Bates v. UPS

United States District Court for the Northern District of California
October 21, 2004, Decided
NO. C99-2216 TEH

Reporter: 2004 U.S. Dist. LEXIS 21062; 16 Am. Disabilities Cas. (BNA) 205

ERIC BATES, et al., Plaintiffs, v. UNITED PARCEL SERVICE, INC., Defendant.

Subsequent History: Affirmed in part and reversed in part by, Remanded by Bates v. UPS, 465 F.3d 1069, 2006 U.S. App. LEXIS 25293 (9th Cir. Cal., 2006)
Vacated by, in part, Reversed by, in part, Remanded by Bates v. UPS, 2007 U.S. App. LEXIS 29870 (9th Cir. Cal., Dec. 28, 2007)

Prior History: Bates v. UPS, 204 F.R.D. 440, 2001 U.S. Dist. LEXIS 19842 (N.D. Cal., 2001)

Disposition: Court issued findings of fact and conclusions of law.

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For ERIC BUMBALA, Plaintiff: Laurence W. Paradis, Alison Aubrejuan, Caroline Jacobs, Disability Rights Advocates, Oakland, CA.

For EDWARD WILLIAMS, on behalf of himself and of all others similarly situated, Plaintiff: Laurence W. Paradis, Alison Aubrejuan, Caroline Jacobs, Disability Rights Advocates, Oakland, CA.

For UNITED PARCEL SERVICE dba UPS, defendant: Patricia S. Radez, Gibson Dunn & Crutcher LLP, San Francisco, CA; Christopher J. Martin, Gibson Dunn & Crutcher LLP, Palo Alto, CA.

Judges: THELTON E. HENDERSON, JUDGE.

Opinion by: THELTON E. HENDERSON

Opinion

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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[*2] **INTRODUCTION**

This pattern-or-practice class action concerns whether United Parcel Service ("UPS"), Inc., may categorically exclude from its package-car driver positions all individuals who cannot pass the federal Department of Transportation ("DOT") hearing standard. It is undisputed that the DOT standard bars deaf individuals, including members of the Plaintiff class, from driving any vehicles weighing 10,001 pounds or more. [1] It is equally undisputed that some vehicles in UPS's fleet weigh less than 10,001 pounds and are therefore not governed by the DOT regulations for commercial vehicles, but that UPS nonetheless requires all of its package-car drivers to pass the DOT hearing standard. The issue in this case is whether UPS's application of the DOT hearing standard to all package-car drivers is lawful under the Americans with Disabilities Act ("ADA") and California state anti-discrimination laws. Upon careful review of the parties' papers and arguments, the trial record, and governing law, the Court concludes, for the reasons discussed below, that it is not.

[*3] **PROCEDURAL HISTORY**

Plaintiffs Eric Bates and Bert Enos filed this action on May 31, 1999, to challenge allegedly discriminatory policies by Defendant UPS on behalf of themselves and other similarly situated deaf individuals. After obtaining leave of court, Plaintiffs filed an amended complaint on July 3, 2001. Among other changes, the first amended complaint ("FAC") named Eric Bumbala, Babaranti Oloyede, and Edward Williams as additional plaintiffs and potential class representatives.

The FAC contained three broad categories of claims. First, Plaintiffs asserted that UPS failed to develop interactive policies to address the communication barriers faced by deaf workers in the workplace. Plaintiffs further alleged that UPS's failure to address communication barriers, in conjunction with the company's subjective personnel policies, created a glass ceiling that prevented deaf workers from being promoted to supervisory positions. Finally, Plaintiffs argued that UPS impermissibly applied the DOT hearing standard to all driving positions, even though not all UPS vehicles are regulated by the DOT.

On behalf of the proposed nationwide class and California subclass, Plaintiffs asserted [*4] that UPS's actions violated the

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[1] In these findings of fact and conclusions of law, the Court uses the term "deaf to refer to individuals who lack sufficient hearing to pass the DOT hearing standard.

ADA and California state anti-discrimination laws. In addition, Plaintiffs Bates, Enos, and Oloyede asserted individual claims of intentional infliction of emotional distress. These three individuals further brought a claim on behalf of themselves and the general public in California alleging that UPS violated California law regulating unfair business practices.

This Court granted Plaintiffs' motion for class certification on November 2, 2001. The Court certified the following nationwide class for Plaintiffs' ADA claims: those persons throughout the United States who (i) have been employed by and/or applied for employment with UPS at any time since June 25, 1997 up through the conclusion of this action, (ii) use sign language as a primary means of communication due to a hearing loss or limitation, and (iii) allege that their rights have been violated under Title I of the ADA on account of UPS's policies and procedures. The Court also certified a similar California subclass for Plaintiffs' class claims arising under state law: those persons throughout California who (i) have been employed by and/or applied for employment with UPS at any time since June 25, 1997 up [*5] through the conclusion of this action, (ii) use sign language as a primary means of communication due to a hearing loss or limitation, and (iii) allege that their rights have been violated under California civil rights laws on account of UPS's policies and procedures.

In the order certifying the class and subclass, the Court also granted Plaintiffs' motion to bifurcate trial into two phases. Phase I was to address class liability and equitable relief issues. Phase II would address Plaintiffs' two non-class claims as well as individual and class damages, if necessary.

The Phase I bench trial began on April 8, 2003. Following several weeks of trial, the parties requested a recess to pursue settlement. During the recess, they settled Plaintiffs' first two categories of claims relating to accommodations and promotions. The parties requested approval of their settlement on July 21, 2003. After allowing for notice to the class and receiving no objections, the Court granted final approval of the settlement on November 26, 2003. Thus, the only Phase I claim remaining for resolution is Plaintiffs' claim that UPS impermissibly applies the DOT hearing standard to all of its package-car driver [*6] positions.

Trial resumed on September 2, 2003. On September 17, 2003, the Court visited UPS's San Francisco facility to view the different sizes of UPS package cars and participate in an abbreviated ride -- along designed to simulate part of the training provided to UPS package-car drivers. Trial concluded on November 20, 2003, and the parties submitted simultaneous post-trial briefs and proposed findings of fact and conclusions of law on December 23, 2003. Having carefully considered all of the evidence and testimony adduced at trial, the parties' oral and written submissions, and the entire record herein, the Court makes the following findings of fact and conclusions of law.

FACTUAL BACKGROUND

UPS and Its Operations

United Parcel Service is engaged in the business of package transportation and delivery on a worldwide basis. Headquartered in Atlanta, Georgia, UPS employs over 350,000 individuals worldwide, including over 320,000 at approximately 1700 facilities across the United States. Of these domestic employees, over 70,000 are package-car drivers who deliver and pick up packages via the familiar brown UPS trucks.

Within the United States, UPS is divided [*7] geographically into nine regions, which in turn contain 61 districts. Each district contains four divisions: a package division, hub operations, feeder operations, and staff functions. Each package division is organized around "centers," which correspond to particular geographical areas or ZIP codes. UPS package-car drivers are assigned to centers and pick up and deliver packages within the center's geographical area. Centers typically include anywhere from 30 to 60 drivers, and more than one package center may be housed in the same UPS facility.

Hubs act as distribution centers that receive packages from centers and other hubs. Packages are sorted by geographic area at each hub and then distributed either to another hub or to a center served by the hub, depending on the delivery destination. Feeder operations is the division responsible for moving packages between hubs and centers and between hubs.

UPS's Package-Car Fleet

Plaintiffs do not seek to drive vehicles that are governed by DOT safety regulations. Thus, this case only concerns vehicles that have a gross vehicle weight rating ("GVWR") and gross vehicle weight ("GVW") of less than 10,001 pounds. *See* 49 U.S.C. § 31132(1)(A) [*8] (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"). The GVWR of a vehicle refers to the weight of the vehicle plus the maximum load that the manufacturer believes the vehicle can carry. This rating is set by the manufacturer, and UPS cannot change it. However, it is possible for a vehicle to exceed its GVWR if heavier cargo is placed on the vehicle. Thus, a vehicle may have an actual weight, or GVW, of 10,001 pounds or more even if the GVWR is less than 10,001 pounds. Vehicles may be randomly checked for their GVW at roadside inspections designed to monitor compliance with DOT regulations.

According to an October 2003 inventory (DX2232), UPS's fleet contains 65,198 vehicles, of which 5902 have a GVWR of less than 10,001 pounds. This is an increase from the 5292 vehicles with a GVWR of less than 10,001 pounds in UPS's fleet as of February 2003. JX55 (February 2003 inventory). These lighter vehicles are distributed across every UPS district in the United States. In addition, when necessary, the company can transfer vehicles [*9] between districts or between centers within the same district.

UPS refers to its delivery vehicles as "package cars" and classifies them based on cubic feet of cargo space. All package cars with more than 500 cubic feet of cargo space weigh 10,001 pounds or more; thus, this suit only concerns packages cars with 500 cubic feet of cargo space or less.

Specifically, the UPS package cars with GVWRs of less than 10,001 pounds are the P20, P30, P31, P40, P47, and P5. The P20

is a Ford Aerostar van with approximately 105 cubic feet of cargo space and a GVWR of 7160 pounds. UPS currently has 480 P20's in its fleet. [2]

The P30 and P31 are Ford Econoline vans with approximately 300 cubic feet of cargo space and GVWRs of 7900 and 8550 pounds, respectively. UPS's fleet currently includes 186 P30's and 66 P31's.

The P32 contains slightly more cargo space than the P31 and has a GVWR of 8600 pounds. UPS [*10] currently has 3082 P32's in its fleet.

The P40, also referred to as a P400, has approximately 400 cubic feet of cargo space and a GVWR of 8000 pounds. UPS has only seven P40's remaining in its fleet.

The P47, also called a P47D or Sprinter, has a GVWR of 8550 pounds. UPS currently has 1821 P47's in its fleet and has no plans to order any additional P47's. These vehicles cannot be used in California because they do not meet California's emission standards.

