No. 98-1968

In the Supreme Court of the United States

CHARLES F. GRESHAM, PETITIONER

v.

WILLIAM HENDERSON, POSTMASTER GENERAL OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the jury correctly found that the Postal Service's refusal to rehire petitioner was based on factors unrelated to his record of a disability.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 3a-6a) is unpublished, but the decision is noted at 166 F.3d 347 (Table).

JURISDICTION

The judgment of the court of appeals was entered on December 14, 1998. A petition for rehearing was denied on March 10, 1999. The petition for a writ of certiorari was filed on June 8, 1999 (Pet App. 1a-2a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner has been an epileptic since childhood and first began having seizures at work in 1978. Ac-

cording to the testimony of petitioner and his physician, these seizures would last no longer than 25 minutes, during which petitioner would go into a trance-like state and be either unresponsive or disoriented and confused. Gov't C.A. Br. 3-4.

Petitioner worked for the United States Postal Service as a distribution clerk beginning in May 1966. Pet. 3. In 1986, the Postal Service discharged petitioner for several on-the-job incidents. The Notice of Removal set out three charges. The first charge concerned erratic behavior during contacts with customers that made petitioner unable to meet the requirements of his position. In particular, petitioner took $10 from a customer who wanted stamps, put the money in his pocket, and took off his tie and unbuttoned his shirt; he took $25 from a customer, said "Oh my God," and left the building; he threatened a customer at his counter by warning her that he was "crazy enough to do anything"; and he responded to a customer's putting $20 on the counter by saying it was "time for me to go" and leaving. Pet. C.A. Br. App. Addendum, PX 29, at 1.

After two such incidents, petitioner submitted assurances from doctors that his problems were under control, and the Postal Service abandoned plans to demote him. When a "fitness for duty" examination showed that petitioner's problems were not under control, the Postal Service attempted to accommodate him by moving him to a temporary position answering the phone and setting meters. Pet. C.A. Br. App. Addendum, PX 29, at 1-2.

The second charge concerned misconduct. The Notice of Removal recited the Postal Service's difficulties in finding work for petitioner after he was removed from his window position, set out its efforts to accommodate him with a light duty assignment, and

charged him with sabotaging those efforts by going AWOL rather than working the assignment it had found for him. Pet. C.A. Br. App. Addendum, PX 29, at 2.

The third charge involved threatening postal employees. The charge specified that, in a conversation with a Labor Relations Assistant:

> You told him that you could not be responsible for your actions, that you were psychotic. As the conversation went on, you told him that you had two firearms charges against you, and that you were dangerous. Not only did the Labor Relations Assistant feel threatened by these comments, but you pose a potential threat to others with whom you have to work.

Pet. C.A. Br. App. Addendum, PX 29, at 2.

Shortly after the effective date of his removal, petitioner applied to the Office of Personnel Management for disability retirement. His application was granted in September, 1986. Pet. App. 4a, 21a-24a.

2. In April 1993, petitioner requested reinstatement to his former employment with the Postal Service. Petitioner stated that his previous "retirement" was based upon seizures that interfered with his ability to perform his duties, and that new drug therapy had abated his seizures. Pet. App. 4a.

The Postal Service official who made the decision whether to rehire petitioner, Ms. Littleton, testified that she reviewed petitioner's work history, including his official personnel file and the previous Notice of Removal. Pet. App. 4a; Pet. C.A. Br. App. 263-272. These showed that petitioner had been disciplined several times for excessive absenteeism, and had been suspended several times. *Id.* at 268-269. Ms. Littleton

did not believe there was a connection between petitioner's medical condition and excessive absenteeism, *id.* at 202, and petitioner himself testified that there were times when his absenteeism was not caused by his epilepsy, *id.* at 116-117.

Ms. Littleton also consulted petitioner's "rap sheet," which showed several arrests. Pet. C.A. Br. App. 259. Petitioner had been fined $10 in 1968 for aggravated assault in an incident that arose from a domestic dispute. Pet. C.A. Br. App. Addendum, PX 35; see also Pet. C.A. Br. App. 82-83. In addition, petitioner had been arrested and charged with aggravated assault in 1982, in an incident in which he brought a gun to the office of his ex-wife. *Id.* at 84-86. The latter charges ultimately were dropped. *Id.* at 87. There was no evidence that petitioner was in a "trance-like" state or exhibited other signs of epilepsy at the time of these incidents.

The Postal Service declined to offer petitioner a position. In a letter to petitioner, Ms. Littleton explained that the Postal Service considers a number of factors in reaching a decision on reinstatement requests, including "safety, attendance, work performance and attitude," and that its decision declining to reinstate petitioner was based upon his work records and evaluation at the time of his separation from the Postal Service. Pet. C.A. Br. App. Addendum, PX 5. Ms. Littleton testified that when she referred to "work performance" she included his disciplinary record. Pet. C.A. Br. App. 266-267. She also testified that her reference to "safety" included a Postal Service policy of "zero tolerance" policy concerning violence in the workplace, which covers threats and perceived threats. *Id.* at 253.

