Ninth Circuit U.S. Court of Appeals Holds United Parcel Service, Inc. Violated Americans with Disabilities Act, Forbidding Deaf Drivers

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Anyone who has traveled on an interstate highway has probably had the same experience: A car gets trapped in the blind spot of a truck, locked in by traffic in adjacent lanes. The truck's turn-signal flickers on and the truck begins to float into the car's lane. Frightened, the driver acts on instinct, blaring the horn to warn the encroaching truck. The truck driver, now alerted to the car's presence, changes course, narrowly averting disaster.

The Department of Transportation (DOT) likely had this scenario in mind when it issued regulations requiring drivers of commercial vehicles to pass a hearing test. The logic of the regulation is borne out by daily experience, not to mention the studies showing that deaf drivers pose greater risks on the road. On October 10, 2006, however, a panel of the United States Court of Appeals for the Ninth Circuit held that the United Parcel Service (UPS), in requiring this DOT-created test of all of its drivers, violated the Americans with Disabilities Act (ADA).

Influenced in part, perhaps, by an amicus brief filed by the Equal Employment Opportunity Commission, which argued that, since UPS already hires drivers with risk factors such as previous accidents, it unlawfully discriminates by excluding the risks inherent in deafness, the court imposed on UPS the burden of proving on a case-by-case basis that a given deaf candidate is unqualified to drive a package car safely. Beyond imposing a financial burden upon UPS itself, it could well be argued that this decision imposes needless safety risks on society at large and is at odds with the text of the ADA and applicable case law.

Factual Background

UPS considers applicants for package car driving positions solely from the ranks of its existing employees, who "bid" on them. As positions become available, they are considered in order of seniority. Potential drivers must then demonstrate that they satisfy a number of requirements, which vary somewhat from UPS district to UPS district. Generally such requirements include: 1) having completed an application; 2) being at least 21 years old; 3) possessing a valid driver's license; 4) having a clean driving record; 5) passing a UPS road test; and 6) passing the physical exam required by the Department of Transportation (DOT) for drivers of commercial vehicles.[1] The DOT physical criterion relevant to this case provides that:

> A person is physically qualified to drive a commercial motor vehicle if that person…. first perceives a forced whispered voice in the better ear at not less than 5 feet with or without the use of a hearing aid or, if tested by use of an audiometric device, does not have an average hearing loss in the better ear greater than 40 decibels at 500 Hz, 1,000 Hz, and 2,000 Hz with or without a hearing aid when the audiometric device is calibrated to American National Standard (formerly ASA Standard) Z24.5—1951.[2]

The current DOT physical standards do not, however, apply to all package car drivers, but only to those driving vehicles with a "gross vehicle weight" or "gross vehicle weight rating" (GVWR) of at least 10,001 pounds.[3] As of October 2003, the UPS fleet contained over 65,000 vehicles, about 6,000 of which have a GVR of less than 10,001 pounds and, thus, were not subject to the DOT hearing standard.[4] Nevertheless, for public safety and administrative efficiency, UPS has required all of its package-car drivers to meet the DOT physical standards, even if they go on to drive package cars that are not subject to DOT regulations.

Named plaintiffs Eric Bates, Bert Enos, Eric Bumbala, Babaranti Oloyede, and Edward Williams were UPS employees who had been denied positions driving package cars because they failed to meet the DOT hearing requirement for drivers of commercial vehicles. They brought suit, alleging that UPS's use of the DOT hearing requirements for drivers of package-cars not subject to DOT regulations constituted unlawful discrimination against deaf applicants in violation of the ADA. The United States District Court for the Northern District of California held that the plaintiffs satisfied their prima facie case of discrimination based upon UPS's categorical exclusion of deaf candidates from positions as package-car drivers, and upon the fact that at least one named plaintiff and one class member had met all criteria for the driving position, aside from the DOT physical.

Specifically, the district court found that Oloyede was "qualified" for the position on the basis of his good driving record, and that class member Elias Habib, a part-time UPS employee who drove a tug vehicle on the air ramp at a UPS facility and possessed a valid driver's license, was likewise qualified. The district court further found that UPS had failed to establish a business necessity defense under the ADA (as well as under the California Fair Employment and Housing Act[5] and Unruh Civil Rights Act[6]) and issued an injunction prohibiting UPS's exclusion of deaf employees from consideration for driving non-DOT-regulated vehicles.