Finally, UPS has two types of P5's, also known as P50's or P500's, both of which have approximately 500 cubic feet of cargo space. P5's manufactured by General Motors have a GVWR over 10,001 pounds, but P5's manufactured by Ford have a GVWR of 9318 pounds. UPS currently has 259 Ford P5's in its fleet. The last time UPS ordered P5's weighing less than 10,001 pounds was in 1990. Less than 75 of these 1990 vehicles remain in service; the remainder of the 259 Ford P5's still in service were manufactured in 1979 and 1980. Ford P5's have a typical lifespan of 17 to 25 years, and the number of P5's weighing less than 10,001 pounds in UPS's fleet is therefore declining. For example, the number of such vehicles was 1283 in September 2000, [*11] only 621 in February 2003, and reduced even further to 259 by October 2003. JX56 (September 2000 inventory); JX55 (February 2003 inventory); DX2232 (October 2003 inventory). UPS cannot order additional P5's from Ford because Ford changed the way it manufactures the chassis for the vehicle, and the specifications no longer meet UPS's needs.

Route Design

The overarching principle of route design at UPS is to maximize delivery stops while minimizing miles driven. To achieve that goal, UPS's industrial engineering ("IE") department uses a loop concept to divide a package center's delivery area into specific routes. The IE department uses detailed time studies to plan its loops and routes. The company periodically reviews its loops to make sure that the loops are efficiently designed. The "re-loop" process for a center typically takes two-and-a-half to three months and involves a team of six to eight people.

Each package center typically includes twelve to eighteen loops, which are usually defined by postal code or a natural barrier. Each loop is in turn divided into six to ten units, each of which has about 50 delivery stops on a typical day. Routes may consist of more [*12] than one unit, and each loop usually contains only three to five package-car routes. UPS aims to design each route so that it contains enough stops and packages to provide for a 9.1-hour shift on a typical day, although drivers are paid overtime after working 8 hours. Because of contractual bargaining arrangements, the company does not want to dispatch workers for shifts longer than 9.5 hours.

Once a route has been designed, the company assigns a vehicle to the route based on the average volume and package size for that route. UPS assigns the smallest vehicle that can handle the average volume and package size to the route. It would be inconsistent with UPS's design model to reverse the process and design a route to fit a particular size of vehicle. The IE department conducts a review once or twice a year to determine the correct -- sized vehicle to assign to each route.

In addition, UPS has designed its process to plan for fluctuation in volume and number of stops, allowing for slight adjustment of routes on a daily basis. For example, if one route has a spike in volume on a particular day, some of that route's stops may be shifted to a neighboring route for that day.

Routes are [*13] also adjusted during peak season, defined contractually as the period between October 1 and December 24. During this period, and particularly during the time between Thanksgiving and Christmas, package volume spikes. To handle this increase in volume, UPS dispatches more drivers, uses package cars to fuller capacity, and employs larger package cars.

Collective Bargaining and Seniority

The Teamsters Union represents over 200,000 employees at UPS, including all UPS drivers. In 1979, UPS and the Teamsters Union negotiated a National Master Agreement ("NMA") that is periodically re-negotiated. The NMA currently in effect runs for six years, expiring on July 31, 2008. The previous NMA was in effect for five years, from August 1, 1997 to July 31, 2002. In addition to the NMA, UPS and various Teamsters Union locals throughout the country have negotiated local supplements, riders, or addenda that establish local terms, conditions, and work rules that apply to particular geographic areas of the country. Seniority rules are found primarily in these local supplements.

Seniority governs virtually all of the key terms and conditions of a UPS employee's employment. Typically, UPS [*14] employees exercise their seniority rights to bid on a particular job, and the most senior qualified individual is generally awarded the bid.

UPS has one seniority system for full-time employees and a separate seniority system for part-time employees. When an employee has risen to the top of the part-time seniority system, he or she will generally have enough seniority to bid on a full-time position. Once an employee switches from part-time to full-time employment, he or she begins at the bottom of the full-time seniority system.

Each center also maintains its own seniority list based on the date each employee became employed at the center. When a person

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[2] A11 references to the number of vehicles currently in UPS's fleet are based on the October 2003 inventory (DX2232).

transfers to a different UPS center, he or she starts at the bottom of the center's seniority system regardless of his or her company seniority date -- that is, the date on which he or she first became employed by UPS.

Plaintiffs in this case do not ask for any remedies that would violate the seniority systems in place at UPS. Thus, some class members may not yet have the requisite seniority to apply for driving positions at the facilities at which they work. However, while it may be that no driving, work is available to particular [*15] class members seeking such work, this is an individualized inquiry that cannot be decided during this phase of trial. Here, the Court is concerned with class-wide liability and injunctive relief issues, and UPS has not established that all class members lack sufficient seniority to obtain driving work without violating UPS's seniority systems.

Driving Positions at UPS

UPS employs drivers in several different capacities. Different locations may use different terminology to describe the driving positions, but the positions are generally grouped into the categories discussed below.

Feeder Drivers

Feeder drivers drive large tractor trailers that have gross vehicle weight ratings greater than 10,001 pounds land are therefore regulated by the DOT. Plaintiffs do not contend that they should be allowed to drive DOT -- regulated vehicles. Consequently, the position of feeder driver is not at issue in this lawsuit.

Full-Time Bid Route Drivers

UPS employs two types of full-time package-car drivers: bid route drivers and unassigned drivers. Bid route drivers are assigned to specific routes and drive the same route every day. Drivers must attain sufficient seniority [*16] to bid on routes. Actual bidding procedures vary depending on the specific provisions of the local seniority agreements. Typically, when a route becomes available, it will be posted for one week and opened for bidding. The driver with the highest full-time driving seniority who bids on the route will be awarded that route.

Different routes have different degrees of desirability. In general, UPS drivers tend to prefer routes that involve more driving time -- or "windshield time," as it is sometimes known -- and fewer deliveries. As a result, these routes tend to be held by drivers with high levels of seniority. Such routes are often found in rural areas or other areas located further away from package centers.

Full-time bid route drivers generally keep the same route until they relinquish that route when, for example, they win a bid on a different route or retire from driving or from the company. In some centers, however, routes are put up for re-bid every one or two years.

Full-time drivers may transfer from one center to another, depending on seniority and local rules. In general, a driver who transfers to another center will move to the bottom of the seniority list at the new [*17] center. As a result, a bid route driver who transfers to a new center may not have enough seniority to bid on a route at the new center; the driver may have to work as an unassigned package-car driver until he or she gains sufficient seniority at the new center.

Unassigned Package-Car Drivers

Unassigned drivers, or cover drivers, are full-time drivers assigned to a particular center but generally not assigned to a specific route. These drivers have attained sufficient seniority to obtain a full-time driving position but not enough seniority to win a bid route. Unassigned drivers cover for bid route drivers who are absent or serve as additional drivers when there are spikes in volume.

The order in which unassigned drivers are assigned to fill in for vacant routes varies somewhat by local policy, but it is generally based on seniority. For example, under some local seniority agreements, if a bid route vacancy is for five or more days, the unassigned driver with the highest seniority will be assigned to cover that route. If the vacancy is for less than five days, then seniority will generally be observed, but route knowledge may also come into play. At other centers, there are [*18] some unassigned drivers, referred to as bid cover drivers, who own bids to select open routes in seniority order. At these centers, once the bid cover drivers have bid on their routes, the remaining routes are either assigned or chosen based on seniority.

Air Drivers (Full-and Part-Time)

Regular package-car drivers sometimes pick up and deliver air products, including Next Day Air and Second Day Air, but UPS also employs drivers who only pick up and deliver air products. It is more economical for regular drivers to handle air products, but tight deadlines sometimes require additional pick-ups or deliveries by air drivers. In addition, some air drivers do what is referred to as "shuttle work," meaning that they do not interact with customers but instead shuttle air packages between airports and hubs or package centers. UPS employs relatively few full-time air drivers, and the majority of air drivers work on a part-time basis.

At some centers, when a full-time air job becomes available, full-time drivers have the first option to bid on that job, and the driver with the most seniority would get the job. However, at other centers, employees bid on open full-time air jobs based [*19] on their company seniority. The person with the highest company seniority would get the job, and then that person would use his or her driving seniority to bid on available routes.

Some part-time air drivers have the equivalent of bid routes; they cover set delivery areas on a regular schedule five days a week. Other part-time air drivers, sometimes referred to as exception air drivers, only drive to fill in for other air drivers or under exceptional circumstances, such as when an aircraft carrying a package arrives late or other delays require a special delivery or pick-up. Part-time air work is assigned based on seniority.

Part-Time Utility (or Cover) Drivers

Utility drivers drive for UPS on a part-time basis. They typically have other part-time jobs within UPS -- for example, as preloaders, unloaders, or sorters -- but fill in for full-time drivers when necessary. Under the seniority system, UPS may only use a utility driver if no full-time unassigned drivers are available. Utility drivers are assigned to fill in for full-time drivers based on seniority and may drive routes, pick up or deliver air volume, or drive air shuttles.

Article 22.3 Positions

Article 22.3 [*20] refers to a section in the National Master Agreement that requires UPS to create full-time jobs from existing part-time jobs. Accordingly, Article 22.3 positions are full-time position's that combine two different job functions. An Article 22.3 job cannot include delivery of ground packages, but some Article 22.3 employees work part-time as drivers in other capacities. For example, an Article 22.3 employee may work as an air driver for part of an eight-hour shift and then complete the shift by working as a sorter.

Like the other jobs already discussed, Article 22.3 jobs are also based on seniority. Part-time employees use their company seniority to bid on Article 22.3 jobs, with the job going to the bidder with the highest seniority. However, as with other seniority provisions in place at UPS, this procedure also varies based on local contractual arrangements with the Teamsters Union. For example, in Central Florida, first preference for Article 22.3 job openings goes to employees who already hold Article 22.3 jobs, followed by full-time package-car drivers, and then part-time employees. As another example, in the Kansas District, full-time package-car drivers are given first preference [*21] to bid on open Article 22.3 jobs, followed by part-time employees.

