U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210

In the Matter of:

UNITED STATES DEPARTMENT OF LABOR, OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS,

PLAINTIFF,

v.

UNITED AIRLINES, INC.,

DEFENDANT,

and

AIR LINE PILOTS ASSOCIATION, INT'L,

INTERVENOR.

ARB CASE NO. 97-024

ALJ CASE NO. 94-OFC-1

DATE: July 25, 2000

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Plaintiff:
Dolores A. Sullivan, Esq.; Heidi Dalzell-Finger, Esq.; James D. Henry, Esq.; Henry L. Solano, Esq., *U. S. Department of Labor, Washington, D.C.*

For the Defendant:
Marian C. Haney, Esq., Of Counsel, *Mayer, Brown & Platt, Chicago, Illinois*

FINAL DECISION AND ORDER

This case arises under §503 of the Rehabilitation Act, 29 U.S.C.A. §793 (West 1999), and its implementing regulations at 41 C.F.R. Part 60-741 (1999).[1/] Plaintiff, Office of Federal Contract

[1/] This appeal was decided by a panel of two Board members pursuant to Secretary's Order 2-96. 61 Fed. Reg. 19,978 §5 (May 3, 1996).

Compliance Programs (OFCCP), charged United Airlines, Inc. with violating §503 by rejecting the complainant, Paul Pyles, for a position as a commercial aircraft pilot in 1991.[2/]

After an administrative hearing, the Administrative Law Judge (ALJ) issued a decision and order in which he recommended that the charges against United be dismissed. Docket No. 94-OFC-1 (ALJ Nov. 29, 1996)("ALJ D&O"). The ALJ concluded that OFCCP failed to establish that Pyles was an "individual with a disability" within the meaning of §503, a threshold requirement of the Act. The ALJ also concluded that even if OFCCP had proved that Pyles did have a disability, the claim should be dismissed because United did not reject Pyles because of the disability. Finally, the ALJ concluded, even if United had rejected Pyles because of his condition, the fact that Pyles was precluded from only one position, pilot of 747 commercial aircraft at United Airlines, meant he was not substantially limited in the major life activity of working.

We have jurisdiction to review the ALJ's decision and to issue the Department's final decision and order pursuant to 41 C.F.R. §§60-30.35, 60-30.37 (1999).

For the reasons discussed below, we agree with the ALJ that OFCCP failed to show that Pyles was an "individual with a disability" within the meaning of §503, that United rejected Pyles because of his alleged disability, or that Pyles' condition substantially limited him in a major life activity.

STATUTORY BACKGROUND

Section 503(a) of the Rehabilitation Act ("the Act") applies to federal contractors, and requires them to "take affirmative action to employ and advance in employment qualified individuals with disabilities."[3/] 29 U.S.C. §793(a). Although §503(a) does not expressly mention discrimination, it has long been settled that §503(a) does prohibit federal contractors from discriminating against workers because of the workers' disabilities. *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624, 633 n.12, 104 S.Ct. 1248, 1254 n.12 (1984).

The Act defines an individual with a disability as:

An individual with disabilities is one who:

[2/] United held contracts with the U.S. Postal Service which required that United transport mail on any flight in its system. Accordingly, United was a federal contractor within the meaning of §503,and United's decision not to employ Pyles is covered by the Act. *See OFCCP v. Keebler* Co., No. 97-127 (ARB Dec. 1999).

[3/] The Act was amended in 1992, after United rejected Pyles for transfer. However, the only amendments relevant to this case involved renumbering of §793 and substitution of the term "individual with a disability" for "handicapped individual," with the latter not being intended as a substantive change. Accordingly, we refer throughout this decision to the section numbers currently in effect and use the term "individual with a disability" rather than "handicapped individual."

(i) has a physical or mental impairment which substantially limits one or more of such person's major life activities;

(ii) has a record of such an impairment; or

(iii) is regarded as having such an impairment.

29 U.S.C.A. at §705(20)(B). Thus, an individual may qualify as a member of the protected class based on an impairment that substantially limits him or her in a major life activity, **or** based on a record of a previous disability, **or** based on the employer's erroneous belief that he or she has a disability.

The Americans With Disabilities Act (the ADA) also prohibits disability discrimination in employment; it applies to employers not covered by §503. The ADA definition of an individual with a disability is the same as the §503 definition:

The term "disability" means, with respect to an individual –

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment.

