Nos. 01-15410, 01-15976, 01-15977

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff-Appellee/Cross-Appellant,
and
SHAWN HOGYA, JAMES FRANCIS,
JAMES AIKENS, and CHRIS WILSON,
Intervenors-Appellees/Cross-Appellants,
v.
UNITED PARCEL SERVICE, INC.,
Defendant-Appellant/Cross-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
NO. CV-97-00961-WHA

BRIEF OF WASHINGTON LEGAL FOUNDATION AS AMICUS CURIAE IN SUPPORT OF APPELLANT/CROSS-APPELLEE UNITED PARCEL SERVICE, INC. SEEKING REVERSAL

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The Washington Legal Foundation ("WLF") is a non-profit corporation organized under the laws of the District of Columbia. As a non-profit, public interest law and policy center, the Foundation has no parent company, nor has it issued any stock to the public.

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IDENTITY AND INTEREST OF *AMICUS CURIAE*, AND SOURCE OF AUTHORITY TO FILE

The WLF is a national non-profit public interest law and policy center based in Washington, D.C. WLF has devoted substantial resources to promoting free enterprise principles through litigation, research, and publications in diverse areas of the law. For pertinent examples of cases in which WLF has participated as *amicus curiae,* see WLF's Unopposed Motion For Leave To File Brief *Amicus Curiae,* filed with this brief.

WLF strongly supports the purpose of the Americans with Disabilities Act in eradicating intentional discrimination against persons with disabilities. WLF applauds efforts to expand opportunities for the employment of individuals with disabilities and to promote self-respect, self-sufficiency, and the economic well-being of persons with disabilities. WLF believes, however, that the decision of the district court fails to balance the goal of eliminating unintentional or "disparate impact" discrimination with an employer's "business necessity" needs. This balancing routinely occurs under other federal discrimination statutes, but the district court effectively disregarded it in this case. The issue is of particular importance, where, as here, the public safety issues that comprise the "business necessity" are substantial.[1]

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[1] Since 1980, motor vehicle accidents have been the leading cause of injury-related deaths for U.S. workers. *Fatal Occupational Injuries – United States, 1980-1997,* Center for Disease Control Morbidity and Mortality Weekly Report

WLF supports employers who establish workplace safety standards and goals that exceed the minimum requirements mandated by statute or regulation. However, WLF is concerned that unintentional liability pressures may jeopardize business incentive to pursue improvements in workplace and public safety. WLF believes that the district court's ruling below discourages employers from pursuing workplace safety improvement by converting such good faith efforts into increased ADA liability. Additionally, because the district court's decision implies an obligation to reduce employer qualification standards for essential job functions such as safety, it is more than dangerously bad policy. It is plain dangerous.

The source of authority for WLF to file this brief is by motion under Rule 29 of the Federal Rules of Appellate Procedure.

(April 27, 2001) at http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5016a4.htm (last visited July 22, 2001). Not only UPS but the public at large has a stake in ensuring that employers like UPS have the ability to establish safety requirements for its employees.

STATEMENT OF CASE

UPS has articulated and applies a "bright line" vision acuity standard as one of its qualifications for the safety-sensitive position of package driver. The UPS Vision Protocol applies to drivers of UPS's smaller delivery vehicles, which weigh less than 10,001 pounds and therefore are not subject to the more stringent U.S. Department of Transportation vision standards for drivers of commercial vehicles. The DOT vision standard requires a corrected visual acuity level of at least 20/40 vision and horizontal peripheral vision of 70 degrees in *each* eye, standards that exclude even mildly monocular individuals from DOT regulated jobs. 49 C.F.R. § 391.41(b)(10) (2000); *see also* ER 64, 201-202. The UPS Vision Protocol, by contrast, is far more flexible, applying an absolute exclusion only in the case of the most severely monocular applicant who is unable to attain a corrected visual acuity of at least 20/200 in the impaired eye.