Process of Becoming a Package-Car Driver

The threshold criterion for becoming a package-car driver is seniority. Part-time employees who are interested in driving must express that interest by signing up on a bid sheet or, in some locations, by submitting a letter. At some centers, employees must have a certain amount of seniority -- for example, nine months or one year -- before they can be considered for driving work. When an opening for a driving position becomes available at a center, the human resources department contacts the individual with the highest seniority who has expressed ah interest in driving. If the highest -- seniority employee opts not to take the position, then the center will move down the list in seniority order until an employee chooses to accept the position. That individual will then begin the qualification process, beginning with filling out a written application to become a driver.

The applicant must also meet UPS's driver qualification standards. While these standards vary somewhat from district to district, driver applicants must generally be at least 21 years old, possess [*22] a valid driver's license (in some districts, a valid chauffeur's license), and present evidence of a "clean driving record," as defined below. As proof of the latter, UPS looks to state department of motor vehicles ("DMV") records. In some parts of the country, applicants themselves obtain their DMV records and present them to UPS. In other parts of the country, UPS obtains the applicants' driving records directly from the state DMV office.

Different districts have different definitions of "clean driving record." In many districts, a driver applicant cannot have more than three moving violations or any DUI or DWI convictions within the past three years. However, some districts look only at driving records from the prior year or prior two years, while others look at records from a five-year period. In addition, districts may be more or less stringent in the number of violations allowed. In some districts, for instance, a driver applicant can have no more than two moving violations or accidents during the last three years. In others, an applicant must have had no moving violations in the past twelve months.

UPS also claims that driver applicants must be able to drive manual -- transmission [*23] vehicles. However, Grady Brown, UPS's corporate transportation safety manager, testified that "there are a lot of cases where we have applicants who come in who can't drive a standard shift, and we have to afford them training so that they can pass a road test." Tr. at 4070:2-5. In addition, not all of the bid sheets presented as evidence in this case include driving standard -- transmission vehicles as a required qualification. *See* DX2228. Thus, the Court finds that driving a standard -- transmission vehicle is not a prerequisite to beginning the driver testing and orientation process at UPS.

Applicants must, however, pass a UPS road test. Passing this road test does not guarantee that an applicant will ultimately qualify as a driver. Instead, the road test is designed to determine whether applicants are capable of handling a package car and can follow basic traffic laws. UPS generally administers the test in the largest vehicle that the applicant will be driving.

During the road test, an applicant goes out on the road with a supervisor or trainer who evaluates the applicant's driving skills using a "Delivery Vehicle Road Test Report" form (DX124). The evaluator counts any demerits [*24] in 25 different categories, and the applicant will pass the road test unless he or she accumulates 125 or more demerits or commits one of four "grounds for immediate rejection," such as causing an accident. None of the categories specifically requires any level of hearing; however, hearing may impact an applicant's ability to perform the tasks in some categories, such as backing up the vehicle (20 demerits per incident) or handling intersections and crosswalks (20 demerits per incident). The road test includes a pre-trip vehicle inspection, approximately five minutes driving around a parking lot where there is no traffic, and anywhere from ten to thirty minutes driving on a designated route.

In addition to passing the road test, an applicant must also pass a DOT physical before proceeding to driver training. To pass a DOT physical, an applicant must be examined by a physician who, following the examination, certifies that the applicant meets various physical qualification standards promulgated by the DOT. UPS managers testified that applicants first take the road test arid that those who pass the road test are then sent for a DOT physical, but the parties presented no evidence of [*25] any class

member who took the road test before taking a DOT physical. In fact, Plaintiff Eric Bates did not take the road test until after he passed his DOT physical. Thus, it is unclear whether UPS's standard practice is to have driver applicants take a road test before taking a DOT physical, whether the DOT physical always precedes the road test, or whether the order of these tests varies by applicant.

The record is clear, however, that all UPS package-car drivers must meet the physical standards promulgated by the DOT for drivers of commercial motor vehicles. At issue in this case is the DOT hearing standard, which 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 -- 1951.49 C.F.R. § 391.41(b)(11). [*26] To pass the forced whisper test, individuals must do more than just hear that someone is speaking with a forced whisper voice; they must also understand what is said. To evaluate this ability, examining physicians typically ask applicants to repeat back a sequence of numbers or letters. The physicians who administer DOT physicals to driver applicants are selected by UPS employees but are not employed by UPS. DOT physicals are routinely conducted by generalists and do not involve audiologists.

The DOT only regulates vehicles weighing over 10,000 pounds, and not all of UPS's vehicles fall into this category. The company has never conducted any studies regarding whether the DOT hearing standard should be applied to vehicles weighing 10,000 pounds or less. Nonetheless, UPS requires all of its drivers to satisfy the DOT physical requirements, including the hearing standard. UPS is under no contractual obligation to do so, since neither the National Master Agreement with the Teamsters nor any of the local supplements and riders address this issue.

If an applicant cannot satisfy the DOT hearing standard, he or she will not be allowed to move on to UPS's driver training. UPS has never made [*27] an exception for a hearing-impaired driver applicant, and it is clear from the testimony presented at trial that, regardless of the applicant's other qualifications, an individual would never become a package-car driver at UPS if he or she could not pass the hearing portion of the DOT physical. Thus, it is undisputed that UPS bars members of the plaintiff class from becoming package-car drivers because these individuals cannot pass the DOT hearing standard. The company has never asked an individual who failed the DOT hearing test about possible accommodations that might allow that person to be able to perform the job of a UPS package-car driver.

Those who meet UPS's screening criteria and pass both the road test and DOT physical proceed to driver training, which is sometimes referred to as "space and visibility training" and includes a classroom component followed by an on-road component. Both parts of the training emphasize defensive driving techniques and also include training on so-called "340 methods," which are techniques employed by UPS drivers to improve efficiency and to help establish a routine.

During the space and visibility training, UPS drills its "five seeing habits" [*28] and "ten-point commentary" into driver trainees. The five seeing habits are:

> 1. Aim high in steering. Under this rule, drivers should look fifteen seconds ahead of where they are so that they can plan a safe path of travel. When driving in a commercial area at 25 or 35 miles an hour, a fifteen-second lead time translates into approximately two average city blocks. Following this rule also helps drivers center their vehicle in the lane so that there is adequate space on either side of the vehicle.
>
> 2. Get the big picture. The idea behind this rule is to allow drivers to keep a safe following distance that will allow them to see stationary objects, moving objects, and objects on the ground. Drivers are trained to include in their "big picture" whatever is fifteen seconds down the road and are taught to scan beyond the roadway to parked cars, alleyways, and sidewalks.
>
> 3. Keep your eyes moving. Following this habit helps drivers aim high in steering and get the big picture. Drivers are trained to move their eyes continuously, looking forward the majority of the time but checking their side mirrors every five to eight seconds.
>
> 4. Leave yourself an out. This principle [*29] teaches drivers to make sure they have an escape route at all times by, for example, maintaining a safe following distance.
>
> 5. Make sure they see you. This rule teaches drivers to communicate in traffic by using horns, lights, and signals, and by establishing eye contact.

The ten-point commentary, which is based on the five seeing habits, consists of the following:

> 1. When starting up at an intersection, look left, right, and then left again, and then check your mirrors.
>
> 2. Leave one car length of space in front of your vehicle when stopped in traffic.
>
> 3. After the vehicle in front of you starts moving, count to three before moving your vehicle to create a space cushion around your vehicle.

4. Maintain a following distance of four to six seconds when traveling at speeds under 30 miles per hour and six to eight seconds when traveling faster than 30 miles per hour.

5. Keep a generous eye-lead time by looking at least eight to twelve seconds ahead of your vehicle.

6. Scan the steering wheels of parked cars to see if the vehicles are occupied and may pose a potential threat if the driver decides to pull away from the curb.

7. Watch for stale [*30] green lights (i.e., those that you did not see turn green), and set up a point-of-decision line when approaching to determine whether you will need to stop.

8. Establish eye contact to make sure that pedestrians, bicyclists, and other drivers see you.

9. When pulling away from a curb, check the blind spot on the driver's side by glancing over your left shoulder.

10. Check your mirrors every five to eight seconds.

The length of the classroom training varies from district to district, but it typically lasts five to ten days. Following the classroom part of the training, driver trainees proceed to on-road training, which typically lasts one or two days. During the on-road training, a UPS driver trainer generally takes a small group of six to eight driver trainees on the road in a designated training vehicle, but UPS has also provided on-road training on a one-on-one basis. The training vehicles are usually modified versions of a larger package car (weighing over 10,000 pounds) that are equipped with audio equipment and include seats for driver trainees rather than a cargo area for packages.

On September 17, 2003, Larry Mazzone provided a driver training demonstration [*31] for the Court in a P700 training vehicle. The demonstration was abbreviated, and it also included an experienced driver playing the role of driver trainee. Nonetheless, the demonstration appears to have been a faithful simulation of UPS's on-road driver training that matched the testimony provided by UPS's witnesses. The demonstration began with a pre-trip vehicle inspection at UPS's San Francisco facility, followed by a simulated interactive on-road training through the streets of San Francisco. During the on-road training, the trainer communicated to the trainee by giving driving directions and also asking questions relating to the five seeing habits and ten-point commentary (e.g., asking about upcoming potential hazards). The trainee was expected to answer back. It is through these question-and-answer exchanges, sometimes referred to as the "driver drill," that UPS evaluates whether driver trainees are able to apply the defensive driving techniques taught in the classroom.

After successfully completing the classroom and on-road training, driver trainees are placed on a thirty-day probationary, pre-seniority period. The purpose of this probationary period is to give trainees an [*32] opportunity to demonstrate that they can drive a vehicle safely, meet customer needs, and perform the job in the allotted time while driving designated training routes. Supervisors ride along on-car with the trainees when they first go out on the training routes. This initial on-car supervision can last anywhere from three to ten days. Supervisors also do subsequent ride-alongs with the trainees to assess the trainees' ability to become a UPS package-car driver. In addition, the space and visibility training is re-visited during the probationary period, and trainees are also taught customer communications, business development, and 340 methods.

