Docket No. 08-0201

IN THE

SUPREME COURT OF THE UNITED STATES

Spring Term, 2009

DANIEL NOONAN, Petitioner,

-- against --

EMPIRE PROPERTY MANAGEMENT, Respondent.

DANIEL NOONAN, Petitioner,

-- against --

NATIONAL LABOR RELATIONS BOARD, Respondent, and

EMPIRE PROPERTY MANAGEMENT, Respondent.

ON WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS FOR THE THIRTEENTH CIRCUIT

BRIEF FOR PETITIONER

Team 9

QUESTIONS PRESENTED

I. WHETHER TITLE I OF THE AMERICANS WITH DISABILITIES ACT, 42 U.S.C. § 12111(9), REQUIRES AN EMPLOYER TO AUTOMATICALLY REASSIGN A QUALFIED EMPLOYEE WITH A DISABILITY TO A VACANT POSITION AS A REASONABLE ACCOMODATION.

II. WHETHER THE NATIONAL LABOR RELATIONS BOARD IMPROPERLY BROADENED THE DEFINTION OF SUPERVISOR CONTAINED IN SECTION 2(11) OF THE NATIONAL LABOR RELATIONS ACT, 29 U.S.C. § 152(11), BY INCLUDING AN EMPLOYEE WITH MINOR SUPERVISORY AUTHORITY.

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The opinion of the United States Court of Appeals for the Thirteenth Circuit is reported at *Noonan v. Empire Prop. Mgmt. & Nat'l Labor Relations Bd.*, 925 F.4th 1 (13th Cir. 2008).

STATUTORY PROVISIONS

The relevant portions of the following statutory provisions appear in the appendices following this brief: 42 U.S.C. §§ 12111, 12112, 12116, and 29 U.S.C. §§ 151, 152, 157, 158.

STANDARD OF REVIEW

Legal questions involving statutory construction are reviewed *de novo*. *Resolution Trust Corp. v. Gallagher*, 10 F.3d 416, 418 (7th Cir. 1993).

STATEMENT OF THE CASE

I. Statement of the Facts

Empire Property Management ("Empire") hired Daniel Noonan ("Mr. Noonan") as a porter for the Bushwood Towers complex on June 12, 1997. (R. at 4.) Bushwood Towers is a 600-unit apartment complex with 61 employees and a superintendent. (R. at 4.) During the relevant time period Ty Webb ("Mr. Webb") served as the superintendent. (R. at 4.) The Collective Bargaining Agreement ("CBA") divided Empire's employees into three categories: Senior Handymen, Handymen, and Others. (R. at 5 n.3.) All of Empire's employees, with the exception of Mr. Webb, were members of Local 101 of the National Apartment Workers Union. (R. at 4.)

As a porter, Mr. Noonan's duties included: collecting the garbage, vacuuming, moping, cutting the grass, and generally cleaning the complex. (R. at 4.) Mr. Noonan proved himself

capable and regularly helped the handymen at their request. (R. at 4-5.) A handyman is responsible for general maintenance and repairs at the complex. (R. at 4-5.) Mr. Noonan, a quick learner, obtained his Operating Engineers License after attending trade school night classes. (R. at 5.) Consequently, when a handyman position became available in May of 2000, Mr. Noonan applied and was promoted. (R. at 5.) Mr. Webb stated that Empire selected Mr. Noonan over more senior employees not only based upon his qualifications but also his positive and cooperative attitude. (R. at 5.)

As a superintendent, Empire required Mr. Webb to be on-call at all times during the week. (R. at 6.) Mr. Webb reported to the managing agent for Empire, Elihu Smails ("Mr. Smails"), and was responsible for the day-to-day operation of the complex. (R. at 5-6.) Empire authorized Mr. Webb to use independent judgment to hire, fire, promote, suspend, assign, reward, discharge, and discipline employees. (R. at 6.) In order to attend law school, Mr. Webb used Mr. Noonan to cover for him on Wednesday afternoons. (R. at 6.) At Mr. Webb's direction Mr. Noonan assigned tasks to handymen to perform specific jobs, and reported disciplinary problems or safety rule violations. (R. at 7-8.) Mr. Webb's absence, on a few occasions, forced Mr. Noonan to make time sensitive decisions that Mr. Webb would later approve. (R. at 8-9.) Additionally, Mr. Webb requested Mr. Noonan assist in tasks such as reporting material shortages and in 2006 Mr. Webb instructed Mr. Noonan to pre-interview candidates for a job position according to Mr. Webb's specific guidelines. (R. at 7-8.) Mr. Noonan had no express authority in any of these situations because Mr. Webb made all final determinations. (R. at 7-9.)

Mr. Webb referred to Mr. Noonan unofficially as "assistant superintendent." (R. at 7.) Empire, however, did not. (R. at 7, 13.) Throughout this period, Mr. Noonan still punched a

time-clock like all union employees. (R. at 7.) Empire paid Mr. Noonan at the senior handyman rate, including overtime at the rates specified in the CBA. (R. at 7.) His responsibilities to Empire were still those of a senior handyman. (R. at 7.)

On June 6, 2007, a drunk driver rammed into Mr. Noonan. (R. at 10.) As a result, Mr. Noonan suffered a compound comminuted fracture of the humerus. (R. at 10.) Because of this injury, Mr. Noonan now suffers from a permanent disability and can no longer perform the essential functions of a handyman or porter. (R. at 10.)

On November 10, 2007, Empire created three new assistant superintendent positions at its largest complexes including Bushwood Towers. (R. at 10.) Empire created these positions in response to Mr. Webb's memo detailing his experience managing Bushwood Towers. (R. at 26.) The assistant superintendent position pays slightly more than a senior handyman and requires only minor supervisory duties. (R. at 7, 11.) Mr. Noonan's disability would not preclude him from performing the essential functions of this position. (R. at 11.)

Understanding the limitations of his disability, Mr. Noonan contacted Mr. Smails about reassignment to the vacant assistant superintendent position. (R. at 11.) Mr. Smails minimized Mr. Noonan's qualifications, calling him "Webb's waterboy" and blamed Mr. Noonan for his disability. (R. at 12.) Mr. Smails told Mr. Noonan that he could apply for the position like anyone else. (R. at 12.) Mr. Noonan sought assistance from his union, but Mr. Smails rebuffed attempts by the union to meet and discuss Mr. Noonan reassignment, saying that Mr. Noonan had "act[ed] like management" and so was not entitled to union protection. (R. at 12.)

Empire concedes that Mr. Noonan suffers from a qualifying disability and that Empire would not now place him in a handyman position. (R. at 12.) Empire also recognizes that Mr. Noonan is qualified for the vacant position. (R. at 12.) Nevertheless, Empire contends that it has

no duty to automatically reassign Mr. Noonan to the assistant superintendent position as it was newly created. (R. at 12.) At the same time, Empire argues that acting like an assistant superintendent excludes Mr. Noonan from union representation. (R. at 12.)