The Decision of the Ninth Circuit Panel

On appeal, in an opinion written by Judge Berzon, the Ninth Circuit panel held, first, that because the alleged discrimination took the form of a qualification standard, the plaintiffs did not have the burden of establishing that the UPS hearing standard excluded individuals who were actually qualified to drive package trucks; second, that UPS had not established a business necessity defense under the ADA; and third, that the district court's injunction had intruded into UPS's business practices to the least degree possible. These holdings give short shrift to the plain language of the ADA and federal precedent requiring courts to choose the side of safety when considering an entity's claims of business necessity in close cases.

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"Qualified" Individuals under the ADA

The ADA prohibits covered employers from discriminating against a "qualified individual with a disability;" that is, 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."[7] UPS argued that the plaintiffs were required to prove that they were "qualified" in order to make a prima facie case of discrimination under the ADA, pursuant to the familiar *McDonnell-Douglas* burden-shifting framework (which, in the case of pattern and practice discrimination, was articulated in *International Brotherhood of Teamsters v. United States*). However, the Ninth Circuit concluded that the burden-shifting framework was irrelevant, insofar as the alleged discrimination was embodied on the face of the contested policy.[8]

Instead, the court held that the plaintiffs must demonstrate their standing to sue by identifying at least one plaintiff "qualified" in the sense that he satisfied all other UPS prerequisites aside from the challenged DOT standard. Thus, considering whether Oloyede had suffered an injury sufficiently "concrete and particularized" and "actual or imminent" to establish standing under the first prong of *Lujan v. Defenders of Wildlife*,[9] the court imported the analysis of a Seventh Circuit holding in a Title VII disparate impact context: "[an unqualified] plaintiff would have no standing to sue… for he could not claim that he was injured… by defendant's use of an employment practice with an allegedly disparate impact."[10] The court applied this analysis to the issue of qualification under the ADA, concluding that the district court's factual findings regarding Oloyede's clean driving record and his earlier bids on a driving position established his having met the other prerequisites of the relevant UPS district. The court further found that the fact that Oloyede subsequently moved to another UPS position from which he was ineligible to bid on driving jobs did not undermine his standing, insofar as he had been "influenced by an allegedly discriminatory policy to avoid humiliating circumstances," and thus was "still aggrieved by that policy [because] he maintain[ed] a continuing interest in the benefit to which access ha[d] been denied."[11]

Significantly, the court held that to establish standing under the ADA, the plaintiffs did *not* have to prove that they were "qualified" in the sense that they *were actually capable performing the "essential function" of driving safely.*[12] UPS had argued to the contrary, pointing out that § 12112(a) of the ADA prohibits discrimination only against *qualified* disabled individuals—those who can perform a job's "essential functions." This argument appeared to find support in the Ninth Circuit's decision in *Kennedy v. Applause, Inc.*[13] which held, "in order to prevail on an ADA [claim], a plaintiff must establish… that he is qualified, that is, with or without reasonable accommodation (which he must describe), he is able to perform the essential functions of the job." The court rejected this UPS argument, emphasizing that § 12112(a) "does not stand alone in the ADA" and that it must be read in conjunction with § 12112(b)(6). This latter provision specifies certain kinds of prohibited discrimination, including "using qualification standards…that screen out or tend to screen out *an individual with a disability or a class of individuals with disabilities*" and lacks § 12112(a)'s express limitation to "*qualified*" individuals with disabilities. Thus, even though § 12112(a) does not prohibit discrimination against *unqualified* individuals, the court concluded that the plaintiffs did not bear the burden of proving that individuals who cannot meet the qualification standard are nevertheless "qualified with regard to the essential job function the standard addresses—here, safety."

