No. 04-17295

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ERIC BATES, *ET AL.*,

Plaintiffs-Appellees,

v.

UNITED PARCEL SERVICE, INC.,

Defendant-Appellant.

On Appeal From The United States District Court
For The Northern District Of California

SUPPLEMENTAL BRIEF *AMICI CURIAE* ON REHEARING *EN BANC* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL AND CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF DEFENDANT-APPELLANT UNITED PARCEL SERVICE, INC.

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May 22, 2007

CORPORATE DISCLOSURE STATEMENT

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1. The Equal Employment Advisory Council and Chamber of Commerce of the United States of America have no parent corporations and no subsidiary corporations.

2. No publicly held company owns 10% or more stock in the Equal Employment Advisory Council or Chamber of Commerce of the United States of America.

Respectfully submitted,

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

FEDERAL STATUTES

LEGISLATIVE HISTORY

The Equal Employment Advisory Council and Chamber of Commerce of the United States of America respectfully submit this brief *amici curiae* contingent upon the granting of the accompanying motion. The brief urges reversal of the decisions below and supports the position of Defendant-Appellant United Parcel Service, Inc., before this Court on rehearing *en banc*.

INTEREST OF THE *AMICI CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of employment discrimination. Its membership includes over 310 major U.S. corporations, collectively providing employment to more than 20 million people throughout the United States. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC a unique depth of understanding of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

The Chamber of Commerce of the United States of America (the Chamber) is the world's largest business federation, representing an underlying membership of over three million businesses and organizations of every size and in every

industry sector and geographical region of the country. A principal function of the Chamber is to represent the interests of its members by filing *amicus curiae* briefs in cases involving issues of vital concern to the nation's business community.

All of EEAC's members and many of the Chamber's members are employers subject to Title I of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12111–12117, as well as other equal employment laws and regulations. EEAC's and the Chamber's members include chemical and other manufacturing companies, oil refineries, airlines, pharmaceutical manufacturers, railroads, health care providers, nuclear power companies, defense contractors, and many others. A large number, if not all, of these companies have adopted safety-based qualification standards addressing the risks presented by the work environment. These standards are grounded in such legitimate business considerations as the need to prevent workers from killing or injuring themselves, coworkers or members of the general public. EEAC and the Chamber thus have a direct and significant interest in the issues raised in this appeal regarding whether the three-judge panel and the district court below applied the proper standard for evaluating the "business necessity" defense under the ADA.

EEAC and the Chamber seek to assist the Court by highlighting the impact its decision in this case will have beyond the immediate concerns of the parties to the case. Accordingly, this brief brings to the attention of the Court relevant matter

that has not already been brought to its attention by the parties. Because of their experience in these matters, EEAC and the Chamber are well situated to brief the Court on the relevant concerns of the business community and the significance of this case to employers.

ARGUMENT

I. THIS COURT'S DECISION IN *MORTON v. UPS* INTERPRETED "BUSINESS NECESSITY" SO NARROWLY AS TO EVISCERATE THE SAFETY-BASED DEFENSES AVAILABLE TO EMPLOYERS UNDER THE ADA AND THEREFORE SHOULD BE DISAVOWED

A. *Morton* Erroneously Applied The More Restrictive "Bona Fide Occupational Qualification" (BFOQ) Standard Contained In Title VII And The ADEA To Determine Business Necessity Under The ADA

Title I of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12111-12117, prohibits employment discrimination against qualified individuals with disabilities, and requires employers provide reasonable accommodations unless doing so would impose an undue hardship on business operations. "The statutory definition of 'discriminat[ion]' covers a number of things an employer might do to block a disabled person from advancing in the workplace, such as 'using qualification standards . . . that screen out or tend to screen out an individual with a disability.'" *Chevron U.S.A. v. Echazabal*, 536 U.S. 73, 78 (U.S. 2002) (citation omitted).

Importantly, however, the term "discriminate" excludes any such qualification standard if it "is shown to be job-related for the position in question and is consistent with business necessity." 42 U.S.C. § 12112(b)(6). The Act also contains a separate, affirmative defense to liability where a qualification standard is "job-related and consistent with business necessity." 42 U.S.C. § 12113(a).