42 U.S.C.A. §12102(2) (West 1995).

Both the ADA and the Rehabilitation Act require that the statutes be construed in harmony with one another. *Id*. at §12201(a); 29 U.S.C.A. §793(d).

FINDINGS OF FACT

Paul Pyles

Paul Pyles served as a pilot during his military service in the Air Force from1953 to 1957. From 1958 until 1965, he worked for the Air Force as a civilian; he flew military aircraft as an air reserve technician and as an instructor. In 1965, Pyles worked for National Airlines as an aircraft power plant mechanic and flew aircraft during his off time to log flying hours for his pilot's license. Pyles began flying as a commercial pilot for Pan Am in 1966. In 1975, Pyles went on disability leave from Pan Am when his myopia progressed to the point where it could not be corrected to 20/20 with glasses, an FAA requirement for a first class medical certificate. While on medical leave from Pan Am from 1975 to 1986, Pyles worked for Caribe Aviation as a marketing manager and was self-employed as an aviation consultant. He was flying with a third class license.

In early 1986, Pyles had radial keratotomy ("RK") surgery on both eyes. The surgery returned vision in both eyes to normal, and he was again able to qualify for a first class medical certification. In October 1986, Pyles resumed his job as a commercial aircraft pilot for Pan Am. Pan Am was fully aware of Pyles' RK surgery when it accepted him back to active duty in 1986.

Early in his career with Pan Am, Pyles flew 707, 720, and 727 aircraft. After his return to Pan Am in 1986, however, Pyles consistently flew as a first officer, 747 type aircraft. The "first officer," is the co-pilot.

Transfer to United

In late 1990, United purchased some of the Pan Am flight routes and agreed to employ some of the Pan Am pilots who were flying those routes. Pyles was in the group slated for transfer to United. A separate agreement between United and the Air Line Pilots Association expressly conditioned transfer from Pan Am to United on the pilots' ability to meet United's medical standards for pilots even if those standards were more stringent than FAA licensing standards.

During his medical examination at United in April 1991, Pyles reported his RK history. The examining physician disqualified Pyles for work as a United pilot because of his RK scarring. "During your recent medical evaluation at United Airlines, you were not found to be qualified as a flight officer due to the presence of bilateral radial keratotomy scars. No other aspects of your exam were disqualifying." PX 9; Tr. 56.

Pyles protested, but to no avail, and returned to Pan Am and his former job as a 747 first officer. Pyles continued to fly for Pan Am until he was laid off in December 1991.

United has three pilots in each 747 aircraft, the captain, the first officer, and the second officer. Pyles had never flown in the captain position for Pan Am and did not expect to work as a captain for United. Eligibility for the captain position is based at least in part on seniority and Pyles did not have enough. Had Pyles been accepted by United, he would have flown 747 aircraft as a first officer until he reached age 60. Then he would have transferred into the second officer position until retirement, which would be at no fixed age.

Pyles testified that he had no RK-related vision problems. Pyles also testified that he knew of no other commercial airline that would disqualify him because of his RK scars and that all major air carriers employ numerous pilots who have had RK surgery.

Radial Keratotomy

RK surgery leaves scars on the cornea. In some people, these scars can have the effect of weakening the cornea and can cause intermittent blurring of vision, glare and halos. These residual effects tend to diminish over time but can also be permanent. There is no objective medical test for identifying RK patients with residual corneal weakening, blurring, glare or halos. The physician must depend on self-reporting.

United's No-Hire Policy

In the mid 1980s, United's chief physician, Gary Kohn, adopted an informal policy of not hiring RK pilots. Dr. Kohn did not think there was enough reliable evidence about the long-term effects of RK surgery to judge whether pilots with RK histories could fly as safely as pilots without RK scarring. Kohn opted for an absolute no-hire policy over a case-by-case policy because of the lack of reliable medical testing.

Evidence that long-term side-effects were negligible in the general population of RK patients increased during the period 1985 to 1991. However, Kohn did not think it was enough to warrant a change in policy:

> It seemed to me that as with many other decisions we've made in aviation medicine, maybe even in occupational medicine in general, the issue is when does it become a safety issue and when is it not a compromise of safety. To the extent that we can use objective data to do that, I think you have to do that. I think many times, though, you have to make a decision when the data is not clear, and if it's not clear and if it's forthcoming, and if it's evolving, in our business, the aviation safety business, you have to take the conservative approach.