II. Procedural History

On November 20, 2007, Mr. Noonan filed a claim with the Equal Employment Opportunity Commission ("EEOC"). (R. at 3.) Mr. Noonan asserted Empire violated his rights under the Americans with Disabilities Act ("ADA") by failing to reassign him to a vacant position that he was qualified for. (R. at 2-3.) After finding probable cause that Empire had violated Mr. Noonan's rights, the EEOC issued a right to sue letter. (R. at 3.) Mr. Noonan then filed a complaint in the Federal District Court for the Southern District of Wagner on December 14, 2007 asserting a claim pursuant to Title 1 of the ADA, 42 U.S.C. § 12111(9). (R. at 3.) The District Court held for Empire after a full trial. (R. at 3.)

On January 3, 2008, Mr. Noonan filed an unfair labor practice charge through his union at the regional office of the National Labor Relations Board ("NLRB"). (R. at 3.) Mr. Noonan asserted Empire violated his rights under the National Labor Relations Act ("NLRA") by refusing to recognize Mr. Noonan's union representation in his ADA claim. (R. at 3.) The regional director issued a complaint against Empire for denying union representation to Noonan after conducting an investigation. (R. at 3.) An Administrative Law Judge ("ALJ") heard the matter and disagreed with the director, holding that Mr. Noonan was a supervisor and not entitled to union representation. (R. at 3.) The National Apartment Workers Union appealed the ALJ's ruling to the NLRB on July 7, 2008. (R. at 3.) The NLRB affirmed the decision and held that Empire did not violate the NLRA. (R. at 3.)

Mr. Noonan appealed the decision of the Board as an individual and Empire moved to intervene in the appeal. (R. at 3-4.) The Court of Appeals for the Thirteenth Circuit granted Empire's motion and consolidated both the NLRA and ADA matters. (R. at 4.) The Court of Appeals reversed the judgment of the District Court and affirmed the decision of the NLRB. (R. at 4.) On January 29, 2009, this Court granted certiorari for the Spring Term, 2009. (R. at 29.)

SUMMARY OF THE ARGUMENT

This Honorable Court should affirm, in part, the decision of the United States Court of Appeals for the Thirteenth Circuit because reassignment under the ADA must be automatic. The ADA requires an employer to make a reasonable accommodation for an employee with a disability. If only one reasonable accommodation exists, it must be made. The ADA expressly defines reassignment to a vacant position as a reasonable accommodation, subject to limited exceptions. That reassignment is automatic is consistent with the EEOC's regulations and guidance. It is also consistent with the statute's plain language, Congress's intent and the opinions of several courts below. Here, Empire must reassign Mr. Noonan because it is reasonable and it is the only accommodation available.

This Honorable Court should reverse, in part, the decision of the United States Court of Appeals for the Thirteenth Circuit because a "supervisor" under 29 U.S.C. § 152(11) must have genuine supervisory authority. The text of the statute, when understood in light of the legislative history, shows that Congress intended to protect employees with minor supervisory duties under the NLRA. While courts must generally afford the NLRB deference in their interpretation of this statute, the Board's conclusion may not be irrational or inconsistent as it is here. The Board improperly broadened the term "supervisor" to include minor supervisory duties. Alternatively, assuming *arguendo*, that the Board's definition is controlling, Empire failed to establish that Mr. Noonan's actions as a substitute for Mr. Webb fell within the ambit of 29 U.S.C. § 152(11).

ARGUMENT

I. REASSIGNMENT, AS A REASONABLE ACCOMODATION UNDER TITLE I OF THE AMERICANS WITH DISABILITIES ACT, MEANS AUTOMATIC REASSIGNMENT.

The Americans with Disabilities Act ("ADA" or "Act") prohibits employers from "discriminat[ing] against a qualified individual [with] a disability." 42 U.S.C. § 12112(a) (2008). The Act defines a "qualified individual with a disability" as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds *or desires*." 42 U.S.C. § 12111(8) (2008) (emphasis added). The Act defines "discriminat[ion]" as not making "reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability." 42 U.S.C. § 12112(b)(5)(A). "Reassignment to a vacant position" is specifically listed among the "reasonable accommodation[s]" employers are required to provide. 42 U.S.C. § 12111(9)(B).

Congress understood that an employee with a disability will undoubtedly "face higher costs of searching for a job than other employees." Pamela S. Karlan & George Rutherglen, *Disabilities, Discrimination, and Reasonable Accommodation*, 46 Duke L.J. 1, 36 n.110 (1996). As a reaction, Congress drafted the ADA with a preference for accommodations that enable an employee with a disability to keep his or her existing position. *See* H.R. Rep. No. 101-485(II), at 63 (1990); *see also Cassidy v. Detroit Edison Co.*, 138 F.3d 629, 634 (6th Cir. 1998) ("Generally, transfer or reassignment of an employee is only considered when accommodation within the individual's current position would pose an undue hardship."). But, Congress did not limit the ADA's scope to only those accommodations that allow an employee to remain in his or her current position. Indicated by the ADA's express inclusion of the accommodation, Congress

intended for individuals with disabilities to remain part of the economic mainstream of society specifically through automatic reassignment. *See* S. Rep. No. 116, at 6 (1989).

A. The Equal Employment Opportunity Commission Supports the Automatic Reassignment of an Employee with a Disability.

The ADA gives the Equal Employment Opportunity Commission ("EEOC") authority to issue regulations implementing Title I of the ADA. 42 U.S.C. § 12116 (2008). The EEOC's regulations are entitled to great deference. *See EEOC v. Commercial Office Prods. Co.*, 486 U.S. 107, 115 (1988); *Chevron, U.S.A. Inc. v. Natural Resources Def. Council, Inc.*, 467 U.S. 837, 844 (1984). In addition to regulations, the EEOC publishes interpretive guidance for its own regulations under its *Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the ADA*. While this guidance is "not controlling upon the courts by reason of their authority," it "constitute[s] a body of experience and informed judgment" that this Court should consider. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986). Considerably more weight should be given to EEOC guidance interpreting its own regulations, but EEOC guidance interpreting the underlying statute nevertheless receives deference as well. *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994).

1. The EEOC's regulations require that reasonable accommodations include the automatic reassignment of an employee.

Regarding the issue of reassignment, the EEOC's regulations stipulate an employer should reassign the individual if the individual is qualified, and the position is vacant within a reasonable time. *See* 29 C.F.R. § 1630.2(o) (2009). This is consistent with the idea that accommodations should be effective for a disabled employee. 29 C.F.R. § 1630.2(o)(1) (reasonable accommodation means modifications or adjustments "that enable" the employee with a disability to work and enjoy employment benefits). That reassignment is an automatic

accommodation is also consistent with the EEOC's regulations that state, in general, reassignment should be considered only when accommodation within the individual's current position would pose an undue hardship. 29 C.F.R. § 1630.2(o).

2. Interpretive guidance by the EEOC explicitly states that an employee with a disability must be reassigned to a vacant position within a company.