The district court below rejected UPS's uniform Vision Protocol for the position of package driver as an unlawful qualification standard under the ADA. **The district court held that an across-the-board visual acuity test not only failed the "job-related" test, but was also invalid because, according to the court, UPS could meet its business needs through less restrictive means. While this analysis presupposes that the court had a "less restrictive means" before it, in fact, the EEOC failed to present the court with any alternative to the Vision Protocol, preferring instead to rely on the individualized analysis procedures directed by the statute and regulations under the "direct threat" defense.**

As the district court properly found, the UPS Vision Protocol should be reviewed, if at all, under the "business necessity language" in the qualification section of the ADA, and not the "direct threat" defense within the statute. As explained herein, the court stated the law correctly, but, in effect, applied the direct threat test that the EEOC advocated. The court imposed an "individualized analysis" regimen on UPS, such that UPS bears the burden of *disproving* qualifications of applicants for all practical purposes. That state of affairs not only

stands the statutory allocation of burden on its head, but forces employers like UPS to inappropriately "take a chance" with safety.

Here the Court determination that the UPS test was too restrictive was made in an evidentiary vacuum. The EEOC did not meet its burden under the business necessity standard to identify and prove up a less restrictive alternative to UPS's protocol. Nonetheless, the district court invented its own selection standard, which it ordered should replace the one UPS had modeled after the DOT regulations. **The district court's plan mandated "individualized assessments" of monocular applicants for the package driver positions. Thus, and while the court nominally rejected application of the direct threat defense in this case, it essentially applied exactly the procedure recommended by the EEOC under a direct threat analysis. Troubling too is the fact that the district court's own protocol was set forth for the first time after close of trial.** Without reference to record evidence, the district court attributed to its own protocols both the "job-relatedness" and the "least restrictive" qualities it found lacking in the UPS Vision Protocol. The district court also expressly found without reference to any record evidence whatsoever, that its own plan would meet UPS's business needs, was "workable," and was "practical" in application. The district court's plan essentially mandated "individualized assessments" of monocular applicants for the package driver position.

WLF believes that the court's analysis ignores the practical realities of the case. Under the court's analysis, employers are effectively prohibited from implementing *any* uniform standards for any jobs, no matter how reasonable or rational. This was not Congress's intent when it enacted the ADA and should not now become the ADA's purpose.

STATEMENT OF FACTS

WLF sets forth a brief statement of facts relevant to the issue presented. Because WLF relies in large part on the statement already set forth by UPS in its Opening Brief, the majority of those facts will not be repeated here.

The ability to drive safely is a "manifest and essential job function" for UPS package-car drivers. ER 49-50; *see also* ER 89, 109, 123. It is uncontested that individuals with monocular vision present a greater safety risk than drivers with normal binocular vision. ER 86, 173-80, 218-20, 308. Thus, the district court found that monocular drivers have *"less opportunity to see a child or any other pedestrian or cyclist or car darting from the impaired side*." ER 83 (emphasis in original); *see also* ER 303-05. Peripheral vision is particularly important for the operation of UPS package cars, which do not have center rear-view mirrors and

have "less all-around visibility than . . . ordinary passenger cars." ER 84. The loss of peripheral vision is a "material safety factor" for the operation of UPS package cars. ER 84.

The DOT vision standard requires drivers to have both 20/40 vision and horizontal peripheral vision of 70 degrees in *each* eye, requirements that categorically exclude monocular individuals from driving DOT-regulated vehicles. 49 C.F.R. § 391.41(b)(10) (2000); *see also* ER 64, 201-202.

All UPS drivers were subject to the DOT vision standard until July 1995, when DOT amended its standard to apply only to vehicles weighing more than 10,000 pounds. ER 64-65, 128-29. That change left a relatively small percentage of UPS vehicles — approximately eight percent of the fleet — unregulated by DOT. ER 55-56, 203, 222, 321-22. Thus, at the time, UPS implemented its Vision Protocol, essentially a relaxed version of the DOT vision standard, for employees who drive non-DOT-regulated package cars. ER 69-70.