3. Petitioner brought this action, alleging that the Postal Service violated the Rehabilitation Act of 1973, 29 U.S.C. 791, 794, in refusing to rehire him in 1993. Following a jury trial, the jury returned a verdict for the Postal Service. Pet. App. 4a. The district court denied petitioner's motion for judgment as a matter of law and his motion for a new trial, and petitioner appealed.

4. The court of appeals affirmed. Pet. App. 3a-6a. The court first held that the district court did not abuse its discretion in instructing the jury that the Postal Service was not required to consider petitioner's application further if it had genuine concerns that petitioner's past problems would recur. The court rejected petitioner's contention that the instruction improperly permitted the jury to find that the Postal Service was not required to consider petitioner's improved condition. As the court explained, "The jury was free to conclude that the Postal Service believed plaintiff's problems would recur for reasons not related to his disability or that he was not qualified for the position he sought, thereby relieving the Postal Service from an obligation to evaluate his application further." *Id.* at 5a.

The court of appeals also rejected petitioner's contention that he was entitled to judgment as a matter of law or a new trial. Pet. App. 5a-6a. With respect to petitioner's contention that the Postal Service violated the Rehabilitation Act by failing to examine whether his past work record was caused by his disability and by failing to take into account his present medical condition, the court of appeals concluded that "[t]he jury heard evidence and received instructions on plaintiff's theory of his case," but that "[i]t was not required to find in [his] favor." *Id.* at 5a. Based on the evidence in

this case, "[t]he jury was free to find that plaintiff was not qualified for the position or that the Postal Service's hiring decision was not related to his disability." *Ibid.*

The court of appeals also held that the district court did not abuse its discretion in excluding testimony from a friend and former coworker of petitioner that the Postal Service's reasons for not rehiring petitioner were pretextual. Pet. App. 6a. Finally, the court of appeals stated that it would "decline to address [petitioner's] claims that the Postal Service failed to meet its affirmative burdens because the issue was raised for the first time on appeal." *Ibid.*

ARGUMENT

The court of appeals correctly held that petitioner received every opportunity to present his theory of the case to the jury, and that the district court committed no reversible error in conducting the trial. The unpublished decision of the court of appeals does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. Petitioner contends (Pet. 7-12) that further review is warranted to consider whether mitigating measures, such as medication, should be considered in determining whether petitioner is disabled under the Rehabilitation Act. He states that the Postal Service concluded that he was not disabled in 1993, when he sought to be rehired, only because the Postal Service took into account the medication he was taking for his epilepsy in assessing his condition.

This issue is not properly before the Court. The jury was instructed that petitioner was asserting that he had a "past record or history of a substantially limiting condition" when he applied for reemployment in 1993, Pet. C.A. Br. App. 443, not that he had an "actual"

disability at that time. See 29 U.S.C. 706(8)(B) (defining disability in terms of actual disability, record of a disability, or regarded as disability). Petitioner did not object to the absence of any language regarding mitigating measures in the instructions, nor did he request any jury instruction that would have addressed the mitigating measures issue. And petitioner's briefs in the court of appeals did not raise (and the court of appeals did not address) any issue regarding mitigating measures.

In any event, this Court has recently resolved the question whether mitigating measures should be taken into account in assessing the existence of a disability under the Americans with Disabilities Act of 1990 (ADA), and it has rejected the argument petitioner presents here. In *Sutton* v. *United Air Lines, Inc.*, No. 97-1943 (June 22, 1999), this Court held that "disability under the Act is to be determined with reference to corrective measures." Slip op. 15. See also *Albertson's, Inc.* v. *Kirkingburg*, No. 98-591 (June 22, 1999), slip op. 9 (noting that "mitigating measures must be taken into account in judging whether an individual possesses a disability."). The definition of "disability" in the ADA, 42 U.S.C. 12102(2), is "drawn almost verbatim," *Bragdon* v. *Abbott*, 118 S. Ct. 2196, 2202 (1998), from the Rehabilitation Act. Compare 42 U.S.C. 12102(2) (ADA) with 29 U.S.C. 706(8)(B) (Rehabilitation Act). Accordingly, there is no reason to believe that the rule regarding mitigating measures would be any different under the Rehabilitation Act. Thus, the Court has already rejected petitioner's position that mitigating measures should not be taken into account in determining the existence of a disability.

2. Petitioner contends (Pet. 12-15) that the Tenth Circuit erred by declining to address his contention that

the Postal Service failed to meet its affirmative burden of accommodating those who are disabled. The "affirmative burden" to which he refers appears to be the burden of extending to him what he believes to be the "reasonable accommodation" of "perform[ing] medical tests to confirm or deny [a physician's] opinion that [petitioner's] epilepsy and the byproducts thereof are now under medical control, allowing [petitioner] to perform the essential job functions." Pet. 13-14 (quoting Pet. App. 20a). See also Pet. C.A. Br. 35 (stating claim as based on the fact that petitioner "asked [the Postal Service] to accommodate his disability during the application process by taking his epilepsy into account as the cause of his prior poor work record").