In its enforcement guidance on reasonable accommodation, the EEOC explicitly states reassignment to a vacant position is a reasonable accommodation. E.E.O.C., *Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act*, EEOC Enforcement Guidance No. 915.002 (Oct. 17, 2002). The EEOC's enforcement guidance rejects the contention that an employer's reassignment obligation simply requires "that the employee be permitted to compete for a vacant position." *Id.* In fact, reassignment is automatic as long as the employee is "qualified" to perform the position. *Id.* This is satisfied if the employee 1) has the requisite skill, experience, education and other job-related requirements of the position, and 2) can perform the essential functions of the new position, with or without reasonable accommodation. *Id.* The EEOC's interpretive guidance, according to *Shalala*, must be respected. After all, the guidance reflects informed judgment and expertise.

3. Circuit courts have held that Title I of the ADA requires more than considering an employee with a disability for a position.

Supplementing the Act, EEOC guidance and legislative history, a number of circuit courts hold "reassignment to a vacant position" under § 12111(9) means more than considering a disabled employee for a vacant position within the company.

The Tenth Circuit, for example, held reassignment to a vacant position "is one of a range of reasonable accommodations which must be considered and, if appropriate, *offered if the employee is unable to perform his or her existing job*." *Smith v. Midland Brake, Inc.*, 180 F.3d

1154, 1167 (10th Cir. 1999) (en banc) (emphasis added). In *Smith*, the Tenth Circuit reasoned, "if a disabled employee only had a right to require the employer to consider [an] application for reassignment . . . the ADA [reasonable accommodation requirement] would be empty." *Id.*

The District of Columbia Circuit similarly rejects the view that the ADA only requires an employer to consider reassignment. *Aka v. Washington Hosp. Ctr.*, 156 F.3d 1284, 1304 (D.C. Cir. 1998) (en banc). The majority for the en banc D.C. Circuit explained such a view opposes "both the text and legislative history of the statute, and deviate[s] from the construction of the statute." *Id.* Specifically, to substitute a consideration requirement for an actual reassignment requirement would render the ADA "redundant." *Id.*

Here, because no other alternative accommodation exists, Mr. Noonan must be reassigned to the vacant position at Bushwood Towers. Automatic reassignment is supported by the regulations issued by the EEOC as well as the agency's interpretive guidance. This Court should respect the EEOC's informed and experienced judgment. Doing so gives effect to the ADA's purpose and protects the needs of an employee with a disability. For Mr. Noonan, reassignment is the difference between remaining a productive member of society and becoming unemployed.

B. Interpreting Title I of the ADA as Merely Requiring Consideration Is Not a Reasonable Conclusion.

A reading that replaces the meaning of "reassignment to a vacant position" under § 12111(9) with "consideration for reassignment to a vacant position" cannot be sustained. Such a reading contradicts the ADA's meaning, renders part of § 12111(9) redundant, and ignores legislative intent.

1. The canons of statutory interpretation do not support an interpretation of reassignment that only requires consideration for a position.

The starting point of statutory interpretation is "the language employed in Congress" and it is "assume[d] that the legislative purpose is expressed by the ordinary meaning of the words used." *INS v. Phinpathya*, 464 U.S. 183, 189 (1984) (citations and internal quotation marks omitted); *Caminetti v. United States*, 242 U.S. 470, 485 (1917) (it is a basic rule of statutory interpretation that words be given their plain and ordinary meaning). The statute's core verb, assign, means "to appoint (one) to a post or duty." *Webster's New International Dictionary* (3d ed. 1961). By contrast, consideration means "careful thought or deliberation." *Id.* The former meaning, read in context with the statute, requires action from an employer. An incorrect reading that substitutes the latter definition does not reflect a plain understanding of the statute's text.

To further illustrate, if reassignment really means consideration, other accommodations listed in § 12111(9) would be subjected to a similar reading. *See e.g. Beecham v. United States*, 511 U.S. 368, 371 (1994) ("That several items in a list share an attribute counsels in favor of interpreting the other items as possessing that attribute as well."). But, for example, no court holds job restructuring, another reasonable accommodation listed in § 12111(9), actually means consideration for job restructuring.

Additionally, statutory interpretation that renders a provision without effect should be avoided. *Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 574 (1995). An understanding that merely requires an employer to consider a disabled employee for reassignment renders the ADA's affirmative duty to make reasonable accommodations meaningless. A number of circuits agree that the ADA's language requires something more than consideration. *See Smith*, 180 F.3d at 1161; *Aka*, 156 F.3d at 1304; *Gile v. United Airlines, Inc.*, 95 F.3d 492, 496-99 (7th Cir. 1996);

Monette v. Electronic Data Sys. Corp., 90 F.3d 1173, 1187 (6th Cir. 1996); *Benson v. Northwest Airlines, Inc.*, 62 F.3d 1108, 1114-15 (8th Cir. 1995). Consideration alone is not an accommodation. *Ransom v. State of Arizona Bd. of Regents*, 983 F.Supp. 895, 902 (D. Ariz. 1997).

Here, Empire's contention does not reflect the plain and ordinary meaning of "reassignment" under the ADA. The statute does not state passive "consideration" as an accommodation. Rather, the statute is active and requires Empire to appoint Mr. Noonan to a vacant position. Nothing in the ADA's plain language has the effect of allowing Empire to circumvent the statute's affirmative duty by "considering" Mr. Noonan for the vacant position.

In addition, Empire's asserted definition of "reassignment" renders the ADA's affirmative duty to provide reasonable accommodations meaningless. Substituting "consideration" for reassignment would make the statute ineffective, as employers like Empire would not be required to make any accommodation to an employee with a disability. Contrary to Empire's assertion, considering Mr. Noonan's application is not an accommodation at all.

2. Automatic reassignment is not a form of affirmative action, and so should not be rejected on those grounds.

A small number of courts refuse to use reassignment as an accommodation because of a misconception that reassignment is preferential treatment similar to affirmative action. *See Daugherty v. City of El Paso*, 56 F.3d 695 (5th Cir. 1995), *cert. denied* 516 U.S. 1172 (1996) (holding that for a disabled employee to succeed on an ADA claim, the employee would need to prove that by not being reassigned he was treated differently than other displaced employees without disabilities). But, as Professor Carlos Ball points out, the ADA differs from affirmative action in two key respects. First, reassignment as a reasonable accommodation reflects a barrier to equal opportunity that is specific to a plaintiff. Carlos A. Ball, *Preferential Treatment and*

Reasonable Accommodation Under the Americans with Disabilities Act, 55 Ala. L. Rev. 951, 953 (2004). Affirmative action, in contrast, is a class-based remedy that does not require individualized assessments. *Id.* Second, the failure to provide reassignment as a reasonable accommodation "is itself a form of discrimination," while affirmative action "constitutes a type of remedy rather than a category of substantive liability." *Id.*

Proper understanding of the ADA, therefore, cannot be reached by reference to affirmative action statutes. Instead, the ADA must be understood in its proper historical context, as a set of laws passed in reaction to its predecessor, the Rehabilitation Act of 1973. Barbara A. Lee, *Reasonable Accommodation Under the Americans with Disabilities Act: The Limitations of Rehabilitation Act Precedent*, 14 Berkeley J. Emp. & Lab. L. 201, 205 (1993) [hereinafter Lee]. Case law prior to the ADA did not view reassignment as an automatic requirement. *See School Bd. of Nassau County v. Arline*, 480 U.S. 273, 289 n.19 (1987). The fact that the ADA provides for reassignment means the "issue facing employers under the ADA is not whether reassignment is required, but under what circumstances." Lee at 220. Congress, by including reassignment in the ADA's text, sought to overturn prior case law developed under the Rehabilitation Act that held reassignment is not required. *Id.* at 223.

