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OCTOBER 2006

A recent Ninth Circuit decision that UPS violated the ADA by barring deaf and hearing impaired individuals from driver positions may increase the risk of similar class actions.

Ninth Circuit Rules Policy that Excludes Deaf Drivers Violates the ADA, Opening the Door to More Class Actions Challenging Hiring Standards

By Nancy E. Pritikin and Michael G. Pedhirney

In a decision issued earlier this month, *Bates v. United Parcel Service, Inc.*, No. 04-17295 (9th Cir., October 10, 2006), a three-member panel of the Ninth Circuit Court of Appeals issued a ruling that may generate a new wave of class action claims based upon the Americans with Disabilities Act ("ADA"). The Ninth Circuit upheld a trial court ruling that UPS's policy of excluding deaf individuals from being eligible for hire as drivers violated the ADA. In so ruling, the Court established a much lighter burden of proof for plaintiffs challenging a facially discriminatory qualification standard than that which is normally required. The Court also agreed that an ADA action challenging the application of a uniform qualifications standard may properly be brought as a class action.

Overview

At issue in *Bates* was a job qualification standard maintained by UPS requiring that all package-car drivers pass a physical examination that the United States Department of Transportation requires commercial drivers to pass under the applicable federal regulations. The DOT's physical examination included a hearing standard. While UPS required drivers of *all* package cars to pass the DOT's examination, the DOT only requires drivers of vehicles with a gross vehicle weight of at least 10,001 pounds to pass the examination. Several of UPS's package delivery vehicles have a gross vehicle weight of less than 10,001 pounds, and, consequently, the DOT's regulations do not require that the drivers of those vehicles meet the hearing requirement.

A class of UPS employees and applicants who were not able to meet the DOT

hearing standard brought an action against UPS alleging that the Company's hearing requirement violated the ADA and California's anti-discrimination statutes, the Fair Employment and Housing Act and the Unruh Act. After the trial court granted the plaintiffs' motion for class certification, UPS unsuccessfully applied to the Ninth Circuit for permission to file an appeal of the court's order granting class certification.

Following the first phase of a bifurcated trial, the trial court ruled that UPS's hearing standard was unlawfully discriminatory under the ADA, the FEHA, and the Unruh Act, and thus, the trial court ordered an injunction against UPS. The trial court also denied UPS's motion for judgment on partial findings or, in the alternative, for class decertification. Among the issues raised on appeal by UPS were that the plaintiff class should be decertified; that the class's claims failed because plaintiffs did not establish that any class members were qualified to be package-car drivers; and that UPS satisfied its burden under the business necessity defense to the ADA.

On appeal, the Ninth Circuit affirmed the trial court's denial of UPS's motion to decertify the class. The Court did not provide any significant analysis on the class certification issue. However, the Court's decision suggests that an employer policy that is facially discriminatory and applied uniformly may be sufficient grounds for class certification.

The Court also found that the plaintiff class had standing to bring the suit even though the class representative allegedly harmed by UPS's policy was employed in a position that precluded him from even applying for a driver job. In reaching this conclusion,

the Court found that the individual had been sufficiently harmed by UPS's policy because he had accepted his present job knowing that he was not eligible for a driver position under the Company's hearing standard. The fact that the individual had a "continuing interest" in the opportunity to be assessed individually for the driver position was sufficient grounds for the Court to find enough injury to that individual to establish standing.

The Court also rejected UPS's argument that in order to show unlawful discrimination, at least one class member must demonstrate that he or she is a qualified person with a disability, as is normally required of plaintiffs in disability discrimination cases. As part of its argument, UPS contended that at least one class member needed to demonstrate an ability to drive "safely." Rejecting this argument, the Court, relying on its interpretation of the statutory language and legislative history of the ADA, held that when a plaintiff challenges a categorical employment qualification standard, such as UPS's hearing requirement, the plaintiff need not establish that the qualification standard excludes qualified individuals with disabilities. Instead, the Court determined that the plaintiff has the less imposing burden of establishing that: (1) he or she meets the other qualifications for the position besides the challenged standard; and (2) that the challenged standard screens out or tends to screen out an individual with a disability or class of individuals with disabilities.

The Court further held that if a plaintiff meets this minimal burden, the employer must establish that the challenged standard is job-related and justified by "business necessity" by demonstrating that: (1) substantially all persons with disabilities excluded by the standard present a higher risk than individuals not excluded; and (2) there are no practical criteria for determining which excluded individuals with disabilities present a higher risk. As a result, the employer's burden in such cases is heavier than what is normally required to establish a business necessity defense. Indeed, the Court noted that under the facts of this particular case, evidence demonstrating that a hearing driver is generally safer than a deaf driver with similar skills and characteristics would not be sufficient to meet the employer's burden. In light of its finding that UPS failed

to establish sufficient facts to meet this burden, the Ninth Circuit upheld the trial court's determination that UPS's hearing standard violated the ADA.

Analysis and Practical Recommendations

The *Bates* decision should raise red flags to employers with physical qualification standards for its employees. The Court's ruling places a lesser burden on plaintiffs challenging a discriminatory policy and higher burden on employers that maintain such a policy. Moreover, the decision indicates that lawsuits brought under the ADA challenging the application of a uniform qualifications standard may properly be brought as a class action.

In light of this decision, employers should thoroughly evaluate their physical qualification standards to determine if any of those policies are susceptible to challenge under the ADA. Notably, *Bates* does not prohibit an employer from maintaining physical qualification standards that are otherwise mandated by law. Indeed, the Court expressly noted that UPS has every right to enforce the hearing standard for the drivers of DOT-regulated vehicles. However, in light of the unfavorable burden allocation set forth in *Bates*, employers should carefully scrutinize any physical requirement standards that are not imposed by law.

The *Bates* case also reinforces that class action claims may be brought against employers with facially discriminatory employment qualification standards. In order to eliminate the possibility of class actions, employers may wish to consider implementing, or amending, alternative dispute resolution policies that expressly require employees to bring disputes to arbitration only as individuals and not as part of or representing a class.

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