Tr. 410-411. From March 1987 to February 1994, approximately 35 to 40 RK pilots who applied for pilot positions with United were rejected by United. In 1993, Dr. Kohn changed the policy from an absolute no-hire rule to a case-by-case rule.

United's RK Incumbents

During the years of United's policy against hiring RK pilots, Dr. Kohn became aware of three incumbent United pilots with RK histories. In two of the cases, the discovery was made several years after the pilots' surgeries. Kohn did not ground these two pilots, reasoning that they had demonstrated for a significant period of time after RK surgery that they had been able to operate United airplanes and follow United's procedures safely and without difficulty.

> Well, when we found out about [one of the RK incumbents] we found out that she had an extensive period of time – I believe it was something like a decade; it may have been more or less, where sort of a natural experiment had been done, not one that I would intentionally do or foist upon our passengers, but I guess the best way to explain this is that the entire point of aviation medicine or maybe occupational medicine in general is to make a decision whether an individual is safe on the job, safe for themselves and safe for others. You can do this by looking at a whole bunch of people over a long period of time, and that's how we primarily do it, we look at studies; or you can look at an individual and see how they do. Well, you can't do that in any good conscience with a pilot. You can't say, "Well,

> let's see how it goes with this pilot," but with [the two RK incumbents], it had happened. We didn't know it, but it happened. We couldn't ignore the fact that these people had demonstrated that for a very long period of time.

Tr. 414-415.

Pyles' employability after 1991

After Pyles was laid off by Pan Am in December 1991, he bought an airplane, hoping to set up a charter business in the Bahamas, his home since 1968. However, Pyles was unable to get a permit to operate the business in the Bahamas, or indeed, to work in the Bahamas at all. (He did get a work permit in 1995 which allowed him to work in his own business in the Bahamas but not for other businesses there.) Pyles testified about other efforts he made to gain employment after 1991 and explained why those particular efforts were not successful. Delta did not hire him when he applied there in 1991 because Delta was only hiring pilots for 310 and 727 aircraft and 747 captains. Freddie Laker was hiring only 727 pilots. A local charter service turned him down because he did not have a Bahamian work permit. U.S. African gave no reason. The Florida Key Club decided not to switch from their existing charter operation to one run by him. Pyles made many other efforts to gain employment as a pilot, as a marketing manager, and as a consultant in various kinds of airline industry positions. By the time of the trial Pyles was 62 years old and was still unemployed.

Pyles reapplied for a pilot position at United in 1992 and was invited to come to United's Denver office. Pyles thereupon wrote to United asking if the RK policy was still in effect, but when he received no response to his letter, he dropped the matter. At no time did Pyles apply at United for any position other than pilot.

DISCUSSION

OFCCP contends that Pyles qualifies as an individual with a disability because he has a "record of" an impairment–myopia–which substantially limited him in the major life activity of working from 1975 to 1986. OFCCP also contends that Pyles qualifies as an individual with a disability because United "regarded" him in 1991 as being substantially limited in the major life activity of working due to impaired vision caused by RK scarring. We review these issues *de novo*, with due regard for the views of the ALJ. 5 U.S.C.A. §557(b) (West 1996); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 71 S.Ct. 456 (1951).

The "record of" charge

OFCCP argues that Pyles was substantially limited in his ability to work as a pilot of commercial aircraft from 1975 to 1986 because his uncorrected vision was so poor he could not fly a plane–or, indeed, perform any kind of work–without glasses. Thus, OFCCP asserts, Pyles qualifies as an individual with a disability for purposes of his claim against United based on a "record of a disability." The ALJ concluded the severity of Pyles' myopia had to be judged in its corrected state,

not in its uncorrected state. "It is the extent to which one is impaired by his or her corrected vision that should be controlling on the question whether such an impairment substantially limits a person's activities." ALJ D&O, slip op. at 11.