In support of its construction, the court suggested that the § 12112(a) specification of a "qualified individual with a disability" would make no sense as applied to § 12112(b)(4), one of the other subsections describing prohibited discrimination, which refers to discrimination against a "qualified individual" known to associate with a disabled individual.[14] The court also relied on the legislative history of the ADA, which it stated, "treat[s] § 12112(b)(6) as a stand-alone provision, making no reference to the 'qualified individual with a disability' language in § 12112(a)."[15] Further, the court distinguished substantial Ninth Circuit precedents it conceded "have stated in general terms that ADA plaintiffs bear the burden of establishing that they are 'qualified individuals with disabilities,'" on the ground that those cases did not "for the most part" deal with challenges to a categorical qualification standard under § 12112(b)(6).

Business Necessity Defense

Of great concern to covered employers wishing to balance ADA compliance with their responsibility not to compromise public safety is the court's decision to uphold the district court's rejection of UPS's business necessity defense. The ADA allows the use of a qualification standard in hiring that would "screen out or tend to screen out an individual with a disability or a class of individuals with disabilities" if it is shown "to be job-related for the position in question and is consistent with business necessity."[16] *Morton v. UPS* established two situations in which a defendant may satisfy its burden under this defense in considering deaf applicants: 1) if "substantially all [deaf drivers] present a higher risk of accidents than non-deaf drivers," or 2) "there are no practical criteria for determining which deaf drivers present a heightened risk and which do not."[17]

In evaluating the expert testimony presented by UPS, the district court had observed that "all other things being equal, a driver with perfect hearing would likely pose less of a safety risk than a driver with impaired hearing," and that "there are, in theory at least, situations where a hearing driver would avoid an accident while a deaf driver, with all of the same training and skills except for hearing, would not."[18] Nonetheless, the district court found that this rationale was insufficient to establish business necessity, as "UPS had failed to demonstrate that those situations where hearing alone makes the difference between an accident and avoiding an accident would ever be confronted by a UPS package-car driver."[19]

The plaintiff's expert had testified that the most comprehensive study on the subject concluded that deaf male drivers pose an increased accident risk almost 1.8 times that of hearing male drivers, and that this study, if anything, under-represented the risk.[20] The district court dismissed this testimony, reasoning that "there was no significant difference in accident rates between deaf and non-deaf females" and that this unexplained gender anomaly served to "negate any conclusion that all or substantially all deaf drivers present a heightened

risk of accidents."[21] The district court did not address, however, UPS's undisputed evidence that its drivers must operate in situations in which a lack of hearing is most dangerous—i.e., when reliance on visual cues are diminished by the darkness of early morning or night, or inclement weather. The district court also disregarded UPS's evidence that most UPS drivers operate in dense urban and commercial areas, in which deaf drivers are particularly dangerous to bystanders.

In concluding that the district court's decision was not clearly erroneous, the Ninth Circuit reasoned that evidence demonstrating that a hearing driver is "generally safer" than a deaf driver with similar skills and characteristics "still does not address the question of whether there are *some* deaf drivers who are as safe or safer than some or all of the hearing drivers that UPS employs."[22] The court described the concept of risk as individual, rather than aggregate:

> How likely is it that the individual driver will get into an accident? If there is, for example, a one percent chance that hearing drivers who have had two prior accidents will get into an accident, yet UPS hires them, and a one percent chance that deaf drivers generally will get into an accident, it is excluding a subgroup no less safe than another subgroup not excluded, and is therefore discriminatory.[23]

The court likewise upheld as not clearly erroneous the district court's findings on the second prong of the *Morton* test—that UPS had failed to prove that it could not modify its existing training and assessment program to determine which deaf drivers are safe. UPS had cited the Supreme Court's holding in *Western Airlines, Inc. v. Criswell*, that if an employer demonstrates a "credible basis in the record" for its safety standard the trier-of-fact should defer to that judgment in a close case, due to the reasonable need to err on the side of caution.[24]

In this case the plaintiffs' expert testified that "there is no evidence available at this point that can point to characteristics among individuals who are deaf or hearing impaired that say this one may be more likely to crash because of the hearing-impairment than another one."[25] The district court had found this testimony non-dispositive, and observed that UPS had failed to consider "obvious" criteria such as whether the deaf driver had completed rehabilitative driver training, possessed a good driving record, previously driven commercial vehicles successfully, or passed a supplemental driving test.

