**Golden Gate University Law Review**

Volume 37
Issue 3 *Ninth Circuit Survey*

Article 9

January 2007

# An Employer's Use of Federal Safety Standards to Exclude Individuals with Disabilities: Bates v. United Parcel Service, Inc.

Ian Hansen

Follow this and additional works at: http://digitalcommons.law.ggu.edu/ggulrev

 Part of the Constitutional Law Commons

Recommended Citation

Ian Hansen, *An Employer's Use of Federal Safety Standards to Exclude Individuals with Disabilities: Bates v. United Parcel Service, Inc.*, 37 Golden Gate U. L. Rev. (2007).
http://digitalcommons.law.ggu.edu/ggulrev/vol37/iss3/9

This Note is brought to you for free and open access by the Academic Journals at GGU Law Digital Commons. It has been accepted for inclusion in Golden Gate University Law Review by an authorized administrator of GGU Law Digital Commons. For more information, please contact jfischer@ggu.edu.

# CASE SUMMARY

# AN EMPLOYER'S USE OF FEDERAL SAFETY STANDARDS TO EXCLUDE INDIVIDUALS WITH DISABILITIES

# *BATES v. UNITED PARCEL SERVICE, INC.*

## INTRODUCTION

In *Bates v. United Parcel Service, Inc.*,[1] the United States Court of Appeals for the Ninth Circuit held that a plaintiff challenging a categorical safety-based "qualification standard" under the Americans with Disabilities Act[2] does not have the burden of establishing that she could perform the essential function of generally performing the job "safely."[3] The plaintiff is instead merely required to show that she is "qualified" in the sense that she has satisfied all prerequisites for the position, including any safety-related prerequisites not connected with the challenged criterion.[4] The burden will then shift to the defendant to establish that the challenged qualification standard was job-related and consistent with business necessity.[5] This was an issue of first impression in the Ninth Circuit, though the resolution was forecast by *Morton v. United Parcel Service, Inc.*,[6] a case with "strikingly similar" facts.[7]

---

[1] Bates v. United Parcel Service, Inc., 465 F.3d 1069 (9th Cir. 2006).

[2] 42 U.S.C.A. §§ 12101-12213 (West 2007).

[3] *Bates*, 465 F.3d at 1085.

[4] *Id.*

[5] *Id.*

[6] Morton v. United Parcel Service, Inc., 272 F.3d 1249 (9th Cir. 2001).



Published by GGU Law Digital Commons, 2007

## I. FACTS AND PROCEDURAL HISTORY

*Bates v. United Parcel Service, Inc.* concerned whether the United Parcel Service ("UPS") could, consistent with the Americans with Disabilities Act ("ADA") and California Law,[8] categorically exclude individuals from employment positions as "package-car drivers" because they could not pass a United States Department of Transportation ("DOT") physical.[9] Although UPS required drivers of all package-cars to pass the DOT physical,[10] the DOT itself only required the physical for those driving vehicles with a "gross vehicle weight" and "gross vehicle weight rating" ("GVWR") of at least 10,001 pounds.[11] A class of UPS employees and applicants unable to pass the hearing standard that is part of the DOT physical—a class referred to in the opinion as "Bates" (the name of the original class's lead plaintiff)—challenged UPS's application of the DOT hearing standard beyond its intended scope.[12] Bates contended that UPS could not, in accordance with the ADA, lawfully exclude deaf[13] individuals from consideration for positions that

---

[7] Bates v. United Parcel Service, Inc., No. C99-2216, 2004, U.S. Dist. LEXIS 21062, at *75 (N.D. Cal. Oct. 21, 2004). The primary differences between the two cases are that *Bates* involved a plaintiff class rather than a single individual plaintiff, the Ninth Circuit evaluated the *Morton* case at the summary judgment stage rather than after the presentation of evidence at a trial, and, finally, in *Morton*, "UPS made its argument that deaf drivers cannot drive safely *only* as part of its 'business necessity' defense . . . ." *See* Bates v. United Parcel Service, Inc., 465 F.3d 1069, 1084-85 (9th Cir. 2006) (emphasis in original).