The ADA does not contain the more restrictive "bona fide occupational qualification" (BFOQ) defense to liability established under Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.* and the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621 *et seq.* Because the business necessity standard "is more lenient for the employer than the statutory BFOQ defense," *International Union, UAW, v. Johnson Controls, Inc.*, 499 U.S. 187, 198 (U.S. 1991), it would be improper and inconsistent with the plain language of the Act to require an employer to demonstrate the existence of a BFOQ justifying a safety-based qualification in order to avoid liability under the ADA.

In *Morton v. United Parcel Service, Inc.*, this Court held that an employer "may require disabled employees as well as others to meet an across-the-board qualification standard if it can establish the stringent elements of the business necessity defense." 272 F.3d 1249, 1258 (9th Cir. 2001) (citations omitted). Although the Court purported to apply the business necessity defense contained in

the ADA, in fact, it adopted the much more stringent BFOQ standard, notwithstanding its own concession that "the ADA business necessity defense may not mimic in all respects the defense as it has been developed in [Title VII]." *Id.* at 1260. It concluded employers such as UPS may prove business necessity only by showing either (1) "that all persons who fail to meet a disability-related safety criterion present an unacceptable risk of danger" or (2) "that it is highly impractical more discretely to determine which disabled employees present such an unacceptable risk . . . ." *Id.* at 1263. Because it establishes a significantly more stringent test for evaluating business necessity than is permitted under the ADA, the *Morton* decision should be disavowed by this Court.

Overruling *Morton* would be a positive step away from a long line of cases in which this Court has interpreted the ADA in a manner that unreasonably ignores legitimate safety concerns and/or has been out of step with the U.S. Supreme Court and other Circuits. *See Raytheon Co. v. Hernandez*, 540 U.S. 44 (2003); *US Airways, Inc. v. Barnett*, 535 U.S. 391 (2002); *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73 (2002); *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555 (1999). *Morton* – itself relying on this Court's now-overruled decision in *Barnett v. U.S. Air Lines, Inc.*, 228 F.3d 1105 (9th Cir.) (*en banc*), *rev'd* 535 U.S. 391 (2000) – held, for instance, that the failure of an employer to engage in an interactive process with the employee shifts to the employer the burden of persuasion

"throughout the litigation" to show the absence of a reasonable accommodation. 272 F.3d at 1256. *Morton* erred in expanding the holding of *Barnett*, which concerned only the burden of production at the summary judgment phase (*Barnett*, 228 F.3d at 1116), and was itself wrongly decided. *Compare, e.g*., *Willis v. Conopco, Inc.*, 108 F.3d 282, 285 (11th Cir. 1997) (*per curiam*).

B. The Panel's Decision Should Be Reversed As It Rests On *Morton's* Flawed Legal Conclusions

Relying on this Court's ruling in *Morton,* the district court held – and the panel affirmed – that the hearing standard used by UPS to select package car drivers violated the ADA because it screened out qualified individuals with hearing-related disabilities and was not justified by business necessity. *Bates v. United Parcel Service, Inc.*, 2004 U.S. Dist. LEXIS 21062, at *74-*79, 16 A.D. Cas. (BNA) 205, 225-26 (N.D. Cal. Oct. 21, 2004), *aff'd in part*, 465 F.3d 1069, 1084-85 (9th Cir. 2006), *vacated and reh'g en banc granted*, 2007 U.S. App. LEXIS 9288 (9th Cir. Apr. 24, 2007). The district court's untenable view of "business necessity", which a panel of this Court improperly adopted, will cause immense difficulties for any employer using safety-based qualification standards.