3. The exceptions to automatic reassignment demonstrate that reasonable accommodation under Title I of the ADA cannot mean simply consideration for a vacant position.

Another indication that reassignment is required (as opposed to mere consideration) is the series of exceptions that exempt an employer from the obligation to make any accommodation. These exceptions strike a balance between the employee's needs and the employer's ability to carry out its business operations. An employer, as a result, is not required to reassign an employee in every case. Rather, an employer is only required to reassign an employee when it is

reasonable. In each case, an employer that does not wish to reassign an employee with a disability must show a requested accommodation is unreasonable; the complaining party does not have to attack the basis for an employer's decision. *Board of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 372 (2001).

The exceptions to the ADA's reassignment requirement originate from the statute's "undue hardship" provision. The ADA states an employer does not have to make an accommodation if it creates "undue hardship," defined as an "action requiring significant difficulty or expense" that interferes with the employer's business operations. 42 U.S.C. § 12111(10)(A). An employer, on a case-by-case basis, may show a proposed accommodation will create undue hardship to the employer's business operations. *US Airways, Inc. v. Barnett,* 535 U.S. 391, 397 (2002). Factors include: the nature and cost of the accommodation, the financial resources of the employer, and the nature of the employment. 42 U.S.C. § 12111(10)(B); *see also Smith*, 180 F.3d at 1178.

For instance, an employer is not required to redefine the essential elements of an existing job to bring the disabled employee into the position's qualifications. *Smith*, 180 F.3d at 1178. Nor is an employer required to promote the disabled employee into a position. *Id.* at 1176; *see also Malabarba v. Chicago Tribune Co.,* 149 F.3d 690, 699 (7th Cir. 1998). Additionally, an employer does not have to create a new position for the purpose of accommodating a disabled employee. *Smith*, 180 F.3d at 1174; *see also Willis v. Pacific Maritime Ass'n*, 162 F.3d 561, 567 (9th Cir. 1998); *Terrell v. USAir*, 132 F.3d 621, 626 (11th Cir. 1998); *Still v. Freeport-McMoran, Inc.*, 120 F.3d 50, 53 (5th Cir. 1997); *Smith v. Ameritech*, 129 F.3d 857, 867 (6th Cir. 1997); *Gile*, 95 F.3d at 499. Finally, an employer is also not required to displace another employee in

order to reassign a disabled employee. *Smith*, 180 F.3d at 1175; *see also Eckles v. Consol. Rail Corp.*, 94 F.3d 1041, 1047 (7th Cir. 1996).

Moreover, this Court holds the reassignment requirement "ordinarily" will not displace an employer's established seniority system. *US Airways, Inc.*, 535 U.S. at 406. In *US Airways*, the employer had an established reassignment policy predicated on staff seniority. *Id.* at 404. This Court reasoned that the combined expectations of employers and employees with respect to an established reassignment policy made the ADA-required reassignment unreasonable. *Id.*; *see also* Seth D. Harris, *Re-Thinking the Economics of Discrimination: U.S. Airways v. Barnett, the ADA, and the Application of Internal Labor Market Theory*, 89 Iowa L.R. 123, 156 (2003) [hereinafter Harris] ("Intangible working conditions, like fair treatment, matter a great deal to workers' morale."). However, this Court also held that a disabled employee, on a case-by-case basis, is entitled to demonstrate that "reassignment is nonetheless reasonable" in spite of an established plan. *US Airways, Inc.*, 535 U.S. at 406.

At the circuit court level, certain other policies have been used to show reassignment in a particular case is unreasonable. The Eighth Circuit held that an employer is not required to reassign a disabled employee if the reassignment would "violate a legitimate nondiscriminatory policy of the employer to hire the most qualified candidate." *Huber v. Wal-Mart Stores, Inc.*, 486 F.3d 480, 483 (8th Cir. 2007). Similarly, in an opinion written by Chief Judge Posner, the Seventh Circuit held that it is not reasonable to require an employer to reassign a disabled employee if the reassignment violates a "consistently applied" and "bona fide policy" of reassigning the most qualified candidate. *EEOC v. Humiston-Keeling, Inc.*, 227 F.3d 1024, 1028 (7th Cir. 2000) (citing *Malabarba*, 149 F.3d at 699-700); *see also Hedrick v. Western Reserve Care Sys.*, 355 F.3d 444 (6th Cir. 2004) (holding that although reasonable accommodation may

include reassignment to a vacant position, an employer need not waive a legitimate, non-discriminatory employment policy or other employee's rights); Harris at 156 ("In particular, morale can be threatened when there is a discrepancy between how workers expect to be treated and how they are actually treated by their employer, or if there is a sense that some workers are treated differently from others without legitimate cause.").

These exceptions would be superfluous if reassignment to a vacant position under the ADA merely required that the disabled employee would be permitted to apply for the position and would be considered alongside other applicants. Why create an exception for an established seniority system or a consistent bona fide hiring policy if the employer were not subject to a mandatory action? The only reasonable conclusion is that these are exceptions to an automatic reassignment of the disabled employee.

C. As an Employee with a Qualifying Disability, Mr. Noonan Is Entitled to Automatic Reassignment to the Vacant Assistant Superintendent Position as it Would Not Cause Undue Hardship to Empire.

Empire must reassign Mr. Noonan to the vacant position at Bushwood Towers. The statute's express language identifies reassignment as a presumptively valid accommodation. Mr. Noonan is a "qualified individual with a disability" under the ADA because Mr. Noonan suffers from a permanent and debilitating injury. Mr. Noonan's inability to perform the essential functions of a handyman, however, does not deny his status as a "qualified individual with a disability."

Empire admits Mr. Noonan is "physically able and qualified to handle the responsibilities" of the assistant superintendent position. (R. at 12.) On account of Empire's admission and the analysis of the relevant statute, regulations, guidance and history, Mr. Noonan

is a "qualified individual with a disability" entitled to reasonable accommodation. Importantly, reassignment in this case does not trigger any of the established exceptions to § 12111(9).

1. In this case, reassignment is proper because Empire 1) does not have to modify its job qualifications, 2) does not have to promote Mr. Noonan into the position, 3) does not have to create a new position in order to accommodate Mr. Noonan, and 4) does not have to displace an existing employee from the position.

