority rule]," I would do so. *Screws* v. *United States,* 325 U. S. 91, 134 (1945) (Rutledge, J., concurring in result). "The Court, however, is divided in opinion," *ibid.*, and if each member voted consistently with his or her beliefs, we would not agree on a resolution of the question presented in this case. Yet "[s]talemate should not prevail," *ibid.*, particularly in a case in which we are merely interpreting a statute. Accordingly, in order that the Court may adopt a rule, and because I believe the Court's rule will often lead to the same outcome as the one I would have adopted, I join the Court's opinion

despite my concerns. Cf. *Bragdon* v. *Abbott,* 524 U. S. 624, 655–656 (1998) (STEVENS, J., joined by BREYER, J., concurring); *Olmstead* v. *L. C.,* 527 U. S. 581, 607–608 (1999) (STEVENS, J., concurring in part and concurring in judgment).

The ADA specifically lists "reassignment to a vacant position" as one example of a "reasonable accommodation." 42 U. S. C. §12111(9)(B) (1994 ed.). In deciding whether an otherwise reasonable accommodation involving a reassignment is unreasonable because it would require an exception to a seniority system, I think the relevant issue is whether the seniority system prevents the position in question from being vacant. The word "vacant" means "not filled or occupied by an incumbent [or] possessor." Webster's Third New International Dictionary 2527 (1976). In the context of a workplace, a vacant position is a position in which no employee currently works and to which no individual has a legal entitlement. For example, in a workplace without a seniority system, when an employee ceases working for the employer, the employee's former position is vacant until a replacement is hired. Even if the replacement does not start work immediately, once the replacement enters into a contractual agreement with the employer, the position is no longer vacant because it has a "possessor." In contrast, when an employee ceases working in a workplace with a legally enforceable seniority system, the employee's former position does not become vacant if the seniority system entitles another employee to it. Instead, the employee entitled to the position under the seniority system immediately becomes the new "possessor" of that position. In a workplace with an unenforceable seniority policy, however, an employee expecting assignment to a position under the seniority policy would not have any type of contractual right to the position and so could not be said to be its "possessor." The position therefore would become vacant.

Given this understanding of when a position can properly be considered vacant, if a seniority system, in the absence of the ADA, would give someone other than the individual seeking the accommodation a legal entitlement or contractual right to the position to which reassignment is sought, the seniority system prevents the position from being vacant. If a position is not vacant, then reassignment to it is not a reasonable accommodation. The Act specifically says that "reassignment to a *vacant* position" is a type of "reasonable accommodation." §12111(9)(B) (emphasis added). Indeed, the legislative history of the Act confirms that Congress did not intend reasonable accommodation to require bumping other employees. H. R. Rep. No. 101–485, pt. 2, p. 63 (1990) ("The Committee also wishes to make clear that reassignment need only be to a vacant position—'bumping' another employee out of a position to create a vacancy is not required"); S. Rep. No. 101–116, p. 32 (1989) (same).

Petitioner's Personnel Policy Guide for Agents, which contains its seniority policy, specifically states that it is "*not* intended to be a contract (express or implied) or otherwise to create legally enforceable obligations," and that petitioner "reserves the right to change any and all of the stated policies and procedures in [the] Guide at any time, without advanc[e] notice." Lodging of Respondent 2 (emphasis in original). Petitioner conceded at oral argument that its seniority policy does not give employees any legally enforceable rights. Tr. of Oral Arg. 16. Because the policy did not give any other employee a right to the position respondent sought, the position could be said to have been vacant when it became open for bidding, making the requested accommodation reasonable.

In Part II of its opinion, the Court correctly explains that "a plaintiff/employee (to defeat a defendant/employer's motion for summary judgment) need only show that an 'accommodation' seems reasonable on its face, *i.e.*,

ordinarily or in the run of cases." *Ante*, at 9. In other words, the plaintiff must show that the method of accommodation the employee seeks is reasonable in the run of cases. See *ante*, at 10 (quoting *Barth* v. *Gelb*, 2 F. 3d 1180, 1187 (CADC 1993)). As the Court also correctly explains, "[o]nce the plaintiff has made this showing, the defendant/employer then must show special . . . circumstances that demonstrate undue hardship" in the context of the particular employer's operations. *Ante,* at 10. These interpretations give appropriate meaning to both the term "reasonable," 42 U. S. C. §12112(b)(5)(A), and the term "undue hardship," *ibid.*, preventing the concepts from overlapping by making reasonableness a general inquiry and undue hardship a specific inquiry. When the Court turns to applying its interpretation of the Act to seniority systems, however, it seems to blend the two inquiries by suggesting that the plaintiff should have the opportunity to prove that there are special circumstances in the context of that particular seniority system that would cause an exception to the system to be reasonable despite the fact that such exceptions are unreasonable in the run of cases.

Although I am troubled by the Court's reasoning, I believe the Court's approach for evaluating seniority systems will often lead to the same outcome as the test I would have adopted. Unenforceable seniority systems are likely to involve policies in which employers "retai[n] the right to change the system," *ante*, at 13–14, and will often "permi[t] exceptions," *ante,* at 14. They will also often contain disclaimers that "reduc[e] employee expectations that the system will be followed." *Ibid.* Thus, under the Court's test, disabled employees seeking accommodations that would require exceptions to unenforceable seniority systems may be able to show circumstances that make the accommodation "reasonable in the[ir] particular case." *Ibid.* Because I think the Court's test will often lead to the

correct outcome, and because I think it important that a majority of the Court agree on a rule when interpreting statutes, I join the Court's opinion.