At the time the ALJ issued his recommended decision in this case, decisional law under the ADA was mixed on the question whether the severity of an individual's impairment should be evaluated in its mitigated or unmitigated state. *See Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 477, 119 S.Ct. 2139, 2144 (1999). The Acting Assistant Secretary for Employment Standards had ruled that under §503 the severity of an impairment should be judged in its unmitigated state. *OFCCP v. Commonwealth Aluminum*, No. 82-OFC-6 (Ass't Sec'y Feb. 10, 1994).

However, in 1999, the Supreme Court construed the term "an impairment that substantially limits the complainant in a major life activity" under the ADA and ruled that the impairment must be judged in its mitigated state. "Looking at the [ADA] as a whole, it is apparent that if a person is taking measures to correct for, or mitigate, a physical or mental impairment, the effects of those measures–both positive and negative–must be taken into account when judging whether that person is 'substantially limited' in a major life activity and thus 'disabled' under the Act." *Sutton*, 527 U.S. at 482, 119 S.Ct. at 2146.

The Court focused on three aspects of the ADA. First, it noted that the statutory definition of disability–"a physical or mental impairment that substantially limits one or more of the major life activities"–is in the present tense. "Because the phrase 'substantially limits' appears in the Act in the present indicative verb form, we think the language is properly read as requiring that a person be presently–not potentially or hypothetically–substantially limited in order to demonstrate a disability." *Id.*

Next, the Court focused on the fact that the ADA requires individualized assessments of disabilities. Judging impairments in their uncorrected or unmitigated state, the Court concluded, "runs directly counter to the individualized inquiry mandated by the ADA. [This] approach would often require courts and employers to speculate about a person's condition and would, in many cases, force them to make a disability determination based on general information about how an uncorrected impairment usually affects individuals, rather than on the individual's actual condition." *Id*., 527 U.S. at 483, 119 S.Ct. at 2147.

"Finally and critically," the Court focused on the fact that "Congress found that 'some 43,000,000 Americans have one or more physical or mental disabilities. . . .' §12101(a)(1). This figure is inconsistent with the definition of disability pressed by petitioners." *Id*., 527 U.S. at 484, 119 S.Ct. at 2147.

> Had Congress intended to include all persons with corrected physical limitations among those covered by the Act, it undoubtedly would have cited a much higher number of disabled persons in the findings. That it did not is evidence that the ADA's coverage is restricted to only those whose impairments are not mitigated by corrective measures.

Id., 527 U.S. at 487, 119 S.Ct. at 2149.

As far as we can see, this analysis carries over to §503. The Rehabilitation Act also defines "disability" in the present tense and requires an individualized assessment. And, although Congress did not include in the text of the Rehabilitation Act a finding about the number of Americans afflicted with disabilities, §503's legislative history shows that there was general agreement in Congress in 1974 (when §503 was amended to add the "record of" and the "regarded as" clauses) about the number of Americans with disabilities, and that number is consistent with the 43 million mentioned in the ADA in 1991. S. Rep. 93-1297, 93th Cong., 2nd Sess., 1974 U.S.C.C.A.N. 6373, at 6400 ("Estimates of Americans with handicaps range from a low of 28 million individuals to a high of over 50 million").

We afforded the parties in this case an opportunity to file supplemental briefs in light of *Sutton*. Nowhere in its supplemental brief does OFCCP suggest any reason why the *Sutton* analysis does not carry over to §503. Accordingly, we conclude that the reasoning of *Sutton* applies to §503, and that therefore the severity of a §503 complainant's impairment must be judged in its mitigated state.

Applying this standard in the instant case, it is clear that OFCCP has failed to prove that Pyles' myopia in 1975 to 1986 constituted a "disability." The only evidence in the record is that Pyles' corrected vision was less than 20/20. This is not enough to support a finding of fact that Pyles' corrected vision was impaired, much less that it was impaired to the point of disablement. In the ALJ's words:

> OFCCP has the burden of establishing a prima facie case that Mr. Pyles' past impairment substantially limited his major life activities. * * * I find that it has not met this burden with respect to establishing the extent to which Mr. Pyles' myopia affected his employment potential other than that it precluded his employment as a commercial airline pilot because he could not obtain the required medical certificate from the FAA. Paul Pyles' training and skills obviously afforded him other employment opportunities which OFCCP conveniently ignored. Indeed, the limited evidence in this regard does prove that the former airline pilot was employed as a marketing manager in the airline industry and as an aviation consultant while on disability leave from Pan Am.
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> The position taken by OFCCP that Paul Pyles was substantially limited in his major life activities from 1975 to 1986 because his myopia precluded his employment as a commercial airline pilot makes little sense. If this were true, then every pilot who is grounded because myopia prevents the pilot from retaining the

> required FAA certification could file a complaint alleging discrimination by the pilot's employer under Section 503.