[8] Bates contended that the policy in question violated the ADA, 42 U.S.C. §§ 12101-12213, and two California Laws: (1) the Fair Employment and Housing Act ("FEHA"), California Government Code §§ 12900-12996; and (2) the Unruh Civil Rights Act, California Civil Code § 51. *Bates*, 465 F.3d at 1073. Because the panel ultimately found that the district court's injunction could be upheld solely on ADA grounds and because the pertinent FEHA law had changed since the district court's decision, the panel did not review the FEHA claim. *Id.* at 1074. The panel reversed the district court's finding that UPS violated the Unruh Act, as required by a recent Ninth Circuit decision, *Bass v. County of Butte*, 458 F.3d 978 (9th Cir. 2006). *Id.* at 1094.

[9] *Bates*, 465 F.3d at 1073. "An individual who wishes to become a UPS package-car driver must be an employee of UPS in a qualifying position[,] must 'bid' on a package-car driving position" when one becomes available (the positions are offered to employees on a seniority basis), and "must demonstrate that she satisfies several requirements." *Id.* at 1074. "These requirements vary somewhat from district to district but generally include": (1) having a "clean driving record"; (2) passing a UPS road test; and (3) passing the physical exam the DOT requires drivers of commercial vehicles to pass. *Id.* It was this third requirement that was at issue in Bates. *Id.*

[10] *Id.*

[11] *See* 49 U.S.C.A. § 31132(1)(A) (West 2007) (defining "commercial motor vehicle," drivers of which the DOT regulates, to include any vehicle that "has a gross vehicle weight rating or gross vehicle weight of at least 10,001 pounds, whichever is greater").

[12] *Bates*, 465 F.3d at 1073.

[13] In accordance with the district court's order and the Ninth Circuit's opinion, the term "deaf" is used to refer to individuals who lack sufficient hearing to pass the DOT hearing standard.

did not require them to drive DOT-regulated vehicles.[14]

"The district court found that Bates satisfied his prima facie case based upon a combination of two factors: *first*, UPS's blanket exclusion of deaf individuals, and *second* the credentials of at least one named plaintiff, Babaranti Oloyede, . . . who [was] 'qualified' by virtue of having satisfied all prerequisites for the driving position other than those connected to the DOT standard."[15] Accordingly, the district court denied UPS's motion to decertify the class.[16] "The district court next found that UPS failed to satisfy its burden under the business necessity defense" and that the company's policy of categorically excluding individuals from *all* employment positions as package-car drivers therefore violated the ADA.[17] Based on these findings of fact and conclusions of law, "the district court issued an injunction prohibiting UPS from categorically excluding individuals who fail the DOT [physical] from consideration for positions driving non-DOT-regulated vehicles."[18]

UPS appealed, contending, inter alia, that: "(1) Bates did not establish that any class members are 'qualified'; (2) UPS satisfied its burden under the business necessity defense of the ADA; . . . [and (3)] the [district] court's injunction was an abuse of discretion."[19]

---

[14] Bates v. United Parcel Service, Inc., 465 F.3d 1069, 1074 (9th Cir. 2006). It was undisputed that the DOT standard bars deaf individuals, including members of the plaintiff class, from driving any vehicles weighing 10,001 pounds or more. *Id.*; *see also* Albertson's Inc. v. Kirkingburg, 527 U.S. 555, 570 (1999). It was equally undisputed that some vehicles in UPS's fleet have a GVWR of fewer than 10,001 pounds and are therefore not governed by the DOT regulations for commercial vehicles, but that UPS nonetheless required all of its package-car drivers to pass the DOT hearing standard. *See Bates*, 465 F.3d at 1075 ("As of October 2003, UPS's fleet contained 5902 vehicles with a GVWR of less than 10,001 pounds."). The company has never asked an individual who failed the DOT hearing test about possible accommodations that might allow that person to perform the job of a UPS package-car driver. *See* Bates v. United Parcel Service, Inc., No. C99-2216, 2004, U.S. Dist. LEXIS 21062, at *27 (N.D. Cal. Oct. 21, 2004).

[15] *Bates*, 465 F.3d at 1075.

[16] Bates v. United Parcel Service, Inc., No. C99-2216, 2004, U.S. Dist. LEXIS 21062, at *73 n.14 (N.D. Cal. Oct. 21, 2004).

[17] *Bates*, 465 F.3d at 1075.

[18] *Id. See also* Bates v. United Parcel Service, Inc., No. C99-2216, 2004, U.S. Dist. LEXIS 21062, at *128 (N.D. Cal. Oct. 21, 2004). The district court was careful to note, however, that "[i]f, after performing an individualized assessment . . . UPS determines that any particular deaf driver cannot do the job safely, then neither this [c]ourt's order nor the ADA requires UPS to hire that person as a package-car driver. *Id.* at *129.