First, Mr. Noonan is quailed to perform the essential functions of an assistant superintendent. Empire's job listing requires in-depth knowledge (five years) of the operations and workings of a large property, strong plumbing, electrical and mechanicals skills, and "good communications" skills. (R. at 27-28.) In addition, Empire *prefers* candidates with trade certifications and prior building management and supervisory experience. (R. at 27.) Mr. Noonan, an Empire employee since 1997, exceeds Empire's minimum experience requirement by more than five years. According to Empire's performance review, Mr. Noonan possesses "superior technical ability." (R. at 5.) Mr. Noonan also obtained his Operating Engineers License and attended advanced technical courses during his time at Bushwood Towers. Aside from surpassing each of the position's essential requirements, Mr. Noonan also exemplifies the *preferred* qualifications and experience Empire is seeking. Mr. Noonan's qualifications for the assistant supervisor position are also reflected in Mr. Webb's October 17, 2007 memo to Empire. (R. at 26.) In short, Mr. Noonan exceeds the qualifications for the vacant assistant superintendent position.

Second, reassignment in this case is not a promotion. An assistant superintendent, although compensated at a slightly higher rate, performs the same responsibilities Noonan dutifully carried out (although not authorized to do so) as an unofficial assistant superintendent

in previous years. Reassigning Noonan to the assistant superintendent position will reflect a change in title only.

Third, Empire will not be required to create a new position in order to accommodate Mr. Noonan. Rather, the record reflects Empire posted the assistant superintendent position to serve the demands of its larger buildings. Mr. Noonan's reassignment request, therefore, does not require Empire to create a new position for the purpose of accommodating his injury.

Fourth, because Empire's assistant superintendent position is presently vacant, reassignment will not displace a current employee from his or her position. According to the record, Empire informed its employees about the newly created position on November 10th, 2007. (R. at 10.) Because the assistant superintendent position is vacant, Empire must reassign Mr. Noonan.

2. Reassignment will not violate an established and consistently applied reassignment policy.

Finally, reassignment in this case will not violate an established, consistently applied reassignment policy. The applicable CBA article states preference "shall be given, in seniority order, to employees already employed in the building, but seniority shall not control, as training, ability, efficiency, appearance, personality, and attitude will also be considered." (R. at 5 n. 4.) This policy, though collectively bargained, is distinguishable from the "established" seniority system in *US Airways* and the policy to hire the best-qualified candidate in *Huber*. Rather, Empire's current policy is a hybrid approach that fails to provide any level of expectation to its employees. In fact, Noonan's promotion from porter to handyman illustrates the vagary built into Empire's system. Empire promoted Noonan over two other applicants who were more senior.

Such a "system" is not consistently applied and should not allow Empire or other employers to deny the legitimate goal of the ADA. In *US Airways*, employees understood seniority controlled. Conversely, in *Huber*, employees understood ability controlled. In both instances the employer provided its employees with an expectation of how the reassignment process works. By contrast, the hybrid reassignment approach used by Empire fosters litigation and confusion. The current system enables Empire to prevent Noonan's reassignment on any number of grounds, when in reality Empire's refusal is based in discrimination. The ADA intends to remove workplace barriers. It should not give an employer incentive to use confusing policies to the disadvantage of its employees. Here, Mr. Noonan's reassignment accommodation is reasonable and must be granted.

II. THE NATIONAL LABOR RELATIONS BOARD IMPROPERLY BROADENED "SUPERVISOR" UNDER 29 U.S.C. § 152(11) BECAUSE CONGRESS DID NOT INTEND TO EXCLUDE AN EMPLOYEE WITH MINOR SUPERVISORY FUNCTIONS FROM THE PROTECTION OF THE NATIONAL LABOR RELATIONS ACT.

A supervisor is not entitled to union representation. 29 U.S.C. § 152(3) (2009). This Court has clarified that the definition of a supervisor is an individual with authority, in the interest of the employer, to do any one of twelve statutory functions[1], provided that the exercise of that authority is not merely routine or clerical but requires the use of independent judgment. *NLRB v. Kentucky River Cmty. Care, Inc.*, 532 U.S. 706, 712-13 (2001); *see also* 29 U.S.C. §

[1] The twelve functions are: hiring, transferring, suspending, laying off, recalling, promoting, discharging, assigning, rewarding, disciplining, responsibly directing and adjusting grievances of employees. 29 U.S.C. § 152(11) (2009).

152(11). The only functions at issue are "assign," "responsibly to direct," and "discipline other employees."[2]

Decisions of the National Labor Relations Board ("NLRB" or "Board") are deferred to if they are rational and consistent with the National Labor Relations Act ("NLRA"). *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 364 (1998). In *Oakwood Healthcare, Inc.*, 348 N.L.R.B. 686 (2006), however, a 3-2 majority of the Board adopted interpretations of "assign" and "responsibly to direct" that are irrational and inconsistent with the NLRA.

A. The Proper Interpretation of the NLRA Provides Union Protection to an Employee with Minor Supervisory Duties.

The phrase "assign employees" means "a significant employment decision" on the order of determining 1) an employee's position with the employer, 2) designated work site, or 3) work hours. *Oakwood Healthcare, Inc.*, 348 N.L.R.B. at 703 (dissenting opinion). "Responsibly to direct" is established when an individual 1) has been delegated substantial authority to ensure that a *work unit* achieves management's objectives and is thus "in charge," 2) is held *accountable* for the work of others, and 3) exercises *significant discretion and judgment* in directing his or her work unit. *Id.* at 706. These definitions are supported by the text, legislative intent and policy underlying the NLRA.

1. The text of the NLRA supports the conclusion that the individual statutory functions must affect the basic terms and conditions of employment.

Although the legislative purpose is assumed to be expressed by the ordinary meaning of the words used, when the language is ambiguous, this Court has expressed the need further analysis. *Dolan v. U.S. Postal Service*, 546 U.S. 481, 486 (2006) ("A word in a statute may or

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[2] It was conceded that Mr. Noonan could not and did not directly hire, fire, lay off, recall, promote, discharge, reward or adjust employee grievances. (R. at 14.) Additionally, there is no evidence in the record that Mr. Noonan could or did transfer employees.

may not extend to the outer limits of its definitional possibilities; interpretation of a word or phrase depends upon reading the whole statutory text, and considering the purpose and context of the statute, and consulting any precedents or authorities that form the analysis."). Both "assign" and "reasonably to direct" have been held to be ambiguous. *See NLRB v. Health Care & Ret. Corp. of Am.*, 511 U.S. 571, 579 (1994); *Providence Hosp.*, 320 N.L.R.B. 717, 727 (1996).

The *noscitur a sociis* canon of statutory interpretation holds that when several items in a list share a quality, that quality should be attributed to all of the items. *Beecham*, 511 U.S. at 372. It is immediately apparent from an examination of the twelve statutory functions that several would have an immediate and dramatic impact on the basic terms of employment. It would be difficult to imagine a more basic term of employment than being hired or discharged, being promoted or laid off. Consequently, the terms "assign" and "responsibly to direct" should be interpreted to have the same fundamental effect.

2. To uphold Congress's purpose in enacting the NLRA, the interpretations of "assign" and "responsibly to direct" must look to actual authority and appreciate the scope of that authority.