ALJ D&O Slip op. at 10-11.

The ALJ went on to rule that since the act of discrimination with which United was charged was its rejection of Pyles because of his RK scars, Pyles' record of myopia was legally immaterial. "Regardless of the position advanced by OFCCP, United's reason for rejecting Mr. Pyles for employment as a pilot related to the existing safety questions surrounding radial keratotomy and was not due to Mr. Pyles' history of myopia." ALJ D&O Slip op. at 12. The ALJ did not expressly state that the Act requires the plaintiff to demonstrate that the record of a substantially limiting impairment caused the employer to discriminate. However, the ALJ clearly assumed that there must be a causal connection between the complainant's record and the adverse employment action.

In its brief to us, OFCCP ignores the ALJ's ruling concerning lack of causality, and simply repeats what it said below, that Pyles' record of myopia qualifies him as a covered individual. United simply asserts, without supporting authorities, that a §503 plaintiff must show a causal connection between the recorded disability and the adverse employment action.

We agree with the ALJ that a "record of" a disability that played no part in the employment action at issue is not a basis for coverage for the following reasons. In its original Appendix to its §503 implementing regulations, OFCCP stated that "has a record of" was included in the Act to protect individuals who have recovered from a disability but are discriminated against because of a condition that no longer exists. "It is included **because** the attitude of employers, supervisors, and coworkers toward that previous impairment **may result in** an individual experiencing difficulties in securing, retaining or advancing in employment." 41 C.F.R. §60-741 App. A (1992) (emphasis added).[4/] OFCCP later dropped Appendix A but adopted EEOC guidance concerning the "has a record of" clause under the ADA. The adopted guidance also makes clear that the adverse employment action must have been caused at least in part by the employer's views concerning the previous impairment. "The intent of this provision, in part, is to ensure that people are not discriminated against **because of** a history of disability." 29 C.F.R. §1630 App., "Section 1630.2(k) Record of a Substantially Limiting Condition" (emphasis added).

These statements accurately reflect Congress' intentions. Congress' reason for amending the Rehabilitation Act in 1974 to add the "record of" clause to the Act was to protect workers from discrimination because of a history of disability. "The amended definition [of "handicapped individual"] . . . takes cognizance of the fact that handicapped persons are discriminated against in a number of ways. First, they are discriminated against when they are, in fact, handicapped (this is

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[4/] OFCCP amended the regulations at 41 C.F.R. Part 60-741 during the pendency of this case. 61 Fed. Reg. 19,336-19,369 (May 1, 1996); effective August 29, 1996, 61 Fed. Reg. 43,466 (Aug. 23, 1996). OFCCP explained that "the revisions do not significantly alter the substance of the existing prohibitions relating to discrimination. Accordingly, in general [the proposed revisions] do[] not affect the applicability of case law (administrative and judicial) developed under section 503." 57 Fed. Reg. 48,085 (Oct. 21, 1992). Neither party in this case asserts to the contrary.

similar to discrimination because of race and sex). Second, they are discriminated against **because** they are classified or labeled, correctly or incorrectly, as handicapped (this has no direct parallel in either race or sex discrimination. . .)." S. Rep. No. 1297, 1974 U.S.C.C.A.N. at 6389 (emphasis added). Indeed, it is the very essence of the "discrimination" concept that one party treats another party unfavorably because the second party has a characteristic that society has determined should not be the basis of unfavorable treatment.

OFCCP's litigating position in this case–that Pyles' (alleged) record of a disability places him within the covered class *per se*–is inconsistent with OFCCP's regulatory statements, and is unsupported by any argument. Nor is OFCCP's litigating position on this issue reconcilable with the fact that the Act **permits** employers to disqualify individuals because of impairments that are not disabilities. *Sutton*, 527 U.S. at 490, 119 S.Ct. at 2150. The practical effect of OFCCP's unexplained position here that there need be no causal connection between the recorded disability and the employer's adverse action would be to prohibit employers from disqualifying individuals based on a non-disabling condition whenever the worker can show he or she had a disability some time in the past. As far as we can determine, OFCCP's litigating position in this case is simply contrary to the statutory scheme and purpose and to OFCCP's own regulatory text. We must therefore reject it. *Cf. Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778 (1984).