[19] *Bates*, 465 F.3d at 1073. UPS additionally argued that "the plaintiff class should be decertified" and that "UPS did not violate the FEHA or the Unruh Act." *Id.*

## II. NINTH CIRCUIT ANALYSIS

UPS's primary contention on appeal was that the district court had misallocated the evidentiary burden and that "Bates [bore] the burden of proving that at least one individual in the class was a 'qualified individual with a disability' in the sense of being able to perform the 'essential function' of driving 'safely.'"[20] As a practical matter, this would require Bates "to establish through *different* criteria, *not* used by [UPS]"[21] that at least one individual in the class was capable of driving "safely." UPS's argument was premised on Ninth Circuit case law holding that plaintiffs bringing suit under the ADA must ordinarily "establish that they are 'qualified individuals with disabilities'"[22] and language in the ADA that suggested that in order to be considered a qualified individual with a disability, the plaintiff must be able to demonstrate that she can perform the essential functions of the employment position she desired.[23]

The panel rejected this argument, concluding that the proposed distribution of the burden of proof would be "incompatible with the statutory scheme."[24] The panel noted that § 12112(b)(6) described the type of discrimination at issue in the present case[25] and that it and "its parallel affirmative defense"[26] apply when an "individual with a disability," as opposed to a "qualified individual with a disability," is

---

[20] Bates v. United Parcel Service, Inc., 465 F.3d 1069, 1080 (9th Cir. 2006).

[21] *Bates*, 465 F.3d at 1081 & n.16 (emphasis in original).

[22] *Id.* at 1081 (quoting Kennedy v. Applause, Inc., 90 F.3d 1477, 1481 (9th Cir. 1996)).

[23] UPS relied on 42 U.S.C. § 12112(a)'s provision that "[n]o covered entity shall discriminate against a *qualified* individual with a disability" and 42 U.S.C. § 12111(8)'s definition of "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." *Bates*, 465 F.3d at 1081 (emphasis in original).

[24] *Id.* at 1081. The panel noted that requiring all ADA plaintiffs to initially establish that they are "qualified individuals with disabilities" would be incoherent with regard to another subsection of § 12112(b), § 12112(b)(4), which "prohibits discrimination against a 'qualified individual' known to associate with an individual with a disability. [This subsection] thus protects qualified individuals who do not themselves have disabilities and thus could not possibly meet" any general requirement that they be a "qualified individual with a disability." *Bates*, 465 F.3d at 1082. Further, the court reasoned, even assuming arguendo the statute was ambiguous, relevant legislative history supported the panel's conclusion that § 12112(b)(6) was intended to prohibit the use of a blanket rule excluding people with certain disabilities unless the employer could show that business necessity required it to do so. *Id.*

[25] "[U]sing qualification standards . . . that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard . . . is shown to be job-related for the position in question and is consistent with business necessity." 42 U.S.C.A. § 12112(b)(6) (West 2007).

[26] *See* 42 U.S.C.A. § 12113(a) (West 2007); *see also* Bates v. United Parcel Service, Inc., 465 F.3d 1069, 1081 (9th Cir. 2006).

excluded from consideration for a position under a categorical qualification standard.[27] Thus, the panel reasoned, a plaintiff challenging a facially discriminatory qualification standard need not show that she is otherwise qualified for the position in question in the sense that she can perform the essential functions of the position "safely."[28] Instead, a plaintiff challenging a categorical safety standard need only prove: (1) that she is an individual with a disability; (2) that the challenged qualification standard "'screen[s] out or tend[s] to screen out an individual with a disability or a class of individuals with disabilities'"; and (3) that she meets all *other* qualifications for the position unrelated to the challenged standard.[29] If a plaintiff is able to do so, the burden then shifts to the employer to justify the use of the blanket qualification standard through the business necessity defense.[30]

Having found that the district court had correctly allocated the evidentiary burdens and correctly determined that at least one class member, Oloyede, met the threshold requirements to establish a prima facie case of discrimination, the panel went on to review the district court's extensive findings of fact with respect to UPS's business necessity defense.[31] The business necessity defense required UPS to "establish one of two propositions: (1) that substantially all deaf drivers present an unacceptable risk of danger . . . , or (2) that there is no practical way to determine which deaf drivers present an unacceptable risk of danger."[32] The district court had found that UPS failed to meet its evidentiary burden and the Ninth Circuit panel concurred.[33] The evidence that UPS presented—that "hearing driver[s] [are] generally safer than [] deaf driver[s] with similar skills and characteristics"—failed to address the key question of "whether there were *some* deaf drivers who are as safe or safer than some or all of the hearing drivers UPS employe[d]."[34] Similarly, UPS failed to present evidence tending to

---

[27] *Bates*, 465 F.3d at 1081.