The National Labor Relations Act of 1935 declared it to be the policy of the United States to "encourag[e] the practice and procedure of collective bargaining and . . . protect[ ] the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing." 29 U.S.C. § 151. The NLRA states, in part, that "[e]mployees shall have the right . . . to bargain collectively through representatives of their own choosing" and it is an unfair labor practice for an employer "to interfere with, restrain, or coerce employees" in the exercise of § 157 rights or "to refuse to bargain collectively" with the employee's representatives. 29 U.S.C. §§ 157, 158 (a)(1) and (5).

Two basic policy considerations motivated the NLRA: 1) to "encourag[e] collective bargaining as a means of managing labor relations to achieve greater industrial peace" and 2) to "promot[e] unionization as a vehicle for allowing workers to participate more fully in the sociopolitical life of the nation." Eric J. Weisner, *Voices From the Workplace: Oakwood Healthcare, Inc. and the Rollback of Labor Rights Under the Current National Labor Relations Board*, 42 U.S.F. L. Rev. 457, 461 (2007) [hereinafter Weisner]; *see also NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33 (1937) (Labor organizations "were organized out of the necessities of the situation . . . The union was essential to give laborers opportunity to deal on an equality with their employer."). The Board has also expressed a fundamental concern that "to hold that employees who spend the 'bulk' of their working time as rank-and-file employees are not entitled to the benefits of the Act would deny them the right to bargain collectively for the terms and conditions of employment which govern their basic relationship with their employer." *Frederick Steel Co.*, 149 N.L.R.B. 5, 11 (1964) (citing *The Great Western Sugar Co.*, 137 N.L.R.B. 551, 552-553 (1962)).

Although the Taft-Hartley Act amended the NLRA in 1947, it intended to adopt prior NLRB case law that held "distributing the day's work and assigning tasks to a crew of employees was typical of the type of responsibility held by those 'minor supervisors' who were to remain within the Act's protection." *Oakwood Healthcare, Inc.*, 348 N.L.R.B. at 704 (dissenting opinion). Although the House wanted to include straw bosses within the definition of "supervisor," Congress adopted the Senate's language stating that the definition of "supervisor" must be narrow so as to distinguish between "*straw bosses, lead-men, set-up men, and other minor supervisory employees*, on the one hand, and the *supervisor vested with such genuine management prerogatives* as the right to hire or fire, discipline, or make effective

recommendations with respect to such actions." *NLRB v. Bell Aerospace Co. Div. of Textron Inc.*, 416 U.S. 267, 280-83 (1974) (quoting S. Rep. No. 105, at 4 (1947) (emphasis added)). Thus, Congress made a purposeful choice not to include "minor supervisors" when it excluded "supervisors" from "employees" in the Taft-Hartley Act, added § 152(11) and overruled *Packard Motor Car Co. v. NLRB*, 330 U.S. 485 (1947) (holding that supervisors were included in the definition of "employee").

Drawing the line between an employee and a supervisor "has proven easier said than done even in [a conventional, industrial hierarchy] . . . [and in] settings deviating from that model, the task has been vexing indeed." Marley S. Weiss, *Kentucky River at the Intersection of Professional and Supervisory Status: Fertile Delta or Bermuda Triangle?*, *in* LABOR LAW STORIES 353, 364 (Laura J. Cooper & Catherine L. Fisk eds., Foundation Press 2005) [hereinafter Weiss]. Nevertheless, Congress demonstrated the intent to distinguish between two classes of workers: true supervisors of "genuine management prerogatives" and employees who are protected by the Act even though they perform "minor supervisory duties." *Bell Aerospace Co. Div. of Textron Inc.*, 416 U.S. at 280-281 (quoting S. Rep. No. 105, at 4 (1947)). Consequently, the statutory functions must be interpreted with this purpose in mind.

By interpreting "assign" to refer to major decisions affecting the basic terms of employment, minor supervisors can be separated from statutory supervisors based on the scope of their authority. Thus, this definition can correctly distinguish between minor supervisory functions such as making a single assignment of daily duties and the fundamental decisions of true supervisors such as "designating the employer's job classification, which entails the expected performance of certain tasks during the employee's tenure." *Oakwood Healthcare, Inc.*, 348 N.L.R.B. at 703 (dissenting opinion).

Furthermore, "responsibly to direct" was added to the definition of "supervisor" with the intent to capture supervisors with essential managerial duties, who are "above the grade" of minor supervisors and responsible *for directing his department and the men under him*, but are deprived of authority for the other statutory functions under modern management (e.g., due to a centralized human resources department). 93 Cong. Rec. 4804 (1947), *reprinted in* NLRB, Legislative History of the Labor Management Relations Act, 1947, at 1303 (1985) (emphasis added). By adopting an interpretation of "reasonably to direct" that looks to the scope and scale of the authority, the purpose of the statute can be effected.

B. The NLRB Erred in *Oakwood* by Adopting Interpretations of "Assign" and "Responsibly to Direct" that Conflict with the Text, Legislative Intent and Policy Rationale of the NLRA.

In *Oakwood*, the majority on the Board defined the terms "assign," and "responsibly to direct." It defined "assign" to mean the specific act of designating an employee to a specific place (e.g. appliance department), appointing an employee to a shift (e.g. night), or giving significant overall duties, i.e., *tasks*, to an employee (e.g. restocking shelves). 348 N.L.R.B. at 689 (emphasis added). Additionally, the Board defined "responsibly to direct" as the authority to direct work and take corrective action, delegated by the employer, such that a failure to take action would lead to adverse consequences. *Id.* at 689, 692. These interpretations, however, cannot be reconciled with the text, purpose or policy behind the NLRA.

1. The *Oakwood* majority interpretation ignored established canons of statutory interpretation.

The 3-2 majority in *Oakwood* failed to respect the canons of statutory interpretation in developing the definitions of the statutory functions "assign" and "responsibly to direct" by rigidly applying the dictionary definitions despite case law holding that the terms were

ambiguous. *See* 348 N.L.R.B. at 689-90. Furthermore the definitions the Board arrived at violate the rule against surplusage.

It is a "cardinal principle of statutory construction that we must give effect, if possible, to every clause and word of a statute." *Williams v. Taylor*, 529 U.S. 362, 404 (2000) (internal quotations omitted). The majority's definitions of "assign" and "responsibly to direct" overlap to such a degree as to render "assign" redundant in the statute. Directing an employee to a specific place of work or to a specific task (assign) would be completely subsumed within the authority to direct work (responsibly to direct). Any interpretation of the NLRA should give effect to all of the twelve statutory terms and therefore the *Oakwood* majority's interpretation cannot be correct.

2. This Court should reject the *Oakwood* definitions because they thwart the legislative intent.

As discussed above, the NLRA is intended to distinguish between employees with minor supervisory duties such as straw bosses, or lead-men, and the actual supervisors with the authority to hire or fire, discipline or promote. The interpretation arrived at by the NLRB in the *Oakwood* majority is too broad and fails to recognize this distinction.