A driver who passes the probationary period becomes a full-fledged UPS package-car driver. UPS will not allow someone to reach this final stage unless the company is convinced that the driver has learned and can apply the safe driving and other techniques taught during UPS's driver training.

ANALYSIS

Under the Americans with Disabilities Act ("ADA" or "the Act"), "no covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, [*33] the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." *42 U.S.C. § 12112(a)*. It is undisputed that UPS is a "covered entity" under the Act because it is an "employer" within the meaning of 42 U.S.C. § 12111(5). 42 U.S.C. § 12111(2) (defining the term "covered entity" to include an "employer"). It is also undisputed that class members who cannot pass the DOT hearing standard meet the definition of "disabled" under the ADA. [3]*See*42 U.S.C. § 12102(2) (defining "disability").

[*34] **Essential Job Functions of Package-Car Driving at UPS**

The ADA only prohibits discrimination against "qualified individuals with a disability." *42 U.S.C. § 12112(a)*. A "qualified individual with a disability" 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." 42 U.S.C. § 12111(8). It would therefore not be discrimination under the ADA to screen out individuals who cannot perform the essential functions of the position sought. Thus, if the class of individuals who cannot pass the DOT hearing test could not categorically perform the essential job functions of package-car driving even if offered reasonable accommodations, then the ADA would offer no protection to that class.

Courts must give consideration to an employer's view of what functions are essential to a particular job. 42 U.S.C. § 12111(8).

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[3] UPS disputes whether Eric Bates and Oscar Valencia, both of whom passed the DOT hearing standard, are "disabled" under the ADA. However, as discussed below, in the "Class Members' Experiences in Seeking Driving Positions" section of this order, the Court does not consider Bates or Valencia to be members of the class for purposes of Plaintiffs' driving claim. The Court therefore need not make a determination as to whether Bates and Valencia are "disabled."

Nonetheless, "an employer may not turn every condition of employment which it elects to adopt into a job function, let alone an essential job function, merely by including [*35] it in a job description." *Cripe v. City of San Jose*, 261 F.3d 877, 887 (9th Cir. 2001) (citation omitted). A job's "essential functions" are "the fundamental job duties of the employment position. . . . The term essential functions' does not include the marginal functions of the position." 29 C.F.R. § 1630.2(n)(1).

UPS argues that Plaintiffs cannot perform three essential job functions of the company's package-car driving positions: the ability to drive DOT -- regulated vehicles, the ability to communicate effectively, and the ability to drive safely. Plaintiffs agree that safe driving and effective communication are essential job functions, but they argue that the ability to drive DOT -- regulated vehicles is not an essential job function. Plaintiffs also dispute UPS's contention that individuals who cannot pass the DOT hearing standard are unable to communicate effectively or drive safely. The Court addresses each purported essential job function in turn below.

UPS also suggests that hearing is an essential job function, but the Court finds that it would be inappropriate to consider hearing separately from the three job functions just listed. Hearing is not required [*36] in the abstract; that is, UPS does not argue that hearing for the sake of hearing is required. Instead, UPS insists that hearing is essential to the job of driving a UPS package car because, the company argues, hearing is required for effective communication and safe driving. Thus, the Court will consider hearing as part of its analysis regarding these two essential job functions, rather than as a distinct job function in and of itself.

Whether DOT Certification Is an Essential Job Function

UPS asserts that package-car drivers must be DOT-certified because they must be able to fill in for any and all other package-car drivers, including those who drive DOT -- regulated vehicles. However, UPS admits that some package-car driving positions, such as bid routes involving low package volume, do not require drivers to be able to drive DOT -- regulated vehicles. Similarly, UPS admits that air drivers "typically drive vans or small package cars that are assigned to the centers with air driving work, so that no special arrangements are necessary to make under -- 10,000 lb. vehicles available for non-DOT air drivers." PX273 at 9 (UPS's discovery responses). Thus, not all UPS package-car [*37] drivers are required to drive DOT -- regulated vehicles.

Beyond that, UPS has made exceptions to DOT physical qualification standards for individuals with impaired vision, diabetes, and other impairments besides hearing loss. In its discovery responses, for example, the company described the circumstances surrounding 118 individuals who were permitted to obtain or retain driving positions despite not being able to secure DOT certification. *Id.* at 5-20. Of these 118 drivers, 31 are on federal waivers or exemptions and are therefore not limited to vehicles weighing less than 10,001 pounds; however, that leaves 87 individuals who could not meet the DOT physical requirements but whom UPS allows to drive package cars. *Id.* at 9.

UPS continues to have protocols in place for new driver applicants who cannot pass the DOT vision standard or who have insulin -- dependent diabetes, but who can pass less stringent physical requirements. These applicants will never be allowed to drive DOT -- regulated vehicles, but UPS nonetheless allows them to complete the driver application and training process and, for those who are found qualified through the training and orientation program, to become [*38] UPS package-car drivers. Thus, even if the majority of package-car drivers at UPS are able to drive any and all vehicles because they are DOT -- certified, the company does not require all package-car drivers -- including new drivers who have little to no seniority -- to be DOT -- certified. These vision and diabetes protocols also undermine UPS's argument that it cannot occupy a non-DOT -- certified driver with full-time driving work. There would be no point to having these protocols, and allowing non-DOT -- certified individuals to become package-car drivers, if those individuals would not be able to fill any driving positions whatsoever. In light of all of the above evidence, the Court concludes that DOT certification is not an essential job function of package-car drivers. [4] As a result, the only two essential job functions at issue in this case are the ability to communicate effectively and the ability to drive safely.

[*39] **Effective Communication**

UPS has developed a list of essential job functions for its various positions. The package-car driving positions all include the following as an essential job function: "See, hear and communicate with sufficient capability to perform assigned tasks and maintain proper job safety conditions and communicate with the public." JX20 at 26-27 (2001 essential job functions). This is a slight modification from the 1998 and 1999 essential job functions, which required that applicants be able to "see, hear and *speak* with sufficient capability to perform assigned tasks and maintain proper job safety conditions and communicate with the public." DX47 at 1-2 (1998 essential job functions, emphasis added); JX58 (1999 essential job functions, emphasis added).

UPS argues that deaf individuals cannot hear or communicate with sufficient capability to communicate with the public. However, not all drivers need to communicate with the public. Air shuttle work, for example, involves moving packages between an airport and a package center and does not involve any customer communication. In addition, UPS does not require its drivers to be able to communicate with all of [*40] their customers. For example, the company has no expectation that its drivers will be able to speak languages other than English or that its drivers will be able to use sign language to communicate with deaf customers.

More significantly, UPS has never analyzed whether deaf drivers could communicate with the public with reasonable

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[4] Another court in this district reached the same conclusion in a similar case challenging UPS's treatment of package-car driver applicants with monocular vision. *EEOC v. UPS*, 149 F. Supp. 2d 1115, 1171-72 (N.D. Cal. 2000), *rev'd on other grounds*, 306 F.3d 794 (9th Cir. 2002), *as amended*, 311 F.3d 1132 (9th Cir. 2002).

accommodations. It is undisputed that UPS does not engage in any interactive process to determine whether deaf individuals can perform the essential job functions of package-car driving with reasonable accommodations. Instead, as noted, any individual who fails the DOT hearing standard is barred by UPS from continuing in the driver application process. Multiple class members testified that, when they inquired about driving positions, they were essentially told they could not drive because they were deaf. UPS did not discuss the possibility of accommodations with these individuals.

Where, as here, an employer has not engaged disabled employees in an interactive process to assist in identifying possible accommodations, the employer bears the burden of persuasion to show that no reasonable accommodation is available. *Morton v. UPS*, 272 F.3d 1249, 1256 (9th Cir. 2001), [*41] *cert. denied sub nom., UPS v. Morton*, 535 U.S. 1054, 152 L. Ed. 2d 821, 122 S. Ct. 1910 (2002). [5] UPS has utterly failed to meet that burden here, as some obvious potential accommodations come to mind. For instance, especially because the evidence demonstrates that most of the communication that takes place between customers and drivers is short and routine, deaf drivers could likely communicate through some combination of speaking (after all, not all deaf drivers are mute), writing, or using hand gestures. Eric Bates, for example, sometimes uses written notes to communicate with customers, and there is no evidence in the record that such communication is ineffective. Drivers could even have pre-printed notes they could show customers for common interactions, or they could communicate using handheld devices that allow text messaging. Similarly, deaf drivers could use the DIAD, text pagers, or cellular phones with text messaging to communicate with the package center, emergency personnel, and other individuals with whom hearing drivers might be able to communicate by telephone. [6] While the inability to communicate verbally may slow things down somewhat, UPS has not persuaded the Court that communicating [*42] via alternate means when necessary would significantly extend the time required for deliveries or require removing delivery stops from routes with deaf drivers.

[*43] In addition, UPS has employed deaf individuals as driver helpers. These employees assist drivers with deliveries during peak season or other busy periods and are trained in how to deliver packages, except that driver helpers generally do not use the DIAD. Driver helpers also do not drive package cars and only assist package-car drivers at certain times of the year and, even during those periods, typically only for a few hours each day. Although driver helpers are often utilized to deliver packages in situations where no signature or customer contact is required, UPS's essential job functions for this position nonetheless require that driver helpers be able to "see, hear, and communicate with sufficient capability to perform assigned tasks and maintain proper job safety conditions and communicate with the public." JX20 at 28. UPS's hiring of deaf individuals as driver helpers therefore indicates the company's belief that deaf individuals have sufficient communication skills to be able to communicate with the public. Thus, it is not credible for UPS to claim now that deaf individuals cannot be package-car drivers because they categorically lack such skills.