SUMMARY OF ARGUMENT

Far from encouraging employers to take all reasonable steps to protect their workforce and the public from tragic, wasteful, and unnecessary injury and loss of life, the district court decision, if allowed to stand, instructs employers that consideration of *safety* is itself a dangerous proposition when setting workplace selection criteria. The ADA was not intended to prevent employers from maintaining physical requirements that are reasonably related to the safe and efficient performance of the job. *See* H.R. REP. NO. 101-485 (III) at 43 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445. Despite DOT regulations that employ an across-the-board test for minimum visual acuity in the case of UPS's commercial certified drivers, the district court found that UPS could not employ a similar (but less stringent) standard for drivers of unregulated vehicles. In fact, and in a departure from precedent under other federal employment discrimination statutes, the court effectively held that uniform physical qualification standards are impermissible under the ADA. ER 117-22.

The district court unfairly substituted its own guidelines, ignoring employer expertise and the fact that vague and elastic selection criteria are often, as a practical matter, no standards at all. By developing its own guidelines, the district court acted as if it were a regulatory agency (similar to DOT), but did so without the guidance of notice and comment.

At bottom line, the district court decision effectively prohibits UPS from using any absolute minimum vision acuity standard, no matter how liberal, *except*

where statute or regulation expressly set the minimum qualification standard.[2] Nothing in the language or history of the ADA supports the notion that what were once *minimum safety* standards, are now, as a practical matter, the maximum safety protocols a business may safely employ. Thus, in an abrupt departure from decades of tort law in which employers have been "encouraged" to take responsibility for avoiding foreseeable workplace harm, employers are now being told that imposition of selection criteria that go beyond *the bare minimum expressly set by law* could subject them to substantial ADA liability. This is true no matter how admirable the employer's intent and no matter how obvious the public's need.[3] The district court's decision, therefore, effectively establishes *a ceiling* for consideration of safety in the workplace, above which employers may not safely aspire.

The district court decision inappropriately burdens all employer consideration of safety issues and inefficiently imposes greater judicial second-

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[2] It is also clear that the reasoning of the Court is such that *but for the DOT regulations*, UPS would face a near impossible burden in imposing a blanket visual acuity qualification standard even in the case of the drivers of its larger vehicles.

[3] Employers must comply with numerous statutory and regulatory mandates that impose specific, objective, and express safety obligations. The DOT requirements for commercial drivers are just one of many. *See, e.g.*, Cal. Code Regs. tit. 8, § 3203 (2001) (same); Cal. Health & Safety Code § 25249.6 (West 2001) (requiring employers to warn employees before exposure to chemicals known to cause cancer or reproductive toxicity). Employers must also concern themselves with the more amorphous safety liability issues presented by the general duty clause of Section 5 of the Occupational Safety and Health Act of 1970, as amended, 29 U.S.C. § 654, and the responsibilities and duties of employers presented by the California Occupational Safety and Health Act of 1973, as amended, Cal. Lab. Code §§ 6400-6413.5 (West 2001). *See also* Cal. Lab. Code § 6401.7 (West 2001) (requiring employers to establish, implement, and maintain an effective Injury and Illness Prevention Program); Cal. Lab. Code § 2800 (West 2001) ("An employer shall in all cases indemnify his employee for losses caused by the employer's want of ordinary care."). In addition, employers have a heightened consciousness of general liability imposed through "tort" litigation, especially litigation alleging harm caused by negligent hiring, retention, assignment, and entrustment of employees.

guessing rights on workplace standards based on safety considerations, as compared to similar employer-set qualifications designed to serve other legitimate, but perhaps less compelling goals.[4] The decision has the potential to paralyze an employer in imposing even practical, common sense safety qualifications, until and unless the employer can "prove" their utility by actual on-the-job tragedy. By its decision, the district court placed the perceived rights of a few above the safety of many.

ARGUMENT

I. Physical Qualification Standards Are Permitted Under The ADA.

Title I of the ADA sets forth a carefully measured methodology to provide people with disabilities access to jobs for which they are qualified. The Act carefully limits qualification concerns to the essential functions of the job, and also sets forth a framework for reasonable accommodation of individuals with disabilities if such reasonable accommodation will allow an individual to meet job standards. Taken as a whole, the employment provisions of the ADA are designed to balance employer and employee interests by providing access without

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[4] *See, e.g., Contreras v. City of Los Angeles*, 656 F.2d 1267, 1285-86 (9th Cir. 1981) (finding auditor examination that had disparate impact on Spanish-surnamed applicants to be job-related); *United States v. City of Wichita Falls*, 704 F. Supp. 709, 715 (N. D. Tex. 1988) (finding that physical agility test that had disparate impact on female applicants for police officer positions was permissible based on "operational necessity").

compromising employer standards on essential job functions. 42 U.S.C. § 12111(8).