The "regarded as" clause

OFCCP also claims that Pyles is a member of the protected class because United erroneously "regarded" Pyles as having impaired vision due to RK scaring.

> [A]ccording to United, RK surgery produces scars on the cornea; these scars cause side effects such as glare and visual fluctuation; and therefore, persons who have undergone RK have difficulties with glare and fluctuations of vision. United's view is that RK patients not only suffer from glare and fluctuating vision, but these conditions so impair their vision that they are unable safely to pilot airplanes, and so United automatically disqualifies them from flight officer employment. In other words, corneas with RK scars are, in United's view, impaired corneas. Because Mr. Pyles has undergone RK surgery and his corneas are scarred United "regards" or "perceives" him as impaired.

OFCCP Br. at 20.

But the record is entirely to the contrary. It shows that Dr. Kohn well understood that RK scars do not necessarily impair vision, that RK side-effects diminish over time, that the rate of diminishment varies among individuals, and that many, perhaps even most, RK patients lose the side-effects fairly early on. Indeed, that was part of the reason Kohn did not ground the two

incumbent pilots who had flown for several years for United without incident after their RK surgeries.[5/]

We agree with the ALJ that "the record does not establish that United regarded Mr. Pyles as impaired or disabled when it rejected him for employment in 1991 because of his radial keratotomy history." ALJ D&O, Slip op. at 16. "I am convinced that United's corporate medical director did not consider all pilots who had undergone RK in the late 1980's and early 1990's as impaired or disabled. Rather, he was concerned with formulating a policy for his company regarding new-hire pilots which he considered at that time to be in the best interests of United and the public from a safety standpoint." *Id*. at 15-16.

Even if OFCCP had proved that United regarded Pyles as having impaired vision, that would not be enough to bring Pyles within the protected class. OFCCP must prove that the impairment attributed to the complainant is one that would substantially limit him in a major life activity.

> By its terms, the ADA allows employers to prefer some physical attributes over others and to establish physical criteria. An employer runs afoul of the ADA when it makes an employment decision based on a physical or mental impairment, real or imagined, that is regarded as substantially limiting a major life activity. Accordingly, an employer is free to decide that physical characteristics or medical conditions that do not rise to the level of an impairment–such as one's height, build, or singing voice–are preferable to others, **just as it is free to decide that some limiting, but not substantially limiting, impairments make individuals less than ideally suited for a job.**

Sutton, 527 U.S. at 490-491, 119 S.Ct. at 2150 (emphasis added). Thus the Court ruled that, "[b]ecause petitioners have not alleged, and cannot demonstrate, that respondent's vision requirement reflects a belief that petitioners' vision substantially limits them, we agree with the decision of the Court of Appeals affirming the dismissal of petitioners' claim that they are regarded

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[5/] That OFCCP did not understand United's logic is further evidenced in OFCCP's arguments that the policy was not justifiable. In that context, OFCCP contends that United's decision not to ground the RK incumbents shows the "gossamer" nature of the no-new-RK-pilots policy, since the two incumbents were in exactly the same position as Pyles – people who flew without incident for years after having RK. However, Pyles was not in the same position as the incumbents. The incumbents had no-incident records under United's system for determining what is and is not safe operation. Pyles had been flying for Pan Am.

OFCCP also sees United's failure to adopt stronger measures to identify incumbent RK pilots as evidence that the no-new-hires policy was irrational if not pretextual. But United's policy was obviously an attempt to balance uncertainties about a relatively low level impairment in a pragmatic way. (Keeping in mind that if an RK pilot experiences RK blurring, etc. seriously enough that an accident occurs despite the presence of two other pilots in the cockpit, the consequences could be catastrophic.) United's decision not to hire RK pilots, but also not to take every conceivable measure to identify incumbent RK pilots, is quite understandable.

as disabled." *Id.*, 527 U.S. at 494, 119 S.Ct. at 2151. (At issue in *Sutton* was United's requirement that pilot applicants have uncorrected visual acuity of 20/100 or better; the *Sutton* petitioners had 20/200 and 20/400 uncorrected vision).