UPS also never addressed [*44] why the DOT hearing standard, which relates to driving commercial vehicles weighing over 10,000 pounds, should be used as a cut-off for determining the level of hearing required to communicate effectively with others. For instance, the company made no efforts to explain why someone who barely passes the DOT hearing test can communicate effectively, while someone who barely fails cannot.

The Court notes that Plaintiffs' expert on deaf culture, Betty Colonomos, testified about the general ineffectiveness of written notes and lip-reading to carry on a meaningful conversation. In addition, various class members and UPS witnesses testified that, on some occasions, deaf UPS employees, such as named plaintiff Babaranti Oloyede, did not fully understand conversations they had had with supervisors or emergency personnel when those conversations were conducted only in writing. On the other hand, multiple class members and UPS employees also testified about successful communications with deaf UPS employees, including class members Oloyede and Elias Habib, using some combination of writing, lip-reading, speaking, and gestures. This evidence is sufficient to demonstrate that at least some deaf [*45] individuals are able to communicate effectively with others, including UPS customers, without using sign language. It is also notable that, in those circumstances in which class members were unable to communicate effectively in writing, it appears that only handwritten notes were involved; thus, it is far from clear whether the use of other potential accommodations, such as handheld devices that would allow text messaging, would have made those instances of communication more effective. Because UPS has both failed to engage in the interactive process and failed to persuade the Court that no reasonable accommodation is available to allow non-DOT -- certified drivers to communicate effectively, the Court rejects any contention by UPS that hearing at a level necessary to pass the DOT hearing standard is essential to effective communication.

Finally, the Court notes the irony in UPS's current position. The evidence demonstrates that UPS trained deaf employees and that UPS managers communicated with deaf employees without the use of a qualified sign-language interpreter. Often, these interactions were done only in writing, or by some combination

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[5] UPS suggests that *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 152 L. Ed. 2d 589, 122 S. Ct. 1516 (2002), somehow overruled *Morton*. While *Morton* did rely on the underlying Ninth Circuit opinion in *Barnett* that was ultimately vacated by the Supreme Court, as the Ninth Circuit noted in *Morton*, certiorari in *Barnett* was granted "on an unrelated issue." *Morton*, 272 F.3d at 1256. Moreover, this Court has reviewed the Supreme Court's decision and finds nothing in it that overrules or is otherwise inconsistent with the Ninth Circuit's conclusions in *Morton*.

[6] The DIAD is a delivery acquisition device. "It is what the driver uses to scan the packages, and the customer then signs that, or it's our form of permanent record for the delivery." Tr. at 4587:19-25. The DIAD can also be used for two-way communication between a driver and a center. This type of communication is analogous to instant messaging. *Id.* at 4683:19-4684:14.

of writing, speaking, and rudimentary sign [*46] language or gesturing. It is ironic -- and untenable -- for UPS to contend that deaf individuals can communicate effectively with their supervisors and receive effective training in writing or using other non-verbal means, but that they cannot communicate with members of the general public or emergency response teams using the same methods.

Safe Driving

Just as UPS has never investigated what level of hearing is necessary to communicate effectively, the company has also never studied or analyzed whether or to what extent hearing is necessary to be a safe driver. Instead, as has been well-established, UPS defers to the DOT regulations, and individuals who pass the DOT hearing standard are considered by the company to have sufficient hearing to complete the tasks of the job and perform the job safely.

UPS does not rely solely on the DOT standard, however, and would have included hearing as part of the essential job functions for package-car driving even in the absence of the DOT regulations. Susan Pelchat, a corporate occupational health manager at UPS who helped to develop the lists of essential job functions, testified that, even without the DOT physical requirements, UPS [*47] would have included hearing on the list because it is "one of the key senses that's used in assessing and evaluating and performing within your surroundings. If you were riding a bicycle you would want to be able to hear what was going on around you, [and the same would be true] if you're walking across the street." Tr. at 3989:7-11. This proffered justification ignores the fact that there are plenty of deaf people who walk across streets, ride bicycles, and drive passenger cars every day, and there is no evidence to support the bald assertion that deaf individuals cannot perform these tasks safely simply because their hearing is impaired.

UPS argues that, to drive safely, its package-car drivers must be able to hear, among other sounds, horns, sirens, screeching tires, sounds at railroad crossings, people who may be yelling at them to stop, dogs, pedestrians, children playing, motorcycles, and skateboards. As evidence, the company offered anecdotal evidence of sounds that various UPS drivers can typically hear on their routes, in addition to anecdotes of a few near -- accidents that were avoided because the driver heard a sound that served as a warning. These anecdotes fail to [*48] persuade the Court that no deaf individual could ever drive safely. UPS has not, for example, demonstrated that a deaf driver could not also have avoided the near -- accidents described at trial by compensating for their impaired hearing in other ways -- for instance, by being especially sensitive to visual cues about their environment or through the use of technological devices such as backing
cameras, which have already been installed on some UPS package cars. Indeed, UPS relies on expert testimony to support its argument that no reasonable accommodation is possible that would allow deaf drivers to drive safely; however, as discussed below when examining UPS's business necessity defense, this Court does not find such testimony to be persuasive. Consequently, the Court does not find that Plaintiffs, as a class, cannot perform the essential job functions of safe driving.

Class Members' Experiences in Seeking Driving Positions

Eric Bates and Oscar Valencia passed the DOT hearing standard and are currently working as UPS package-car drivers. Thus, even though Bates and Valencia may use sign language as a primary means of communication, their claims regarding the driving [*49] issue are not representative of Plaintiffs' driving claims. On the driving issue, the class includes only those individuals who failed or would fail the DOT hearing test. [7] The experiences of Bates and Valencia are nonetheless relevant, but they do not conclusively establish that deaf individuals can be effectively trained to be UPS package-car drivers. Nor do they establish that deaf individuals can drive UPS package cars safely.

[*50] Not all class members who testified during the trial expressed an interest in driving work. [8] Of those who did seek driving work, most were deterred from starting or pursuing the process after being told that deaf individuals could not drive package cars at UPS, or some other variation of UPS's requirement that all package-car driver applicants must pass the DOT hearing standard to advance in the application process. With the exception of Babaranti Oloyede and Elias Habib, Plaintiffs presented no evidence regarding the driving experience of any deaf individuals.

Babaranti Oloyede

Class member and named plaintiff Babaranti Oloyede currently has an Article 22.3 position in Oakland, California, where he works part-time at the Oakland airport and part-time at the Oakland hub. He has been working for UPS since 1991 and has had a full-time position for the past three years. He first [*51] bid on a driving position in 1998 and has bid on or expressed an interest in driving positions several additional times, most recently in 2003. He still wishes to become a driver. Oloyede's supervisor, Ron Dodge, told Oloyede in 2000 that he would have to pass a hearing exam to become a driver, but there is no evidence in the record that Oloyede was ever given a DOT physical.

Oloyede's current DMV record meets the driver qualification standards in the East Bay District, which includes the Oakland facilities where Oloyede works and seeks a driving position. UPS argues that Oloyede's DMV record is unreliable because of the

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[7] Although this is a modification of the certified class, the Court retains discretion to alter or amend a class certification order before final judgment. *Fed. R. Civ. P. 23(c)(1)(C)*. In this case, it is abundantly clear that the dispute over the driving issue concerns only those individuals who are affected by UPS's application of the DOT standard to all package-car driving positions. Thus, individuals who passed the DOT standard and were subsequently hired by UPS to work as package-car drivers cannot be part of the class, even if those individuals use sign language as their primary means of communication due to a hearing loss or limitation.

[8] Some class members testified only as to the accommodations and promotions claims that settled during the course of this trial.

Oakland Police Department's policy regarding hearing-impaired drivers who need an interpreter. Under this policy, the officer has discretion to call a qualified interpreter to the scene or to issue a warning rather than a citation. [9] However, Oloyede has never asked for an interpreter after being stopped by a police officer, nor has he ever tried to talk a police officer out of giving him a ticket because he was deaf. Similarly, he has never gone to court to argue that a ticket he had received was invalid because he was not provided with an interpreter. Thus, the [*52] Court finds Oloyede's DMV record to be adequate evidence that Oloyede meets UPS's threshold requirements of having no accidents or moving violations within the last year, no DUI within the last three years, and no more than three moving violations in the last three years.

Oloyede has, however, had moving violations outside of this three-year period. In 1993, Oloyede was cited for failing to yield to another vehicle. In 1994, he was cited for failing to yield to a pedestrian in a crosswalk, although Oloyede's testimony indicates that the person may still have been in the crosswalk but was already outside of Oloyede's driving space. Oloyede also received two speeding tickets, one in 1995 and one in 2000.

In 1998, Oloyede was involved in another incident, although it is unclear whether he was cited in connection with that incident. Oloyede [*53] was stopped at a red light when a speeding driver behind him went off the center divide and had a flat tire. Oloyede left the scene when the light turned green but soon returned because he "felt that that was wasn't right [sic]." Tr. at 2907:10-11. Oloyede claims that the accident was not his fault, and there is no evidence that Oloyede's vehicle was impacted in any way. The police officer on the scene told him to go to court to resolve the issue, but Oloyede never received any information about where to go. The record contains no information concerning whether Oloyede ever went to court, or how this incident was resolved. Nonetheless, in the absence of any contrary evidence, it appears more likely than not that Oloyede was never found to be at fault for this accident. It is also highly unlikely that Oloyede actually was at fault for an accident that occurred behind his vehicle, without touching his vehicle, while he was stopped at a red light.

Based on all of the evidence presented, the Court finds that Plaintiffs have adequately demonstrated that Oloyede's driving record meets UPS's threshold requirements. UPS does not look beyond the three-year DMV record for any of its hearing [*54] applicants for driving positions, and Oloyede's DMV record for that time period is clean. In addition, even if the company were to look past the three-year period, the Court does not find that the few citations Oloyede has received in any way indicate that he is incapable of driving a package car safely.

Elias Habib

Class member Elias Habib has been working for UPS since 1997 and currently works at the Boeing Field International ("BFI") facility in Seattle, Washington. He has been a tug driver for the past four years, except for a brief four-month period in which he held a different position. As a tug driver, Habib drives from the BFI building to the planes and back.