The definition of "assign" adopted by the Board includes not only assignment of the basic terms of employment such as an employee's classification, but also basic tasks such as where an employee would be assigned, or even basic tasks such as whether the employee should install roof shingles or hang a door. This definition focuses on task assignments made to employees, instead of the assignment of employees, thereby encompassing "a quintessential function of the minor supervisors whom Congress clearly did *not* intend to [exclude]." *Oakwood Healthcare, Inc.*, 348 N.L.R.B. at 702 (dissenting opinion).

Furthermore, the definition of "responsibly to direct" is so generally worded as to include any direction of work that an employee is held accountable for. This test is so broad as to sweep

up an employee, responsible for janitorial duties, who instructs one co-worker to sweep and another to mop. This definition, however, fails to address a fundamental difference between supervisors who oversee "operational departments and the accountability that goes with it" and minor supervisors with a "kind of one-on-one task direction" who were not intended to fall within the definition of supervisor. *Oakwood Healthcare, Inc.*, 348 N.L.R.B. at 706 (dissenting opinion). An interpretation so directly antithetical to the intent of the statute cannot be correct.

3. Any interpretation of § 152(11) must be applicable to modern industrial life and mindful of the practical consequences.

This Court has stated that the Board has the responsibility to adapt the NLRA to "changing patterns of industrial life." *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 266 (1975). Times have changed and the NLRB has failed in meeting this responsibility. In the early days of the Wagner Act, the battle was between "those on the bottom and those on the top over the loyalties of those in middle." Weiss at 398. Today presents a different challenge in which "workers who use skill and education to exercise judgment but who have little control over coworkers" should be protected. *Id.* at 398. In the modern workplace, "with flattened managerial hierarchies, and with managerial authority pushed downward to the lowest possible level and distributed as widely as possible, a broad construction of § 152(11) factors could render nearly everyone a supervisor." *Id.* at 398. But the *Oakwood* ruling can be characterized as to "have largely ignored the rapidly changing nature of the workplace and the everyday reality of American workers." Weisner at 490. The *Oakwood* decision "threatens to create a new class of workers under Federal labor law: workers who have neither the genuine prerogatives of management, nor the statutory rights of ordinary employees." *Oakwood Healthcare, Inc.*, 348 N.L.R.B. at 700 (dissenting opinion).

The Board was required to "calculate the possible consequences of its reading of the Act and to weigh them against the evidence of Congressional intent." *Oakwood Healthcare, Inc.*, 348 N.L.R.B. at 705. The *Oakwood* majority, however, restricted its analysis so as not to consider "predictions of the results it will entail" and defended its decision on healthcare-specific circumstances. *Id*. at 689-90, 695. The majority stated it "[does] not prejudge what result in any given case will be" and therefore, this interpretation of term "assign" did not preclude it from "continu[ing] to analyze each case on its individual facts, applying the standards set forth herein in a manner consistent with the Congressional mandate set forth in [29 U.S.C. §152(11)]." *Id.* at 690. Thus, the definition was never intended to apply generally and should not be accepted as such.

There are consequences across the entire labor sector with an overly broad interpretation. Although the *Oakwood* Board analyzed a healthcare case, the ramifications of this definition, if accepted, could significantly affect eight million American workers who direct work of less skilled subordinates in at least 24 professions ranging from advertising to computer system analysts to electricians. Scott T. Silverman & Jennifer L. Watson, *The Impact of Recent NLRB Decisions on Supervisory Status*, 81 Fla. B.J. 37, 39 (2007). The *Oakwood* interpretations certainly beg the question of how much of the workforce can be excluded from protection "without rendering [§ 157] a hollow promise." Weiss at 398. An employer "seeking to exclude a borderline supervisor from collective bargaining or to avoid an [unfair labor practice] charge" can exploit a sweeping definition to his favor. *Id*. at 366. Thus, contrary to the NLRA's purpose in leveling the playing field between employee and employer, the *Oakwood* decision encourages "employers to rearrange job duties to maximize statutory exemptions . . . giv[ing] an unfair

advantage to businesses who seek to avoid unionization." Weisner at 485. Such an interpretation of the NLRA is unquestionably wrong.

C. Mr. Noonan Is Not a Supervisor Because He Lacks the Genuine Supervisory Authority Congress Intended to Include in § 152(11).

Mr. Noonan is not a supervisor. There is nothing in the record to indicate that Mr. Noonan had genuine supervisory authority so as to change the status of an employee with Empire, assign employees to work anywhere other than the Complex or outside of their classifications, or that Noonan ever changed an employee's basic hours. Mr. Webb, as the supervisor, was responsible for directing the employees in their work, mediating conflicts, resolving grievances, and was authorized to use independent judgment to hire, fire, promote, suspend, assign, reward, discharge, and discipline employees. (R. at 6.) It is Mr. Webb who had men under him and was responsible for the running of Bushwood Towers. Mr. Noonan, on the other hand, is a senior handyman who spends almost all of his week doing repair work, is paid the senior handyman rate, is subject to the same working terms as all union employees, and has no department under his direction; no independent authority on behalf of Empire. Thus, Noonan is precisely the type of employee who stands so unequal with his employer that without his right to union representation, he is left without his fundamental recourse in negotiating the terms of his livelihood.

D. Assuming the *Oakwood* Definitions Control, Mr. Noonan Is Not a Supervisor Because His Actions Were Not a Regular and Substantial Exercise of Supervisory Authority.

Even assuming *arguendo*, that the Board was correct in *Oakwood*, Mr. Noonan is not a supervisor because his exercise of supervisory authority was, at most, insubstantial, irregular, and sporadic. The Board has consistently affirmed the legal standard that "[a]n employee who substitutes for an absent supervisor is not deemed to be a supervisor *unless his exercise of*

supervisory authority is both regular and substantial." *Brown & Root, Inc.*, 314 N.L.R.B. 19, 20-21 (1994) (emphasis added). There is not "a strict numerical definition of substantiality" for a substitute supervisor. *Oakwood Healthcare, Inc.*, 348 N.L.R.B. at 694. Establishing supervisor status requires more than exercising "statutory supervisory authority when substituting." *Brown & Root, Inc.*, 314 N.L.R.B. at 21. It must also be established that the employee's "assumption of supervisory duties is anything other than insubstantial, irregular, and sporadic." *Id.* at 20-21. The burden of proving that the supervisor exception applies falls on the party asserting supervisor status exists. *Oakwood Healthcare, Inc*., 348 N.L.R.B. at 687.

1. Post-*Oakwood* case law shows that to establish substantial supervisory authority, "assign" requires the authority to compel assignments, "responsibly to direct" requires evidence of accountability, and "discipline other employees" requires an independent-decision maker authority.

Post-*Oakwood* case law has attempted to clarify and limit the broad definitions the Board established in interpreting the NLRA. Even accepting the broadened definition of supervisor, these subsequent decisions establish important limitations on "assign", "responsibly to direct" and "discipline other employees" in an attempt to distinguish supervisors from employees with minor supervisory authority.