Nothing in the ADA requires that an employer abandon rational, job-related physical qualification standards. 42 U.S.C. § 12111(8). An employer is not required to overlook disability when the impairment giving rise to the disability relates to reasonable criteria for employability in a particular position. *See Serrapica v. City of New York*, 708 F. Supp. 64, 73 (S.D.N.Y. 1989). *See also Cook v. United States Dep't of Labor*, 688 F.2d 669, 670 (9th Cir. 1982).[5]

Case law under predecessor equal employment discrimination statutes clarifies the meaning of the term business necessity. *See, i.e.,* note 9 and text at note 9, *infra*. In addition, the legislative history of the ADA provides strong support for the idea that safety was contemplated as an appropriate motivating factor for a job qualification. The Committee on Education and Labor specifically noted that *"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

[5] Interestingly, the United States seems well aware of the need for and utility of physical qualification standards, particularly where the position involved is safety-sensitive. For example, the physical requirements for service in the United States Army (any position) include blanket exclusions of persons with insulin-dependent diabetes, hearing impairment, lack of visual acuity in both eyes, missing or impaired limbs, and numerous other conditions. *See* 32 C.F.R. § 571.2 (2000) (*referencing* U. S. Army Reg. 40-501).

establishing job qualifications, *even though a medical certificate may not be required by law*." H.R. REP. NO. 101-485(II) at 74 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303 (emphasis added). The House Judiciary Committee observed that while employers should not use the results of medical examinations to screen out qualified disabled individuals on the basis of disability, "[t]he Committee does not intend for this Act to override any legitimate medical standards or requirements 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 this Act." H.R. REP. NO. 101-485 (III) at 43 (1990), *reprinted in* 1990 U.S.C.C.A.N. at 445 (emphasis added). Clearly, Congress respected employers' legitimate concern that applicants for safety-sensitive positions meet all reasonable qualification standards for such positions of public trust.

II. By Insisting On An "Individualized" Analysis, The District Court Confused Business Necessity With The Separate Direct Threat Defense.

Despite articulating the correct test in reviewing the UPS vision protocol, the district court so confused UPS's obligations under the traditional business necessity analysis with the separate and more onerous direct threat test, that it *effectively placed* the unreasonable burden on UPS *of disproving*, on an individualized basis, the presumed qualifications of each applicant, even, where, as here, an applicant could not meet narrowly drawn, objective, job-related standards for physical ability.[6] In effect, the district court superimposed the duties of the

[6] The district court held — as a technical matter, at least — that the burden was on the plaintiff to prove that he or she is a "*qualified* individual with a disability." ER 96-97, 104, 109, 133. The district court found that two claimants — Francis and Ligas — had not carried their burden of showing they were *qualified* to drive a UPS package car safely, and it dismissed their claims. Both

direct threat test, where an articulated job qualification is based on safety, a test which even the district court acknowledged was not intended by congress to apply to job selection qualifications criteria (ER121).[7] The end result is that UPS has the greater burden precisely in the case of the applicants whose ability to do the job are most in question.

III. Traditional "Business Necessity" Analysis, Not The Direct Threat Test, Governs Review Of A Neutral Employer Job Standard Even If It Is Designed To Enhance Workplace Safety.

The ADA is similar to its sibling employment discrimination statutes in many ways. Generally speaking, under the ADA, like Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e—2000e-17, after which the ADA was modeled, employers are entitled to set employment standards and criteria as they see fit. Under both statutes, neutral job criteria, which impact "adversely" on a protected group (in the case of Title VII, individuals of a certain race, sex, or national origin, or in the case of the ADA, individuals with disabilities), may be challenged under the business necessity test. [8]

Ligas and Francis are blind in their right eye, and both were excluded from full-time driving positions under the Vision Protocol. ER 89, 100-101, 145-146, 183-186. The district court dismissed their claims because neither could prove he was qualified to drive UPS package cars safely. ER 96-97, 109, 133. The district court held that the remaining plaintiff was not disabled because he was not substantially limited in a major life function, but found instead that he was "regarded as" disabled because UPS rejected his application based on the Vision Protocol. ER 98.