Habib bid on an air shuttle driving position in 2000. He went for a DOT physical hut failed the hearing portion because he is completely deaf. He was therefore told that he could not become a package-car driver at UPS. Because Habib failed the DOT physical, UPS considered Habib unqualified to perform the job of package-car driver and did not engage in any process to determine whether Habib might be able to drive with accommodations.

Habib subsequently filed a grievance through his local Teamsters union regarding [*55] his application to become a driver. The grievance eventually advanced to a national panel consisting of representatives from the Teamsters and UPS. This panel deadlocked on Habib's grievance, and Habib was never permitted to become a package-car driver. During the grievance process, Habib did not seek any modification to the routes or the vehicles. In addition, UPS never disputed that Habib had the requisite seniority to obtain a driving position, nor did the company dispute that the routes bid on by Habib used vehicles weighing 10,000 pounds or less. An investigation by the Teamsters union representative revealed that Habib actually had the requisite seniority because "his company seniority date was higher than some of the employees who were actually granted the opportunity and became air drivers." Tr. at 3515:17-3516:2.

Habib has a valid driver's license and 27 years of driving experience. In the absence of any evidence to the contrary, including any evidence that Habib has ever been involved in even a minor accident, the Court finds it more likely than not that Habib, as a driver with 27 years of experience and someone who has driven vehicles (albeit not package cars) for UPS for [*56] four years, is capable of performing the essential job function of safe driving. [10]

Of course, this does not mean that Plaintiffs have demonstrated [*57] that Habib must be hired by UPS as a package-car driver. The issue in this case is not whether UPS must ultimately hire

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[9] The Court discusses UPS's argument regarding the reliability of deaf drivers' DMV records in more detail below, in the "Screening Deaf Driver Applicants" section of this order.

[10] The evidence on this point could obviously have been much stronger. Plaintiffs could have, for example, introduced into evidence Habib's driving record at the time he sought to become a driver. Plaintiffs only belatedly, on the eve of the close of trial, attempted to introduce Habib's current driving record, which the Court rejected as irrelevant because Plaintiffs pointed to nothing in the record establishing that Habib continues to seek driving work. Similarly, Plaintiffs could have asked Habib the simple question of whether he had ever received any moving citations or been involved in any accidents. That said, although UPS contested the driving records of other class members, UPS never questioned or raised any doubts about whether Habib's driving record would have been sufficient to advance him to the next stage of driver assessment if Habib were not deaf.

Plaintiffs as package-car drivers. To the contrary, the case concerns whether UPS must individually assess Plaintiffs for such positions and allow them to proceed through the driver qualification and training process, instead of categorically excluding any driver applicants who cannot pass the DOT hearing standard. If Habib, for example, could not satisfactorily pass UPS's road test or successfully complete the driver orientation process, then UPS may have good reason to reject Habib's application to become a package-car driver.

Plaintiffs' Prima Facie Case

The parties have divergent views of Plaintiffs' prima facie burden in the liability phase of this case. Plaintiffs contend that the framework established by the United States Supreme Court in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 52 L. Ed. 2d 396, 97 S. Ct. 1843 (1977), applies, and that, under *Teamsters*, Plaintiffs need not show that any individual is a "qualified individual" under the ADA as part of their prima facie case. UPS, by contrast, relies on individual ADA cases to [*58] argue that Plaintiffs' prima facie case must include a showing that Plaintiffs are "qualified individuals." *E.g., Kennedy v. Applause, Inc.*, 90 F.3d 1477, 1480-81 (9th Cir. 1996) (holding that an ADA plaintiff in an individual action bears the burden of demonstrating that he or she is a "qualified individual"). As a result, UPS asserts that, even if *Teamsters* applies, this does not relieve Plaintiffs' burden to show that they are "qualified."

Applicability of the *Teamsters* Framework

Upon review of relevant law, the Court agrees with Plaintiffs that the *Teamsters* framework applies to this case for the reasons discussed below. In *Teamsters*, the Supreme Court held that a government plaintiff in a Title VII pattern-or-practice action against an employer must, as part of its prima facie case, "demonstrate that unlawful discrimination has been a regular procedure or policy followed by an employer," *Teamsters*, 431 U.S. at 360 -- i.e., that "discrimination was the company's standard operating procedure -- the regular rather than the unusual practice," *id.* at 336. During the liability phase of trial, the government "is [*59] not required to offer evidence that each person for whom it will ultimately seek relief was a victim of the employer's discriminatory policy." *Id.* at 360. Instead, the government's burden at this stage is "to establish a prima facie case that such a policy existed. The burden then shifts to the employer to defeat the prima facie showing of a pattern or practice by demonstrating that the Government's proof is either inaccurate or insignificant." *Id.*

Teamsters was a *Title VII* pattern-or-practice case brought by the government, but its framework has been extended beyond Title VII government-plaintiff cases. For example, the Supreme Court has held that, "it is plain that the elements of a prima facie pattern-or-practice case are the same in a private class action" as they are in a government -- plaintiff case such as Teamsters. *Cooper v. Fed. Reserve Bank*, 467 U.S. 867, 876 n.9, 81 L. Ed. 2d 718, 104 S. Ct. 2794 (1984); *see also Thiessen v. Gen. Elec. Capital Corp.*, 267 F.3d 1095, 1106 (10th Cir. 2001) (applying *Teamsters* to a Title VII private class action); *Craik v. Minn. State Univ.*, 731 F.2d 465, 469-71 (8th Cir. 1984) (same). Similarly, [*60] courts have also applied the *Teamsters* framework to ADA pattern-or-practice cases brought by the government. *E.g., Davoll v. Webb*, 194 F.3d 1116, 1147-48 (10th Cir. 1999); *EEOC v. Murray, Inc.*, 175 F. Supp. 2d 1053, 1059-60 (M.D. Term. 2001); *EEOC v. Allied Systems, Inc.*, 36 F. Supp. 2d 515, 522-23 (N.D.N.Y. 1999). Thus, courts have applied the *Teamsters* framework to pattern-or-practice cases brought by the government under Title VII, by a class of private individuals under Title VII, and by the government under the ADA.

Whether *Teamsters* applies to a pattem-or-practice case brought by a class of private individuals under the ADA appears to be an issue of first impression. The parties have not cited any case directly on point, and the Court's independent research has similarly revealed no such authority. However, given that *Teamsters* applies to both private Title VII class actions and ADA government -- plaintiff cases, this Court concludes for the following reasons that *Teamsters* also applies to private ADA class actions. First, the ADA explicitly provides that Title VII's "powers, remedies, and procedures" shall [*61] be available to the EEOC, the Attorney General, or "to any person alleging discrimination on the basis of disability in violation of [the ADA]." 42 U.S.C. § 12117(a). Although *Teamsters* is a Court -- developed approach and not a statutory enforcement mechanism explicitly incorporated in the ADA, the tracking of Title VII by the ADA indicates that the same basic framework should apply to class actions brought under both statutes.

In addition, as noted above, courts have already applied the *Teamsters* framework to ADA pattern-or-practice cases brought by the government. UPS asserts that these government -- plaintiff cases are distinguishable because the EEOC can bring a pattern-or-practice claim against an employer without naming an individual charging party. While true, the Court does not find this distinction to be material in determining whether the *Teamsters* framework applies. The enforcement mechanism that allows the EEOC to bring an ADA pattern-or-practice claim without a charging party was borrowed from Title VII. 42 U.S.C. § 2000e-6 (Title VII provision allowing for pattern-or-practice suits brought by the government); [*62] 42 U.S.C. § 12117(a) (incorporating Title VII remedies, including 42 U.S.C. § 2000e-6, into the ADA). Notwithstanding this provision, the Supreme Court in *Cooper* held that the elements of a prima facie case for a Title VII private class action alleging a pattern or practice of discrimination were the same as those for a pattern-or-practice case brought by the government. *Cooper*, 467 U.S. at 876 n.9. Thus, the fact that the EEOC need not name an individual plaintiff to file a pattern-or-practice suit does not bar the application of *Teamsters* to private class actions.

Finally, the Court finds the rationale for the *Teamsters* approach to apply equally to ADA class actions. *Teamsters* rejected the framework used for individual discrimination cases in a pattern-or-practice case because of the differences in the two types of actions. As the Supreme Court explained in *Cooper*.

> The crucial difference between an individual's claim of discrimination and a class action alleging a general pattern or practice of discrimination is

manifest. The inquiry regarding an individual's claim is the reason for [*63] a particular employment decision, while "at the liability stage of a pattern-or-practice trial the focus often will not be on individual hiring decisions, but on a pattern of discriminatory decisionmaking."*Cooper*, 467 U.S. at 876 (quoting *Teamsters*, 431 U.S. at 360 n.46). This distinction remains true whether the alleged basis for discrimination is race, gender, disability, or any other prohibited factor. During the first phase of this bifurcated class action, the focus is on UPS's policies and practices -- and, in particular, on UPS's across-the-board application of the DOT hearing standard to all package-car driving positions -- and not on individual hiring decisions. Indeed, it would defeat the purpose of a pattern-or-practice class action if this Court were to try each class member's claim before determining liability to the class as a whole. Consequently, the Court holds that the *Teamsters* framework applies to this case, and Plaintiffs' prima facie burden during this phase of trial is to show the existence of an unlawful discriminatory policy, not that every class member was a victim of unlawful discrimination.

Whether Plaintiffs [*64] **Have Satisfied the *Teamsters* Framework**

Contrary to Plaintiffs' arguments, however, the conclusion that *Teamsters* applies does not end the Court's inquiry. The Court must still determine what Plaintiffs must demonstrate to show the existence of an unlawful discriminatory policy under the ADA and, in particular, whether Plaintiffs must show that they are "qualified individuals" as part of their prima facie case.