In a companion case involving a decision by UPS to fire a mechanic with hypertension, the Court reemphasized that the "regarded as" clause requires the claimant to show that the employer regarded him or her as **substantially** limited. "As we held in *Sutton* . . . a person is 'regarded as' disabled within the meaning of the ADA if a covered entity mistakenly believes that the person's actual, nonlimiting impairment substantially limits one or more major life activities." *Murphy v. United Parcel Service, Inc,* 527 U.S. 516, 521-522, 119 S.Ct. 2133, 2137 (1999). "[T]o be regarded as substantially limited in the major life activity of working, one must be regarded as precluded from more than a particular job." *Id.*, 527 U.S. at 523, 119 S.Ct. at 2138.

The record in *Murphy* showed only that UPS regarded Murphy as able to perform the duties of a mechanic but not able to perform the commercial truck driver component of his mechanic job with UPS because his hypertension disqualified him for the necessary Department of Transportation license. "[T]he undisputed record evidence demonstrates that petitioner is, at most, regarded as unable to perform only a particular job. This is insufficient as a matter of law, to prove that petitioner is regarded as substantially limited in the major life activity of working." *Id.*, 527 U.S. at 525, 119 S.Ct. at 2138.

This record shows only that Pyles was precluded from a single job – 747 pilot for United Airlines. After being rejected by United, Pyles resumed flying for Pan Am. After Pan Am, Pyles applied to other airlines for pilot positions, and his failure to get any of those positions had nothing whatever to do with his RK scars. Pyles applied for a 747 first officer position with Delta Airlines and was turned down because Delta was hiring only 747 captains (for which Pyles could not qualify due to lack of seniority) and for 310 and 727 aircraft. He was turned down by Freddie Laker because Laker was hiring only 727 pilots. U.S. African gave no reason. Morever, it was not Pyles' physical condition that prevented him from establishing his own charter business in the Bahamas; it was lack of a work permit. His bid to replace an existing charter operation was turned down because the client decided it was satisfied with its existing charter service. Clearly, Pyles' RK scars did not diminish his ability to perform as a pilot anywhere except at United, nor did his scars diminish his ability to perform in consulting and management jobs that drew on his piloting and general business skills and experience.[6/]

[6/] OFCCP invokes Pyles' age, 58 years, in support of its argument that the seriousness of Pyles' alleged impairment is proved by his inability to find work after being laid off by Pan Am. The ALJ ruled that Pyles' age was immaterial to his §503 claim, and we agree. First, the reasons for Pyles' inability to find work after leaving Pan Am might have become relevant had the case reached the issue of damages, but they are not relevant to the question whether United regarded Pyles' vision as impaired to the point of disablement.

More fundamentally, if age discrimination did play a role in Pyles' unemployment after Pan Am, that was to be addressed under the Age Discrimination in Employment Act, 29 U.S.C.A. §623 (West 1999). *Cf.*, *OCAW v. American Cyanamid Co.*, 741 F. 2d 444, 450 n. 1 (D.C. Cir. 1984) (holding that (continued...)

The record in this case shows that even if Pyles' allegedly impaired vision had been severe enough to disqualify him from commercial aircraft piloting positions generally, Pyles could still have flown other aircraft and served as a pilot instructor. Indeed, when Pyles' myopia disqualified him from flying commercial aircraft for Pan Am, he flew aircraft elsewhere that required only a third class FAA license, served as an aviation marketing manager, and was self-employed as an aviation consultant. Even more importantly, after being turned down by United, Pyles continued to fly as a first officer for Pan Am, and no airline other than United turned him down for first or second officer because of his RK scars.