[28] This would, on a practical level, be virtually impossible to prove where, as here, the employer bars employees from any individualized assessment of their safe driving ability precisely because they are unable to meet the categorical safety standard. As the panel noted, "the ability to drive 'safely,' while critically important for a commercial driver, is not a self-defining quality." *Bates*, 465 F.3d at 1081 n.16.

[29] *Bates*, 465 F.3d at 1085 (quoting 42 U.S.C. § 12112(b)(6)) (emphasis in original).

[30] *Id.*

[31] *Id.* at 1086-92.

[32] Bates v. United Parcel Service, Inc., 465 F.3d 1069, 1086 (9th Cir. 2006).

[33] *Id.*

[34] *Id.* at 1089 (emphasis in original). As the panel pointed out, this comparison is key. All employers tolerate some risk of vehicle accidents and evaluate that risk in their own way. *Id.* at 1081 n.16. Thus the concept of risk is an individual, not aggregate one. *Id.* at 1089. UPS cannot—in accordance with the ADA—decrease its overall risk by excluding one subgroup because of the

show that there was *no* practical or effective criteria which could be employed to separate safe from unsafe deaf drivers.[35] Accordingly, the panel affirmed the district court's finding that UPS had failed to carry its burden to establish the business defense, and the district court's legal conclusion that UPS's use of the DOT qualification standard in this context violated the ADA.[36]

Finally, the panel rejected UPS's challenge to the terms of the district court's injunction, finding that the injunction—which prohibited UPS from categorically excluding deaf drivers from consideration and instead required *some* form of individualized assessment—"intruded into UPS's business practices and discretion 'to the least degree possible under the ADA.'"[37]

## III. IMPLICATIONS OF THE DECISION

While a court will give complete deference to federal safety regulations that exclude individuals with disabilities from certain jobs,[38] *Bates* illustrates that when an employer adopts a government certified safety standard and applies it beyond its intended scope, the employer will be required to justify the use of the standard to the specific job at issue under the ADA's "business necessity" defense.[39] The proffered justification will be subject to heavy court scrutiny. The employer must be able to demonstrate either that practically every individual who fails to meet the standard will be unable to perform the essential functions of the job, or that such an assessment is impossible.[40] It should be remembered, however, that this framework only applies to whether an employer may use a particular qualification standard that precludes a disabled person from obtaining an individualized determination of his or her suitability for the position.[41] If a court, following *Bates*, finds against an employer, it only follows that the employer may not use the

incremental aggregate additional risk it assertedly poses, without showing any individualized risk that is beyond the risk for another subgroup that is not excluded. *Id.*

[35] *Id.* at 1091. The panel noted that UPS uses, inter alia, driving records and extensive driving tests to aid in predicting whether non-deaf individuals will be safe drivers. *Id.* Accordingly, the burden fell to UPS to explain why similar criteria could not be used to separate safe from unsafe deaf drivers. *Id.* Absent *some* explanation, "the district court was entitled to conclude that UPS had not met its burden of demonstrating that there are no practical criteria available" for determining which deaf drivers are safe. *Id.*

[36] *Id.* at 1094.

[37] *Id.* at 1093.

[38] *See* Albertson's, Inc. v. Kirkingburg, 527 U.S. 555, 570 (1999).

[39] *See* Morton v. United Parcel Service, Inc., 272 F.3d 1249 (9th Cir. 2001).

[40] Bates v. United Parcel Service, Inc., 465 F.3d 1069, 1086 (9th Cir. 2006).

[41] *Id.*

qualification standard, not that the individual must be hired to the position.[42]

IAN HANSEN*

[42] *Id.*

* J.D. Candidate, 2007, Golden Gate University School of Law, San Francisco, CA; B.A. Philosophy, 2004, Portland State University, Portland, OR. Senior Editor, Golden Gate University Law Review. Thanks to Suzanne, Atticus and Michael.