The law on this issue has not been clearly established. As discussed in the previous section, no court has specifically decided this issue in the class action context. Moreover, courts that have considered how *Teamsters* applies in the context of an ADA pattern-or-practice claim brought by the government have reached inconsistent conclusions. Plaintiffs rely heavily on *EEOC v. Murray*, in which a district court in Tennessee held that *Teamsters* did not require the EEOC "to prove that *any* individual job applicants or employees of Murray were qualified individuals with disabilities during the liability phase of the litigation." *Murray*, 175 F. Supp. 2d at 1060 (emphasis added). The court therefore denied summary judgment to the employer [*65] despite the EEOC's failure to show that a single "qualified individual with a disability" existed, or even that there existed a single "disabled" individual adversely affected by the challenged employment practice. *Id.* at 1059-60, 1067. Plaintiffs contend that this Court should follow *Murray* and not require Plaintiffs to prove that any class member was "qualified" during the liability phase of this litigation. [11]

In another government pattern-or-practice case brought under the ADA, a Colorado district court bifurcated the case "into a liability phase' to determine whether [the defendant's] policy comported with the ADA, and a remedial phase' to determine whether there were any qualified individuals with disabilities who merited relief." *Davoll*, 194 F.3d at 1147. This implies that a court need not consider, at the liability [*66] phase, whether any "qualified individuals" exist. The court acknowledged binding circuit precedent requiring individual ADA plaintiffs to show that they are "qualified," but it rejected application of that precedent to the pattern-or-practice case at issue. *United States v. City & County of Denver*, 943 F. Supp. 1304, 1308-09 (D. Colo. 1996), *aff'd sub nom., Davoll v. Webb*, 194 F.3d 1116 (10th Cir. 1999) (citing *White v. York Int'l Corp.*, 45 F.3d 357, 360-61 (10th Cir. 1995), regarding the burden of proof in an individual ADA case).

However, the Colorado case does not fully support Plaintiffs' position. While the court found that *Teamsters* applied, and that the government therefore did not have to show that every person for whom it would ultimately seek relief was a "qualified individual," the court also held that the government's prima facie case at the liability phase must include a showing that "defendants' policy or practice discriminates against qualified individuals with disabilities' covered by Title I [of the ADA]." *Id.* at 1309. Likewise, although the court accepted the government's position that whether a particular [*67] person is a "qualified individual with a disability" is a phase-two question, *id.*, it never stated that the government need not show that *any* "qualified individual" existed during phase one. To the contrary, in a subsequent order, the court interpreted its holding as follows: At the liability stage of a "pattern and practice' suit, the government was not required to show individual discrimination regarding each person for whom it sought relief. *It sufficed for the government to show specific evidence of Defendants' discrimination regarding some of the employees that it sought to represent.*" *Davoll v. Webb*, 955 F. Supp. 110, 113 (D. Colo. 1997) (emphasis added). Thus, the Colorado case offers some support to UPS's position as well.

UPS's position finds further support from a third case interpreting *Teamsters* in the context of an ADA pattern-or-practice government action. Although neither party cited this case in their papers, the Court's research revealed a Northern District of New York case that agreed with UPS's position. The New York court rejected the EEOC's argument that, under *Teamsters*, the government was "not required to establish that [*68] the claimants are qualified individuals with a disability' at the liability phase of a pattern or practice case." *EEOC v. J.B. Hunt Transp., Inc.*, 128 F. Supp. 2d 117, 124 (N.D.N.Y. 2001). Instead, the court explained:

> The ADA prohibits employment discrimination only against "qualified" individuals -- those with a substantially limiting disability or perceived as having such a disability who are otherwise capable of performing a job either with or without reasonable accommodation. Consequently, to

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[11] The parties do not dispute that an individual who lacks sufficient hearing to pass the DOT hearing standard meets the ADA's definition of "disabled."

withstand summary judgment, though EEOC need not prove that each and every class member herein was the victim of discrimination prohibited by the ADA -- that is, a "qualified" individual with a disability or an individual perceived as having a disability --, [sic] it must show that at least some of the purported class members are such persons. Proof of an employment pattern or practice, without proof that such pattern or practice discriminated against "qualified" individuals within the meaning of the ADA is insufficient. *Id.* at 125. In essence, UPS contends, and the New York court held, that a discriminatory policy is only unlawful under [*69] the ADA if it discriminates against "*qualified* individuals with a disability." *See also, e.g., Cripe v. City of San Jose*, 261 F.3d 877, 884 ("The ADA prohibits employment discrimination only against qualified individual[s]' with disabilities.") (quoting *42 U.S.C. § 12112(a)*). Thus, in UPS's view, and in the apparent view of the *J.B. Hunt* court, because *Teamsters* requires a showing of "unlawful discrimination," *Teamsters*, 431 U.S. at 360, it is insufficient for ADA pattern-or-practice plaintiffs to show only that a policy discriminates against disabled individuals; instead, they must demonstrate that the policy discriminates against disabled individuals who are "qualified." [12]

[*70] As demonstrated by the above discussion, the cases that have analyzed how *Teamsters* applies in the context of an ADA pattern-or-practice suit provide this Court with mixed guidance. However, the Court need not determine the exact contours of how *Teamsters* applies in this context because, as discussed below, it finds that Plaintiffs have met their prima facie burden even under UPS's more restrictive interpretation of the law.

It is undisputed in this case that UPS's application of the DOT hearing standard prevents any person who fails that standard from becoming a UPS package-car driver. UPS's policy categorically excludes all deaf individuals, including those who, at the very least, can make a sufficient showing of their qualifications to proceed to the next steps in UPS's driver application process. UPS does not deny that failure to pass the DOT hearing standard is a per se bar to those seeking to become package-car drivers. Nor does UPS deny that it does not individually assess the driving capabilities and other qualifications of driver applicants who fail the DOT hearing standard. Thus, it is clear that UPS has a qualification standard that screens out all deaf individuals, [*71] and it is therefore equally clear that this standard would screen out any deaf individual who could perform the essential functions of the job, with or without reasonable accommodation, and was therefore qualified.

Standing alone, this may be enough for Plaintiffs to meet their prima facie burden and allow this Court to move forward to analyze UPS's defenses. While plaintiffs in pattern-or-practice discrimination cases typically make out a prima facie case by some combination of statistics and anecdotal evidence, it is possible for plaintiffs to satisfy their prima facie burden through statistics alone. *E.g., Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147, 158-59 (2d Cir. 2001). Here, UPS's policy ensures a gross statistical disparity, with no qualified deaf individuals having ever been hired as package car-drivers.

UPS would undoubtedly respond that this is because no deaf individual is qualified to drive safely, but this issue is better left to the Court's analysis of UPS's business necessity defense. Under that defense, it is UPS's burden to show that all or substantially all members of the Plaintiff class cannot drive safely, or that it is impossible [*72] to determine which can and which cannot. *Morton*, 272 F.3d at 1263. Because the law places this burden on UPS, it would make little sense to require Plaintiffs to prove the opposite as part of their prima facie case.

Moreover, whether a "qualified" deaf individual exists is not simply a hypothetical question; Plaintiffs have also presented evidence that at least two such individuals exist. [13] In particular, as discussed above, Plaintiffs have adequately demonstrated that Elias Habib's and Babaranti Oloyede's qualifications are sufficient to allow them to proceed to the next step of UPS's driver evaluation and training. [14] Consequently, even if Plaintiffs must offer proof that UPS's policy actually discriminates against "qualified individuals with disabilities," the Court concludes that

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[12] The *J.B. Hunt* opinion could be read as dicta insofar as it requires the EEOC in a pattern-or-practice case to show that "qualified individuals" exist. The court held that the EEOC did not meet its burden because it failed to show that any candidates in question were "disabled" under the ADA, not because the EEOC failed to show that any candidates were "qualified." *EEOC v. J.B. Hunt*, 128 F. Supp. 2d at 135-36.

[13] In addition, any argument by UPS that no person who fails the DOT hearing standard can drive safely is belied by the record in *Morton*. In that case, the Ninth Circuit noted that Morton failed the DOT hearing standard but nonetheless "successfully passed UPS's driving and written tests." *Morton*, 272 F.3d at 1251 & n.1. Although Morton is not a class member because she left her employment at UPS before the start of the class period, her case is illustrative of the point that being able to hear well enough to pass the DOT hearing standard is not required to pass UPS's driver screening tests.

[14] As a result, UPS's motion for class decertification is denied. Plaintiffs Oloyede and Habib are adequate representatives of the class, and Oloyede is also an adequate representative of the California subclass. Moreover, even if the Court concluded that none of the individual representatives were adequate, the Court finds that mooting the class claims would be improper because the class claims have been fully tried. *East Texas Motor Freight System, Inc. v. Rodriguez*, 431 U.S. 395, 406 n.12, 52 L. Ed. 2d 453, 97 S. Ct. 1891 (1977) ("In such a case [where the district court had certified a class and only later had it appeared that the named plaintiffs were not class members or were otherwise inappropriate class representatives], the class claims would have already been tried, and, provided the initial certification was proper and decertification not appropriate, the claims of the class members

Plaintiffs have satisfied that burden. *Teamsters* and its progeny make clear that Plaintiffs need not show that every member of the class was affected by the challenged policy, and so Plaintiffs have no obligation to show that every member of the class is "qualified." Plaintiffs' case could have been stronger had they presented additional evidence regarding other class members' [*73] qualifications -- and, of course, Plaintiffs will have to present such evidence during the subsequent remedial phase of this case. Nonetheless, the Court finds that UPS's undisputed blanket exclusion, bolstered by evidence that at least two class members had sufficient qualifications to proceed to the next stage in UPS's driver hiring process, is more than adequate to establish Plaintiffs' prima facie case under *Teamsters*.[15] [*74]

UPS's Business Necessity Defense

Prohibited discrimination under the ADA includes:

> using 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 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)*. The Act continues:
>
> It may be a defense to a charge of discrimination under this chapter that an alleged application of qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation, as required under [*75] this subchapter.42 U.S.C. § 12113(a).