[7] Even though the Court "rejected" the EEOC's position that the direct threat should be imposed (ER 121), the Court's individualized analysis essentially impacts the direct test requirements.

[8] The court below assumed that the Vision Protocol had a disparate impact on a class of individuals with disabilities and therefore the protocol was subject to additional scrutiny ("no one doubts that the UPS vision protocol tends to screen out persons with disabilities.") ER 111. However, the record is not at all clear on that point. The district court seems to have confused

The Ninth Circuit has not yet established a test for determining when a qualification standard is "job related" and "consistent with business necessity" under the ADA. Although case law on the issue under the ADA is relatively sparse, several cases clarify the meaning of "business necessity" under Title VII and the Rehabilitation Act. *See, e.g., Dothard v. Rawlinson,* 433 U.S. 331, 336-37 (1977) (regulation which effectively limited women to competing equally with men for 25% of the correctional counselor positions in the Alabama prison system was "job related" due to large concentration of male sex offenders in prison system).[9] While the employer has the burden to show that a qualification that adversely impacts a protected group is consistent with business necessity, the courts have applied the "business necessity" test in a practical fashion. As articulated by the Supreme Court, an employment standard is job-related if the

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"disabilities" with "impairments." As mentioned in UPS's opening brief, however, the only two drivers the district court found to be "disabled" (such that their visual impairment substantially limited a major life function) were not "qualified" and therefore had no standing to sue. Based on the record below, a fact question may exist as to whether the UPS Vision Protocol is properly subject to "adverse impact" analysis.

[9] The business necessity defense had its genesis in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) and likewise appears in the implementing regulations of the Rehabilitation Act of 1973. *See, e.g.,* 45 C.F.R. Pt. 84, App. A, subpt. B, ¶ 17 (1997). The ADA duplicates Title VII's "business necessity" language by specifying that "qualification standards, employment tests, or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities" are prohibited "unless the standard, test, or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with *business necessity."* 42 U.S.C. § 12112(b)(6) (emphasis added).

employer can show that the test is "predictive of or significantly correlated with important elements of work behavior" in the job or jobs for which candidates are being evaluated. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 431 (1975).

Once the employer meets this burden, a plaintiff may attempt to discredit the standard by showing that there is a less discriminatory alternative to the employer's test that would be equally effective in meeting the employer's legitimate business objectives. *Id.* at 425. Significantly, the test is not one in which a court substitutes its own judgment on workplace values. In evaluating claims that discretionary employment practices are insufficiently related to legitimate business purposes, it must be borne in mind that "[c]ourts are generally less competent than employers to restructure business practices, and unless mandated to do so by Congress they should not attempt it." *Furnco Constr. Corp. v. Waters,* 438 U.S. 567, 578 (1978). *See also Zahorik v. Cornell Univ.,* 729 F.2d 85, 96 (2d Cir. 1984) ("[The] criteria [used by a university to award tenure], however difficult to apply and however much disagreement they generate in particular cases, are job-related . . .. It would be a most radical interpretation of Title VII for a court to enjoin use of an historically settled process and plainly relevant criteria largely because they lead to decisions which are difficult for a court to review").

In other words, and as cases make clear, the business objectives of the employer are ordinarily not to be second guessed. *See, e.g., Gonzales v. Metpath, Inc.,* 214 Cal. App. 3d 422, 428, 262 Cal. Rptr. 654 (1989) ("[T]he employment discrimination laws were never intended to turn the private-sector work force into a new form of civil service, or to commission our courts to sit as personnel review boards to oversee business judgments made by private enterprises. Employers must be given wide latitude to make independent, good faith personnel decisions without the threat of a jury second-guessing their business judgments.").[10]