Subsequent decisions have held that *Oakwood* does not stand for the proposition that all task assignments to employees are "assignments" for § 152(11) purposes, only that *some* may be reachable. The Board clarified this point when it applied the *Oakwood* definition of "assign" to a non-health care case the same day as *Oakwood* in *Croft Metals, Inc.*, 348 N.L.R.B. 717 (2006). In *Croft Metals, Inc.*, the Board held that lead persons did not have the authority to assign because they did not prepare the posted work schedules for employees, appoint employees to the production line, departments, shifts, or any overtime periods, or give significant overall duties to employees. *Id.* at 718, 721-22. Additionally, the Board held occasionally switching tasks among

employees without proof of frequency is a "sporadic rotation of different tasks by the lead person [that] more closely resembles an 'ad hoc instruction that the employee perform a discrete task' during a shift" and does not confer supervisory status. *Croft Metals, Inc.*, at 723; *see also Talmadge Park, Inc. and New England Health Care Employees Union*, 2007 N.L.R.B. LEXIS 536, 26 (Dec. 28, 2007) (holding that filling in vacancies with employees from other departments if necessary and calling for repairs for washers or dryers was not supervisory); *Jochims v. NLRB*, 480 F.3d 1161, 1172-73 (D.C. Cir. 2007) (acknowledging an employee's request to leave early, without consulting management, for emergency situations such as an illness or a family crisis is not assignment). Lastly, on the same day as *Oakwood*, the Board held in *Golden Crest Healthcare Ctr.* that for assignment, it must be shown that the "putative supervisor has ability to *require* that a certain action be taken" and is not established where the authority is "merely to *request* that a certain action be taken." 348 N.L.R.B. 727, 729 (2006).

Golden Crest Healthcare Ctr. also limited the definition of "responsibly to direct." The Board clarified that "a prospect of adverse consequences," as required by the *Oakwood* definition of "responsibly to direct," requires evidence of actual accountability. *Id.* at 731. Even though the Board determined that the nurses did direct within the meaning in *Oakwood* by directing nurses to perform certain tasks when the charge nurse determined it was necessary, the charge nurses were not accountable because there was no evidence that "any charge nurse had experienced any material consequences to her terms and conditions of employments, either positive or negative, as a result." *Id.* Furthermore, the Board explained that such proof "must be more than-merely-paper showing . . . . That is, where accountability is predicated on employee evaluations, there must be evidence that a putative supervisor's rating for direction of subordinates may have . . . an effect on that person's terms and conditions of employment." *Id.*;

see also Croft Metals, Inc., 348 N.L.R.B. at 722 (holding lead persons are accountable because the record revealed the employer disciplined lead persons with written warnings due to their crew's failures in meeting production goals or other shortcomings of the crew).

Oakwood did not directly address "discipline other employees." Therefore, the well-established NLRB case law on disciplining is unchanged. The Board has consistently held that "discipline other employees" requires the exercise of independent judgment and not just routine or clerical duties. For instance, in *Brown & Root, Inc.*, the Board held that safety citations, that do not in themselves result in disciplinary actions, are not effective recommendations for discipline, even if management places great weight on them or they customarily triggered independent investigations by the safety supervisor that could result in disciplinary action. 314 N.L.R.B at 23 ("[I]t is clear that no disciplinary decisions are made without independent investigation by acknowledged supervisors."). This principle is also evident in a recent holding by the Board that sending an employee home on rare occasions without first being instructed by management, for obvious violations of the rules, such as drunkenness, do not require independent judgment. *Jochims*, 480 F.3d at 1171-72.

2. Mr. Noonan is not a supervisor under the *Oakwood* standard because he was not authorized to compel assignments, he was not accountable for directing employees, and his disciplinary decisions did not demonstrate an exercise of independent judgment.

The Board erred by holding that Mr. Noonan is a supervisor, because he did not have the authority to "assign" and compel his assignments, he was not accountable for the direction of employees, and his reports for rule violations were not disciplinary decisions that demonstrate an exercise of independent judgment.

Mr. Noonan's actions did not rise to the level of statutory assignment. Mr. Noonan either assigned discrete tasks or he otherwise lacked the authority to compel its performance. Similar

to the lead persons in *Croft Metals, Inc.*, there is nothing in the record to suggest that Mr. Noonan was in any way responsible for preparing the daily work schedule, appointing staff to other departments from which they normally report to, or giving significant overall duties. Additionally, there is nothing to indicate that Mr. Noonan's evaluation and assignment of employees to perform repair work based on their demeanor and skill was anything more than a discrete task necessary to complete the job at hand. The record suggests that the majority of Mr. Noonan's assignments to specific jobs and duties were routine and predictable, such as plumbing jobs and boiler checks. (R. at 8.) Furthermore, neither Mr. Noonan's request for two porters to clear snow nor his suggestion to an employee to leave early for an emergency required independent judgment. (R. at 9.) Lastly, Mr. Noonan does not have the authority to "assign" because it has not been established that Noonan could compel the performance of any task.

Mr. Noonan also did not have the authority "responsibly to direct" because Empire has not established that Mr. Noonan was held accountable in any way for other employees completing their tasks. The record suggests nothing more than Noonan being answerable to his employer, Empire, as a senior handyman. No evidence indicates that Empire has ever disciplined Mr. Noonan for failing in his duties while substituting for Webb or that Mr. Noonan was informed that of potential adverse consequences. Furthermore, Empire has failed to show that the Mr. Noonan's year-end evaluation factored in his performance in direction and that such evaluation would lead to consequences.

Finally, Mr. Noonan did not have a supervisory authority to "discipline other employees" because he could not independently discipline any employees. Mr. Noonan's disciplinary reports for safety violations were not effective recommendations for discipline because all of his reports were merely placed in the employee's permanent record. (R. at 8.) It was Webb, the actual

supervisor, who decided on a case-by-case basis whether to follow up with disciplinary action. (R. at 8.) Furthermore, Mr. Noonan's actions in reporting one porter for being drunk and another for being asleep on the job were not an exercise of independent judgment. (R. at 9.) Rather, reporting this obvious violation was required by the company policy "to verbally report any and all unsafe working conditions or unsafe work practices by co-workers to Webb." (R. at 8-9.) That these reports may have had an incidental affect on the employees' reviews does not negate the fact that Mr. Noonan was acting within the capacity that every other employee was required to according to the company's policy.

Since Mr. Noonan's actions during his employment with Empire never rose to the level of any of the twelve listed statutory functions, the percentage of time spent covering for Mr. Webb's absence is irrelevant. Mr. Noonan's actions were not those of a statutory supervisor. He does not qualify as a supervisor under the NLRA and must be granted union representation.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests this Honorable Court **AFFIRM** the decision of the United States Court of Appeals for the Thirteenth Circuit, with respect to the ADA claim, and **REVERSE** the decision of the United States Court of Appeals for the Thirteenth Circuit, with respect to the NLRB determination.

Respectfully Submitted,

Team 9

Counsel for Petitioner

Date: February 2, 2009.