The Supreme Court has addressed and rejected the reasoning OFCCP urges upon us here. "There are a number of other positions utilizing [commercial pilot] skills, such as regional pilot and pilot instructor to name a few that are available to [pilots medically disqualified from piloting commercial aircraft]." *Sutton*, 527 U.S. at 493, 119 S.Ct. at 2151; *see also* 29 C.F.R. part 1630 App. § 1360.2 ("an individual who cannot be a commercial airline pilot because of a minor vision impairment, but who can be a commercial airline co-pilot or a pilot for a courier service, would not be substantially limited in the major life activity of working"). Indeed, OFCCP comes close to admitting that this suit is about Pyles' wish to be employed as a 747 first or second officer at United. "Mr. Pyles was not a typical pilot applicant: he was 58 years old and had more than 25 years of union seniority as a pilot. * * * Pan Am, his employer in 1991, was about to go out of business, and he and all other Pan Am pilots would soon be without a job; **his best chance for any employment as a pilot, let alone at the salary and seniority he had at Pan Am, was through a transfer to United**." OFCCP Br. at 28 (emphasis added).

Pyles' disqualification for a single job cannot be cast into a larger mold by, as OFCCP suggests, calling it a disqualification from a profession. "Flying is Mr. Pyles' profession and 'men of common intelligence would not be shocked to find out that a person is substantially impaired in finding employment if he is disqualified from pursuing the profession of his choice.'" OFCCP Br. at 38 (citing *E.E. Black Ltd. v. Marshall*, 497 F. Supp. 1088, 1102 (D. Haw. 1980)). Flying may be Pyles' profession, but flying 747s for United is not. The purpose of the Rehabilitation Act, like the purpose of the ADA, is to protect persons whose physical or mental impairment **substantially limits** them in a major life activity. "While the [ADA] addresses substantial limitations on major life activities, not utter inabilities, *Bragdon v. Abbott*, 524 U.S. 624, 641 (1998), **it concerns itself only with limitations that are in fact substantial**." *Albertsons, Inc. v. Kirkingburg*, 527 U.S. 555, 565, 119 S.Ct. 2162, 2168 (1999) (emphasis added). "To be substantially limited in the major life activity of working . . . one must be precluded from more than one type of job, a specialized job, or a particular job choice." *Sutton*, 527 U.S. at 492, 119 S.Ct. at 2151. To the extent prior decisional law

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[6/](. . .continued)
American Cyanamid's policy of excluding women of childbearing age from jobs with toxic chemical exposure was not a violation of the Occupational Safety and Health Act, but observing that the policy might be a violation of National Labor Relations Act or Title VII of the Civil Rights Act of 1964).

cited by OFCCP suggests that debarment from the job of one's choice may constitute a serious restriction on the major life activity of working, those decisions have been overruled.[7/]

Accordingly, the recommended decision and order of the ALJ is affirmed and the complaint dismissed.

SO ORDERED.

PAUL GREENBERG
Chair

CYNTHIA L. ATTWOOD
Member

[7/] OFCCP makes two supporting arguments that we do not accept. First, OFCCP contends that we ought to measure the degree of Pyles' reduced employability after United turned him down by assuming that all other airlines apply the no-RK-pilot policy. We recognize that this concept once had some currency. *See e.g., OFCCP v. Washington Metropolitan Area Transit Authority*, No. 84-OFC-8 (Acting Ass't Sec'y, March 30, 1989), *rev'd on other grounds sub nom. WMATA v. DeArmant*, 55 Empl. Prac. Dec. ¶ 40,507 (D. D.C. Jan. 3, 1991). But on reflection and in light of *Sutton,* we find such a presumption to be incompatible with the statutory requirement that §503 claims be assessed on an individualized basis. Moreover, the presumption has been specifically rejected in *Sutton*.

> It is not enough to say that if the physical criteria of a single employer were imputed to all similar employers one would be regarded as substantially limited in the major life activity of working only as a result of this imputation. An otherwise valid job requirement, such as a height requirement, does not become invalid simply because it would limit a person's employment opportunities in a substantial way if it were adopted by a substantial number of employers.

527 U.S. at 493-494, 119 S.Ct. at 2152.

We also reject OFCCP's contention that United's refusal to hire Pyles severely restricted him in the major life activity of working because it barred Pyles from three different pilot positions (captain, first officer, and second officer) and 8000 pilot jobs at United. Pyles' own testimony shows that he was interested in or eligible for a pilot position in only one aircraft (747s) that he had never held a captain position at Pan Am and he lacked sufficient seniority to qualify for a captain position at United, and that he expected to fly in the first officer position (co-pilot) for his first two years and then move to the second officer position (second co-pilot) for the remainder of his tenure with United.