IV. By Definition, Vision Requirements For Drivers Are Job-Related.

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[10] Under Title VII, employers traditionally have been allowed to prove business necessity by reference to the need for safe performance of the job. *See New York City Transit Auth. v. Beazer*, 440 U.S. 568, 587 n. 31 (1979); *Dothard,* 433 U.S. at 332 n. 14 (1977) ("a discriminatory employment practice must be shown to be necessary to safe and efficient job performance to survive a Title VII [business necessity] challenge"). Likewise, under Section 504 of the Rehabilitation Act, "business necessity" may justify exclusionary *safety-based* requirements "[i]f the requirements are directly connected with and substantially promote legitimate safety and job performance concerns and are tailored to such concerns…." *David v. Meese*, 692 F. Supp. 505, 517 (E.D. Pa. 1988), *aff'd,* 865 F.2d 592 (3d Cir. 1989). The legislative history also recognizes that employers may legitimately require "fitness for duty" exams or other physical or medical qualifications for certain jobs. H.R. REP. NO. 101-485 (II) at 74, *reprinted in* 1990 U.S.C.C.A.N. at 356. Business necessity under the ADA should have the same meaning as in the Rehabilitation Act (and Title VII). *See Bragdon v. Abbott,* 524 U.S. 624, 638 (1998) ("the ADA must be construed to be consistent with the regulations issued to implement the Rehabilitation Act"). *See also* 42 U.S.C. §§ 12117(b) (agencies administering ADA and Rehabilitation Act are to avoid subjecting claims under the statutes to "inconsistent or conflicting standards for the same requirements….") and 12201(a).

Reduced to its essence, the Vision Protocol simply measures eyesight. One may argue about the particular degrees of visual acuity needed to qualify for the job, but those issues are of no import under the simple job-related test. What is relevant is that the Vision Protocol measures vision and that vision is manifestly related to ability to drive. While the district court articulated a "business necessity" test, it is apparent that the district court was in effect holding UPS to the standards of the separate "direct threat" defense or had forged a new hybrid of these two defenses. Applying its own novel test, the district court ruled the UPS Vision protocol failed the first prong of the business necessity test.[11] The district court erred.

The record evidence is overwhelming concerning the common sense connection between the ability to see well and the ability to drive. It seems beyond legitimate dispute that better visual acuity and better peripheral vision are plus factors with respect to raw driving ability. And conversely, at some level, there can be no question that lack of visual acuity will doom a driver. Thus, even if the

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[11] Applying the first part of the business-necessity test, the district court held that the Vision Protocol did not measure characteristics that were "significantly correlated with an important element" of the UPS driving job. The district court concluded essentially that the Protocol would satisfy this test if it required drivers to have "central vision" in only one eye instead of two. Uncontradicted record evidence establishes, however, that central vision in two eyes is significantly correlated with the ability to drive UPS vehicles safely because of the issue of loss of peripheral vision in monocular individuals. ER 174-80, 218-20, 305, 308, 324.

district court could quibble about the degree of acuity required by the Vision Protocol, it is difficult to understand how this Protocol is not "job-related." Indeed, the connection between vision and driving is so obvious, it would be hard to imagine a qualification standard which is more "job related" than adequate vision is to driving. The U.S. Supreme Court has expressly commented that the risks of combining impaired vision and driving are so well known and so serious "as to dictate the utmost caution." *See Albertson's, Inc. v. Kirkenburg*, 527 U.S. 555, 573 (1998). The Court has more than once recognized that a safety-based job qualification standard is highly likely to meet the test of being job-related. *See*, *e.g.*, *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400, 419 (1985) (when an employer adopts a safety-based job qualification standard, "it will not be overly burdensome to persuade a trier of fact that the qualification is 'reasonably necessary' to safe operation of the business").