In supporting the district court's analysis in this regard, the court emphasized that its holding turned upon "UPS's failure to adduce any persuasive proof suggesting that its standard is job-related and consistent with business necessity."[26] Rather than evaluating the risks inherent in deaf drivers generally, the court suggested, UPS ought to have evaluated whether it could have developed external procedures for making distinctions on an individual basis.

The District Court's Injunction

The final ADA issue considered by the panel was UPS's challenge to the district court's order requiring that "UPS shall cease using the DOT hearing standard to screen applicants" and stating that if individuals fail the DOT hearing test but meet all other threshold requirements, "UPS shall perform an individualized assessment" of the ability of those individuals, including utilizing "an interactive process designed to identify specific accommodations that would enable the deaf individual to obtain driving work" in non-DOT regulated cars. The court rejected UPS's argument that the DOT standard was the only proven means of screening deaf drivers who "present a genuine risk to safety," stating it had already upheld the district court's finding of facts to the contrary. The court also rejected the argument that the injunction required UPS to use a "specially designed" test "invented by the court," characterizing it as requiring merely *some* form of individual assessment in lieu of categorical exclusion. The court thus concluded the injunction "intruded into UPS's business practices and discretion to the least degree possible under the ADA."

Analysis and Conclusions

The Court's Holding on "Qualification"

In attempting to carve out an exception to the well-established requirement that an ADA plaintiff bears the burden of proving that he is qualified to perform the essential functions of the job he seeks,[27] the court blithely substituted a debatable grammatical conclusion for the straightforward language of two provisions of the statute. Section 12112(a) states: "No covered entity shall discriminate against a *qualified individual* with a disability because of the disability of such individual" (emphasis added). Under the heading "Construction," § 12112(b) states "*As used in subsection (a)*, the term 'discriminate' includes" conduct in the following list. The list includes § 12112(b)(6)(A), which the court characterizes as "stand-alone" but which is, per the clear words of the statute itself, simply one of many forms of conduct which constitute discrimination prohibited by § 12112(a): "utilizing standards, criteria, or methods of administration… that have the effect of discrimination on the basis of disability." The sole function of the provision—like all of the others in § 12112(b)—is to define the discrimination that is prohibited *against qualified individuals*. Thus, a standard discriminating against *unqualified* individuals, would not be prohibited under § 12112(a), and the plaintiffs should have had the same burden of proving qualification imposed by the case law under other provisions of § 12112.

The grammatical contention upon which the court base its interpretation—that another subsection, § 12112(b)(4), would make no sense if it were deemed to be governed by the rule of § 12112(a)—seems almost disingenuous. Section 12112(b)(4) lists as a form of discrimination under § 12112(a) "excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association." This provision simply protects the disabled individual's interest in his associational rights, which would be adversely affected if his associates or relatives were denied employment opportunities on the basis of his disability. Section 12112(b)(4) is no more "stand alone" than the court claims § 12112(b)(6) to be: it simply articulates another form of discrimination against a disabled person, in a situation where a non-disabled person could be the qualified individual actually excluded.

Furthermore, other provisions in the ADA reveal no intention to set § 12112(b)(6) apart from the other definitional

provisions so as to give standing even to non-qualified employees. 42 USC § 12111(8) provides that "for the purposes of this title, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job." Thus, the statutory language itself urges here that UPS's written standards requiring that all applicants for package-car driving positions pass the DOT physical should be considered *as evidence* of what constitutes qualification, not a unique form of discrimination requiring broader protections.

The Court's Holding on UPS's Business Necessity Defense

The second part of the panel's decision is of greater concern, due in part to the statistics it cites which draw attention to the danger the holding could impose on the public. In *Criswell*, the Supreme Court stated "[w]hen an employer establishes that a job qualification has been carefully formulated to respond to documented concerns for public safety, *it will not be overly burdensome* to persuade a trier of fact that the qualification is reasonably necessary to safe operation of the business. The uncertainty implicit in the concept of managing safety risks always makes it 'reasonably necessary' to err on the side of caution in a close case."[28] Here, UPS responded to no less documented a concern than the Department of Transportation's own standards requiring drivers of commercial vehicles be able to hear, codifying the recognition that driver of a large vehicle, with correspondingly large blind spots and the ability to do significantly more damage than a private car, must be able to react instantly to audio signs of danger, such as horn blasts.