Indeed, the panel's decision imposes insurmountable evidentiary burdens on employers that are inconsistent with the ADA's business necessity defense. The district court concluded, and the panel affirmed, that UPS could not demonstrate that deaf drivers pose "a greater safety risk than that already accepted by the

company," 2004 U.S. Dist. LEXIS 21062, at *92, 16 A.D. Cas. at 229, *aff'd in part*, 465 F.3d at 1088, because the company "tolerates some level of risk among its drivers and does not require them to be accident-free." *Id.*

The district court's rationale for rejecting UPS's business necessity defense, which was based on its interpretation of *Morton*, defies logic. It is unrealistic to believe that any business successfully could require every one of its employees to be 100% accident-free. If tolerating some risk negates any possibility of showing a business necessity defense, then no company imposing a safety-based qualification standard ever would be able to avoid liability under the ADA. Such a result impermissibly conflicts with the plain language of the ADA.

Because *Morton* was wrongly decided, the district court and the panel's reliance thereupon to find UPS' safety-based qualification standard violated the ADA was improper. Accordingly, *amici* respectfully request this Court reverse the panel's ruling below.

C. Employers May Use Qualification Standards That Are Not Government Mandates

The legislative history of the ADA confirms that "business necessity" can justify qualification standards that establish physical job criteria. Both congressional committees with direct authority over this part of the legislation, the Senate Committee on Labor and Human Resources and the House Committee on Education and Labor, explained this provision as a "requirement that job criteria

actually measure ability required by the job" to guard against employment decisions based on "stereotypes and misconceptions about the abilities, or more correctly the inabilities, of persons with disabilities . . . ." S. Rep. No. 101-116, at 37 (1989); H.R. Rep. No. 101-485, pt. 2, at 71 (1990), *reprinted in* 1990 U.S.C.C.A.N. at 353.

The ADA permits employers to apply federal safety standards, such as DOT standards, as part of the qualification standards for a job, *Albertson's, Inc. v. Kirkingburg*, 527 U.S. at 573-74, and also to use minimum medical criteria as qualification standards even where they are not mandated to do so by law. Nothing in the statutory language limits employers' use of safety standards to the minimum requirements adopted by the federal government. Furthermore, the ADA's legislative history confirms that the ADA is not intended to "override any legitimate medical standards established by federal, state or local law, *or by employers* for applicants for safety or security sensitive positions, if the medical standards are consistent with [the ADA]." H.R. Rep. No. 101-485, pt. 3, at 43 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 466; H.R. Conf. Rep. No. 101-558, at 57-58 (1990) (emphasis added).

Importantly, the ADA uses the phrase "job-related and consistent with business necessity" not only to establish the minimum requirements for using a selection procedure that screens out individuals with disabilities, as discussed

above, but also to set the parameters within which an employer may require a medical examination or make medical-related inquiries. 42 U.S.C. § 12112(d)(4)(A). Here, too, Congress emphasized that employers may establish their own qualification standards without a government mandate. In explaining what medical examinations for employees might be "job-related and consistent with business necessity," the House Labor Committee stated:

> Section 102(c)(4) prohibits medical exams of employees unless job related and consistent with business necessity. Certain jobs require periodic physicals in order to determine fitness for duty. For example, Federal safety regulations require bus and truck drivers to have a medical exam at least biennially. In certain industries, such as air transportation, physical qualifications for some employees are critical. Those employees, for example, pilots, may have to meet medical standards established by Federal, State or local law or regulation, or otherwise fulfill requirements for obtaining a medical certificate, as a prerequisite for employment. In other instances, because a particular job function may have a significant impact on public safety, e.g. flight attendants, an employee's state of health is important in establishing job qualifications, *even though a medical certificate might not be required by law.*

H.R. Rep. No. 101-485, pt. 2, at 74 (1990), *reprinted in* 1990 U.S.C.C.A.N. at 356-57 (emphasis added).

Similarly, the Conference Report explains:

> [I]n certain industries, such as air transportation, applicants for security and safety related positions are normally chosen on the basis of many competitive factors, some of which are identified as a result of post-offer pre-employment medical examinations. Thus, after the employer receives the results of the post-offer medical examination for applicants for safety or security sensitive positions, only those applicants who meet *the employer's criteria* for the job must receive

> confirmed offers of employment, so long as the employer does not use those results of the exam to screen out qualified disabled individuals on the basis of disability.