V. The UPS Vision Protocol Is A Validly Drawn Standard Reasonably Calculated To Fit The Business Goal In Mind.

The district court does not dispute that some degree of visual acuity was necessary for safe driving. Thus, there can be little question that the Vision Protocols, which measure visual acuity and peripheral vision capability, are "job-related" as that term has been consistently understood in the case law. The district court's real criticism of the Protocol was the fact that it was a "blanket" or exclusionary protocol. The district court effectively held that no such blanket exclusion could ever be appropriate under the ADA, because the ADA requires individualized analysis of the physical abilities of the applicants. ER 126, 131-32. This conclusion is erroneous. While it is true that many courts have expressed disapproval of blanket exclusions of an "entire class of persons," such reluctance has generally been expressed in circumstances quite different than those alleged

here. In the case of eyesight at least, blanket or exclusionary tests are routinely used. For example, every state uses an vision exam to screen applicants before granting a driver's license, and these vision exams establish a uniformly-applied level of visual acuity below which no person can safely drive. To offer an extreme example, quite obviously, the Court could not criticize a protocol that flatly excluded all totally blind persons from driving a package car, even though such an exclusion also involves a blanket application. Thus — in reality — the district court's problem with UPS's Protocol was a matter of degree, not whether it was "job-related."

In fact, courts have long recognized that identifying legitimate physical requirements necessary to perform a job is proper, even though such requirements may exclude an entire class, if the requirements are directly connected with and substantially promote legitimate safety and job performance concerns. *Southeastern Community College v. Davis*, 442 U.S. 397, 407 (1979).

VI. The District Court Erred By Essentially Requiring UPS To Lower Its Standard For Visual Acuity Of Package Car Drivers To Comply With The Law.

At issue is not whether individuals with monocular vision can see well enough to drive UPS package cars at all. Rather, the issue is whether UPS may aspire to set standards that take into account real safety risks and attempt to ameliorate it. That means that UPS has an interest in hiring individuals with abilities that are more than the minimal that might be acceptable. UPS would arguably have an interest in only hiring drivers whose eyesight was of such quality that eyesight itself would never be a contributing factor in a vehicle accident. It does not appear that UPS attempted to completely neutralize the issue of eyesight quality, however. The Vision Protocol is a measured and sincere approach to the issue, setting a standard designed to protect the public, but not unduly restricting the opportunities for monocular-visioned applicants. It is not possible to measure correlation of eyesight quality to accident frequency with any degree of certainty without actually conducting experiments that involve the real possibility for loss of life. UPS is not required to take this step. The record evidence amply demonstrates that UPS set the standards rationally, and that severely monocular drivers are more likely to have vision-related accidents.[12] The fact that the Vision Protocol might possibly deprive a monocular-visioned applicant who is as good a driver as the "average" UPS driver is not a relevant inquiry.

Given the record evidence, however, it seems highly unlikely that an individual who is so severely monocular-visioned that he or she is screened out by the Vision Protocol is a strong candidate for safe driving. The record evidence explaining the effect of monocularity on side vision and depth perception is compelling and is obviously related to an individual's ability to perform the job in question. The evidence submitted to the contrary, about the supposed ability of

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[12] The district court acknowledged that monocular employees as a group present *increased* safety risks, that UPS has no obligation to hire monocular drivers who pose a greater risk than the average binocular drivers it employs, and that UPS cannot predict which particular monocular drivers will have accidents. ER 50, 86, 89.

individuals to overcome monocularity in circumstances that differ from the grueling demands of a UPS package car driver, must be considered anecdotal at best and hardly supports the EEOC's burden in challenging this job-related qualification standard. ER 87-88.

The fact that the UPS Vision Protocol is not as stringent as the vision standard imposed by DOT on commercial drivers is significant. DOT likely set its standard based on its belief that such levels were most likely to remove "failure of vision" from the contributing cause to accident list. Yet even if one might argue that DOT was overly aggressive and needlessly exclusionary, the experts acknowledge that the precise level wherein visual acuity is no longer a relevant accident factor is difficult to predict.

Indeed, as the Supreme Court has explained and as common sense would dictate, there is uncertainty implicit in the "managing" of safety risks which would result in one erring on "the side of caution in a close case." *Criswell,* 472 U.S. at 419-20*,* As the Court further pointed out, "[t]he employer cannot be expected to establish the risk of an . . . accident to a certainty, for certainty would require running the risk until a tragic accident would prove that the judgment was sound. *Id.*

Given that the UPS Protocol is more inclusive than the DOT's standards, it is not surprising that there is no record evidence that UPS could have devised a

method of testing that could reliably determine which of the relatively more vision-restricted applicants excluded by the UPS minimum standard might, through mitigation, or for some other reason, approach the safety levels of the "average safety record of UPS drivers." But even if one could predict such a factor, the court's analysis is still improper. UPS is entitled to hire with an aim at better than its average safety record. Furthermore, because UPS takes the risk in relaxing safety qualifications, it should be UPS that decides what risk to take.