In this case, the experts for both the plaintiffs and the defendant testified that no means of distinguishing between "safe" and "unsafe" deaf drivers existed that would not create ethical or safety concerns by requiring on-road experiments. The panel flouted the precedent instructing courts to err on the side of safety by proposing its own series of hypothetical "individualized" screening tests, which even the plaintiffs' expert did not recognize as safe or effective. The panel's almost cavalier dismissal of statistical evidence that deaf male drivers are nearly twice as likely to get into accidents as hearing male drivers (on the grounds that a lack of similar statistics regarding females undercuts its reliability; although the majority of UPS drivers, and truck drivers generally, are male) has caused concern. The first prong of the *Morton* test only requires a showing—made in this case by the study of male drivers—that "substantially all" deaf drivers present a higher risk than hearing drivers.[29] The new burden imposed by the court here—that the defendants prove there are not "*some* deaf drivers who are as safe or safer than some or all of the hearing drivers" has no basis in precedent.[30]

The *Bates* holding—contrary to the Supreme Court's direction in *Criswell* and the Ninth Circuit's holding in *Morton*—creates a situation in which essentially no physical qualification standard imposed by an entity out of concern for the public safety will suffice to meet either prong of the *Morton* test. In practice, *Bates* demands a case-by-case scrutiny based upon each individual applicant, to prevent the exclusion from employment of even a single member of a disabled class who is capable of passing some sort of screening test. This requires that businesses undertake safety and medical analyses for which they are not qualified, and assume the risk of harming innocent parties—including the applicants themselves—in the process.

Endnotes

1 Bates v. United Parcel Service, Inc., No. CV-99-02216, slip op. at 17480 (9th Cir. Oct. 10, 2006).

2 49 C.F.R. § 391.41(b)(11).

3 49 U.S.C. § 31132(1)(A); 49 C.F.R. § 391.21.

4 Bates v. United Parcel Service, Inc., No. C99-2216, 2004 U.S. Dist. LEXIS 21062 at *8 (Oct. 21, 2004 N. D. Cal.).

5 Cal. Gov't Code §§ 12900-12996.

6 Cal. Civ. Code § 51.

7 42 U.S.C. § 1211(8).

8 *Supra* note 1, at 17485.

9 Lujan v. Defenders of Wildlife, 504 U.S. 535, 560-61 (1992).

10 Melendez v. Ill. Bell Tel. Co., 79 F.3d 661, 668 (7th Cir. 1996).

11 *Supra* note 1, at 17489.

12 *Id.* at 17493.

13 90 F.3d 1477, 1480-81 (9th Cir. 1996).

14 *Supra* note 1, at 17495.

15 *Id.* at 17496.

16 42 U.S.C. 12112(b)(6)

17 272 F.3d 1249, 1263 (9th Cir. 2001).

18 *Supra* note 4, at *90.

19 *Id.*

20 *Id.* at *80.

21 *Id.*

22 *Supra* note 1, at 17508.

23 *Supra* note 4, at *79 (citing *Morton v. UPS*, 272 F.3d 1249, 1264 (9th Cir. 2001)) (citations omitted).

24 472 U.S. 400, 419-20 (1985).

25 Appellant's Br. 39.

26 *Supra* note 23, at 1263.

27 *See, e.g.*, Cripe v. City of San Jose, 261 F.3d 877, 884-85 (9th Cir. 2001)("If a disabled person cannot perform a job's 'essential functions' (even with a reasonable accommodation) then the ADA's employment protections do not apply.); *Zukle v. Regents of the Univ. of Cal.*, 166 F.3d 1041, 1046 (9th Cir. 1999); *Kennedy v. Applause, Inc.*, 90 F.3d 1477, 1480-81 (9th Cir. 1996)(In order to prevail on an… ADA [claim], a plaintiff must establish [among other things]… that he is qualified, that is, with or without reasonable accommodation (which he must describe), he is able to perform the essential functions of the job").

28 Western Airlines, Inc. v. Criswell, 472 U.S. at 419 (emphasis added).

29 *Supra* note 23, at 1263.

30 *Supra* note 1, at 17507-08 (emphasis original).