H.R. Conf. Rep. No. 101-558 (1990), at 59 (emphasis added). Hence, this legislative history also supports an employer's use of physical criteria beyond those promulgated by the federal government to determine qualifications to perform the essential functions of the job as long as the criteria are job-related and consistent with business necessity.[1]

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[1] The ADA prohibits discrimination in employment against a "*qualified* individual with a disability" because of the disability. 42 U.S.C. § 12112(a) (emphasis added). The most elemental qualification for a job is being able to perform its essential functions, whatever they may be, without seriously injuring or killing oneself, a co-worker, or members of the public. An individual who cannot do the job safely is not "qualified" for it. *See, e.g., McKenzie v. Benton*, 388 F.3d 1342, 1355 (10th Cir. 2004) (noting that "[t]he job qualification s [of a former deputy sheriff with mental disability] properly included the essential function of performing [her] duties without endangering her co-workers or members of the public with whom she came in contact"), *cert. denied*, 544 U.S. 1048 (2005); *Donahue v. Consolidated Rail Corp.*, 224 F.3d 226, 231 (3d Cir. 2000) (train dispatcher whose medical condition caused him to pass out unexpectedly posed a "significant risk" to others); *EEOC v. Amego, Inc.*, 110 F.3d 135, 144 (1st Cir. 1997) ("Where [the] essential job functions necessarily implicate the safety of others, plaintiff must demonstrate that she can perform those functions in a way that does not endanger others"); *Myers v. Hose*, 50 F.3d 278, 282 (4th Cir 1995) (Individual with uncontrolled diabetes was "unable to perform the essential functions required by a bus driver. The basic function of a bus driver is to operate his motor vehicle in a timely, responsible fashion. It is essential that a driver perform these duties in a way that does not threaten the safety of his passengers or of other motorists."); *Cf. Leonberger v. Martin Marietta Materials, Inc.*, 231 F.3d 396, 399 (7th Cir. 2000) (upholding summary judgment for employer who discharged front loader operator with sleep apnea, noting that "an employee who is less than fully alert could harm himself and others if he is operating a front loader or many other kinds of heavy industrial equipment").

II. IF PERMITTED TO STAND, THE PANEL'S RULING WOULD RENDER IT NEARLY IMPOSSIBLE FOR EMPLOYERS TO DEFEND LEGITIMATE SAFETY-BASED STANDARDS, THUS POTENTIALLY ENDANGERING THE LIVES OF MILLIONS OF AMERICAN WORKERS AND CONSUMERS

Reasonableness is the guiding principle of the ADA. Public policy warrants an interpretation of the ADA that reconciles the reasons why the ADA was passed: to promote the employment of qualified individuals with disabilities; to ensure that they are qualified based on sound business necessity rather than myth or stereotype; and to protect the safety of the general public.

For all intents and purposes, the decision below effectively bars any company from using safety-based qualification standards that screen out individuals with disabilities and thus potentially endangers the lives of millions of Americans who could be injured because a company was forced to abandon such safety rules. Common sense dictates that employers develop and apply qualification standards that ensure the safety and well-being of their employees and customers. In addition, private industry has a strong interest in collectively attempting to self-regulate in the interest of public safety so as to avoid negative public perceptions and having to defend suits based on preventable industrial accidents.

In light of these interests, it is simply unreasonable to forbid an employer, as the panel did in this case, from relying on standards *specifically designed* to protect

the safety of the general public. Public policy warrants an interpretation of the ADA that balances the laudable goal of promoting the employment of qualified individuals with disabilities with the legitimate need of employers to protect the safety of their employees, customers, and the public in general.

CONCLUSION

For the foregoing reasons, the *amici curiae* Equal Employment Advisory Council and Chamber of Commerce of the United States of America respectfully urge this Court to disavow its troubling decision in *Morton* and reverse the decision below.

Respectfully submitted,

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May 22, 2007

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This is to certify that two true and correct copies of the Brief *Amici Curiae* Of The Equal Employment Advisory Council And The Chamber Of Commerce Of The United States Of America In Support Of Defendant-Appellant United Parcel Service, Inc. were served today on the following counsel via United Parcel Service Next Day Air, addressed as follows:

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