VII. The District Court Erred In Failing To Hold The EEOC To Its Burden Of Showing That An Alternative Means Of Meeting UPS's Business Goals Would Have Had A Lesser Impact On Disabled Applicants.

Acting on its own accord, the district court imposed a four-part screening protocol of its own invention which had not been vetted by either party's experts or fact witnesses. ER 126, 131-32. By assigning itself the job of safety engineer, the district court essentially acted as it were a regulatory agency and set minimum standards with out the benefit of, or the ameliorating effects of hearing from interested parties via notice and comment.

Furthermore, there is no evidence that the results of individualized assessments can be used to identify monocular individuals who are at least as safe as the binocular drivers that UPS ordinarily hires. Accordingly, the district court's mandate on this point must be vacated. The court's view about what UPS might be able to accomplish through individualized testing is pure speculation. While no doubt well intentioned, the district court's actions were seriously misguided. While the ADA certainly requires employers to establish business justification for having a standard which produce adverse impact, it does not remove from employer prerogative the right to determine just how high to aim (i.e., employer decides whether to hire typists who are able to type 50 words a minute or 80 words a minute.) It is employer not the court, who is in the best position to set the qualification level.[13] UPS and similarly-situated employers bring a depth of

[13] While a plaintiff challenging a "business necessity" must, as part of that challenge, show the court that there are less restrictive alternatives that meet the employer's legitimate business goals, this process does not ordinarily include the

technical and practical experience to both common and unique safety issues implicated by their business activities, an expertise level that no court could hope to duplicate.

By insisting that UPS may not use an absolute standard for visual acuity, the court is forcing UPS to do what the case law says it need not do — lower its job-related standards. Even if a particular driver, because of overcompensating attention span, a heightened awareness of safety, or other factors, is able to mitigate his vision problems in day-to-day driving, those efforts do not necessarily translate to the particular difficulties or stresses of the UPS package driver. In addition, UPS presumably uses other screening methods to attempt to reduce accidents caused by inattention or lack of safety awareness. Prior driving records are a separate and distinct qualification standard. UPS is not required to reduce its standard on one factor simply because a driver is above average on another.

Even if one accepts the premise of the substituted protocol — that mitigating factors *may* compensate for bad vision — the district court's protocol must still be rejected. The record below is devoid of empirical, expert, or other reliable evidence of any kind to support a conclusion that the substituted standards actually serve the legitimate and articulated business needs of UPS or the safety expectations of the general public. There has been no showing that the district

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right to simply lower the employer's standards. *See, e.g., Interpretative Guidance on Title I of the Americans With Disabilities Act,* 29 C.F.R. App. – 1630 ("the ADA is intended to enable disabled persons to compete in the workplace based on the same performance standards and requirements that employers expect of persons who are not disabled).

court's protocol will *work*. At best, the district court's analysis is a good faith "guess" about how to predict which, if any, of the poorest visioned applicants might conceivably overcome the impairment sufficiently to be a good UPS driver. At worst, it is a highly questionable experiment with the lives of UPS drivers and the public.

CONCLUSION

The district court decision overburdens employers in setting safety motivated job qualifications, in a way never intended under the ADA. WLF respectfully asks that this Court reverse the decision of the trial court and vacate judgment entered for the EEOC. It has been said that the ADA was enacted to give individuals with disabilities "a chance in life." That goal must be tempered, however, so that giving one person "a chance in life" does not mean taking a chance with someone else's life.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that, pursuant to Fed. R. App. P. 32(a)(7)(c) and Ninth Circuit Rule 32-1, the foregoing brief of amici curiae is proportionally spaced, has a typeface of 14 points or more, and contains 6,597 words.

Laura M. Franze

Dated: July 23, 2001

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Unopposed Motion of the Washington Legal Foundation for Leave To File Brief *Amicus Curiae* was served this 23d day of July, 2001, by first-class mail, postage-prepaid, upon the following parties:

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