The court of appeals did address this contention. It noted that petitioner "argues that the Postal Service violated the Rehabilitation Act when it failed to examine whether his past unfavorable work record was caused by his disability and failed to evaluate his present medical condition." Pet. App. 5a. The court of appeals explained that "[t]he jury heard evidence and received instructions on [petitioner's] theory of his case," *ibid.*, which consisted of his claim that his prior poor work performance and other difficulties were the result of his disability. The jury, however, rejected petitioner's theory. As the court of appeals noted, the jury found that "[petitioner] was not qualified for the position or that the Postal Service's hiring decision was not related to his disability." *Ibid.*[*] There was no basis to overturn that finding.

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[*] It is true that the court of appeals stated, at the end of its opinion, that it "decline[d] to address [petitioner's] claims that the Postal Service failed to meet its affirmative burdens because the issue was raised for the first time on appeal." Pet. App. 6a. In our

3. Petitioner claims (Pet. 17-21) that the decision of the court of appeals conflicts with the Second Circuit's decision in *Teahan* v. *Metro-North Commuter R.R.*, 951 F.2d 511, 517 (1991), cert. denied, 506 U.S. 815 (1992). Petitioner contends that the circuits are divided concerning the standard governing an employer's response to behavior that is a manifestation of a disability.

a. As petitioner points out, the majority of courts have held that an employer may discharge an employee for misconduct, irrespective of whether that misconduct was caused by a disability. See, *e.g.*, *Williams* v. *Widnall*, 79 F.3d 1003, 1006-1007 (10th Cir. 1996); *Newland* v. *Dalton*, 81 F.3d 904, 906 (9th Cir. 1996); *Maddox* v. *University of Tennessee*, 62 F.3d 843, 848 (6th Cir. 1995). Petitioner contends, however, that the Second Circuit adopted a somewhat different approach in *Teahan*, holding that adverse action taken in response to an employee's misconduct that is a manifestation of a disabling condition constitutes discrimination on the basis of disability.

At least one court has suggested that *Teahan* need not be read as broadly as petitioner reads it. In *Crandall* v. *Paralyzed Veterans of America*, 146 F.3d 894, 897 (D.C. Cir. 1998), the court of appeals expressed doubt as to whether *Teahan* "can be read to endorse the general proposition that if a disability causes poor job performance, and if the poor performance causes

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view, the court did address the issue that petitioner raises in his petition, and we cannot determine what issue the court of appeals was declining to address. In any event, if there were any issue that the court of appeals failed to address, review by this Court would not be warranted to consider whether the court of appeals correctly determined—in an unpublished opinion—that petitioner had failed to present a particular issue in the district court.

dismissal, then the dismissal was 'by reason of' the disability." Rather, the court held, "[i]t seems more probable that the court intended merely to be sure that employers could not get off the hook by showing that they bore no discriminatory animus against the disability itself, independently of their attitude toward its manifestations." *Ibid.* Until the Second Circuit clarifies its position, it cannot be concluded that there is a conflict in the circuits on this point.

b. In any event, this case does not present an occasion to address the question whether adverse action taken in response to an employee's misconduct that is manifestation of a disability constitutes discrimination on the basis of the disability. The district court instructed the jury that petitioner had to prove that "[t]he fact that he had exhibited conduct that was a product of a disability was a motivating factor in the Postal Service's decision not to reemploy him." Pet. C.A. Br. App. 441. That instruction closely resembles the rule that petitioner asserts was adopted in *Teahan*: that an employer discriminates against a disabled person when the employer takes adverse action that is motivated by conduct that is a manifestation of the employee's disability. Because the jury resolved the factual disputes in this case on the basis of instructions that embodied essentially the legal rule that petitioner now states he desires, this case does not present the question whether that rule is correct.

4. Finally, petitioner contends (Pet. 22) that the decision of the court of appeals is "inconsistent with the rulings of this Court regarding the affirmative duties of a federal government employer to reasonably accommodate a handicapped person under the Rehabilitation Act." There is, however, no disagreement among the parties in this case regarding whether the federal

government has an obligation to provide reasonable accommodations to a disabled person. Indeed, the instructions informed the jury of the Postal Service's obligations in this regard. The jury was instructed that "qualified individual with a disability" means "an individual with a disability who nevertheless can perform the essential functions of the employment position he holds or desires, *with or without a reasonable accommodation*, and who meets experience and education requirements of the position." Pet App. 14a (emphasis added). The same instruction went on to state that a Postal Service regulation declaring an employee to be ineligible for reinstatement if he or she has been fired for cause "does not override the Postal Service's obligation under the Rehabilitation Act to give individualized consideration to an applicant for reinstatement by an otherwise qualified individual." *Ibid.*

The jury therefore was well aware of its task: to determine whether petitioner could perform the functions of the job with reasonable accommodation, and to determine whether the Postal Service gave proper consideration to his application for reemployment. The jury simply reached a decision with which petitioner disagrees. As the court of appeals held, there is no basis to overturn the jury's verdict in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1999