In *Morton v. UPS* -- a case strikingly similar to the instant case [16] -- the Ninth Circuit reviewed this statutory language and found that "the two versions of the general business necessity defense are intended to encompass the same basic requirements." *Morton*, 272 F.3d at 1257 n.8. Plaintiff Morton, a UPS employee who was denied package-car driving work because she could not pass the DOT hearing standard, contended that the direct threat defense applied and argued that a safety-related qualification
standard survives scrutiny under the ADA only if the applicant "poses a threat to the health and safety of other individuals in the workplace." *Id.* at 1258 (quoting 42 U.S.C. § 12113(b)). The Ninth Circuit disagreed and held that "the direct threat defense has no application" to the case. *Id.* at 1259. The court further determined that the business necessity defense under the ADA was not identical to that which has been established under Title VII. *Id.* at 1260. Instead, the court held that the ADA business necessity defense [*76] also incorporates aspects similar to the "bfoq" (bona fide occupational qualification) defense applied in Title VII and age discrimination cases. *Id.* at 1260-63.

The *Morton* court highlighted several considerations when it discussed the contours of the ADA business necessity defense. First, the job-relatedness element of the defense "must pertain only to *essential* functions of the job, so as to mesh with the statute's affirmative provisions." *Id.* at 1262. Second, the defense is "quite stringent," and an employer seeking to invoke the defense "must make a convincing showing both in demonstrating the correlation between the qualification standard and safe job performance and in proving the difficulty [*77] of using less restrictive alternatives." *Id.* Third, the defense includes a reasonable accommodations element, which requires an employer to demonstrate that the qualification standard is "incapable of modification through a reasonable accommodation that would permit a disabled employee to meet the standard." *Id.* Finally, "the nature of the risk, the adequacy of the connection shown between the employer's qualification standard and alleviation of the risk, and the showing of the *necessity* of across-the-board rather than individualized determinations" are "likely to be relevant" to the business necessity analysis. *Id.* at 1263.

The Ninth Circuit also explained that the legislative history of the ADA reveals Congress's intent to allow across-the-board qualification standards only where those standards accurately measure an applicant's actual ability to perform the job. *Id.* Thus, to establish the business necessity defense under the ADA, an employer must demonstrate either "that all persons who fail to meet a disability-related safety criterion present an unacceptable risk of danger" or "that it is highly impractical more discretely to determine which disabled [*78] employees present such an unacceptable risk." *Id.* Applying this framework specifically to *Morton*, which involved UPS's use of the same DOT hearing standard that Plaintiffs challenge here, the Ninth Circuit found that UPS would meet its business necessity defense "if it can show either that substantially all [deaf drivers] present a higher risk of accidents than non-deaf drivers or that there are no practical criteria for determining which deaf drivers present a heightened risk and which do not." *Id.* The court further elaborated that UPS's "overinclusive qualification standard might meet the business necessity test" if the company "were able to show that empirical evidence in this area is so difficult to

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would not need to be mooted or destroyed because subsequent events or the proof at trial had undermined the named plaintiffs' individual claims.")

[15] Accordingly, UPS's motion for judgment on partial findings under Federal Rule of Civil Procedure 52(c) is denied.

[16] The primary differences between the two cases are that this case involves a plaintiff class rather than a single individual plaintiff, and the Ninth Circuit evaluated the *Morton* case at the summary judgment stage rather than after the presentation of evidence at trial.

come by that it is impossible to identify specific risk factors and then use those factors to sort disabled applicants into risk categories." *Id.* at 1265.

UPS argues both that substantially all deaf drivers pose a higher risk of accidents than non-deaf drivers and that it is impossible to determine which deaf drivers pose an increased risk and which do not. For the reasons discussed below, the Court finds that UPS has failed to meet its burden on either [*79] of these arguments.

Relative Risk Posed by Deaf Drivers

UPS raises several arguments regarding the relative risk posed by deaf drivers, but none of the evidence supporting these arguments is sufficient to meet UPS's burden of proof. First, the crash risk studies presented in this case are insufficient to show that all or substantially all deaf drivers pose an increased risk. Although some studies have found that some deaf drivers pose an increased risk, it is undisputed that all of these studies suffered from methodological flaws that call into question the validity of the conclusions reached and their applicability to this case. For example, some studies failed to adjust for factors -- including driving experience, whether the driver received driver training, or an accurate count of mileage driven or other data indicating exposure to driving risks -- that may have affected the results. Some studies also have relied on participants to volunteer for the study, which may skew the results as well. In addition, the Coppin and Peck study, which both parties agree is the least methodologically flawed study of deaf drivers conducted to date, found that deaf males had 1.8 times the [*80] number of accidents as non-deaf males but that there was no significant difference in accident rates between deaf and non-deaf females. This gender anomaly has never been explained, and any potential rationale for the discrepancy offered by UPS is mere speculation and not evidence. On this point, the court agrees with the Ninth Circuit, which found that the gender anomaly serves to "negate[] any conclusion that all or substantially all deaf drivers present a heightened risk of accidents." *Morton*, 272 F.3d at 1264.

UPS's expert, Dr. Loren Staplin, found it significant that, despite having methodological flaws, more than one study found that deaf drivers posed an approximate risk of 1.8 times the risk posed by hearing drivers. However, Dr. Staplin failed to consider that not all studies found the same heightened risk and, in fact, some studies suggested that deaf drivers pose a similar or even lower risk than hearing drivers. In a 1993 review of the literature by a team led by Plaintiffs' expert, Dr. Thomas Songer, and prepared for the Federal Highway Administration ("FHWA"), the authors discussed two studies -- the Coppin and Peck (JX70, 71) and Cook (JX67) studies [*81] relied on by UPS -- finding that deaf drivers posed an increased risk, but they also noted five studies finding a decreased risk and one study finding a similar risk. [17] JX69 at D001257. Considering the lack of consensus in the evidence, the authors concluded that, "on the basis of the available data, our professional judgment is that the crash risk for a driver with hearing loss is between 0.7 and 2.0 times the crash rate for a normal-hearing driver. We cannot rule out that the risk may be below 1." *Id.* at D001260. The Court finds this conclusion to be far more credible than Dr. Staplin's one-sided analysis.

Beyond that, studies comparing "deaf and "non-deaf drivers have used varying criteria to classify drivers as "deaf." The Coppin and Peck study, for instance, specifically excluded drivers who were "merely hard of hearing" but not "deaf," JX71 at D001312, which indicates that only the profoundly deaf were included in the study. In any event, [*82] this and other studies do not reference the DOT hearing standard or forced whisper test. Consequently, the results of the studies, even if consistent with each other and scientifically valid, would not demonstrate the relative risk of "deaf drivers as defined in this case -- i.e., drivers who failed or would fail the DOT hearing standard.

Similarly, Dr. Staplin testified that he believes there is a certain asymptotic level of hearing where increased hearing ability would not lead to increased safety, but that he did not know whether the current DOT hearing standards were at that asymptotic level. Tr. at 5806:13-5808:1. Dr. Staplin agreed that if the current DOT standards are above the asymptote, then the DOT standards could be reduced without compromising public safety. *Id.* at 5808:2-5. Additionally, he testified that he has not analyzed the extent to which any particular hearing level is actually required to ensure public safety. *Id.* at 5806:8-12. Thus, even if this Court were to credit Dr. Staplin's testimony that hearing is required to perform the job of a UPS package-car driver, it is not at all clear that "hearing" in this context refers to a level of hearing sufficient [*83] to pass the DOT hearing standard. Dr. Staplin's testimony essentially admits that the evidence cannot establish whether drivers who fail the DOT hearing standard have enough hearing to be able to drive safely, let alone whether such individuals could drive safely when provided with reasonable accommodations.

Furthermore, the risk studies relied on by UPS are extremely dated. For example, Coppin and Peck published their findings in 1964, while Cook published his findings a decade later, in 1974. Technological advances and advances in driver training have been made in the intervening decades that cast doubt on the results of these and other dated studies. Dr. Staplin, for example, agrees that vehicles have become safer in the last forty years and that the system of roads is also safer on a per miles driven basis "in that people drive more miles without a proportional increase in the injury or fatality rates." Tr. at 4942:20-4943:7. In light of all of the above, the Court does not find that any of the studies comparing accident rates of deaf and hearing drivers demonstrates that all or substantially all deaf drivers pose a heightened safety risk.

UPS also relies on a human factors study [*84] conducted in 1997 by Robinson, Casali, and Lee (JX68) on behalf of the FHWA. Robinson and his colleagues concluded that "hearing is both important and necessary for the safe operation of commercial vehicles. Given that there are tasks and signals for which truck drivers must listen, a hearing requirement becomes the only way to ensure that commercial vehicle operators are able to safely complete these tasks." JX68 at D001034. The Court

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[17] The Federal Highway Administration is a division of the DOT.

does not find this conclusion persuasive for several reasons. First, although human factors is a valid scientific field, Dr. Staplin admits that human factors research is "absolutely dependent upon subjective judgments." Tr. at 4997:2-6. Here, Robinson, *et al.*, based their conclusions on interviews with eleven "subject matter experts" and questionnaires returned by 80 truck drivers. In those interviews and questionnaires, the authors asked whether the respondent believed hearing to be "important" to particular tasks involved with commercial driving or to rate the importance of the identified task on a scale of 1 to 5. However, one person's definition of "very unimportant," "unimportant," "important" or "very important" could vary greatly from another [*85] person's definition. Thus, while it would be possible to draw conclusions on how important the respondents believed hearing to be as a subjective matter, there would be no way to conclude from such data the extent to which hearing was objectively important.

In addition, as Dr. Songer points out, the study also fails to identify the impact on safety of the tasks that the authors concluded were "hearing critical." Songer Trial Decl. P 83. Robinson and his colleagues "pointed out several situations identified by truck drivers as hearing critical, but did not provide an analysis of their potential impact on safety with respect to motor vehicle accidents," Dr. Songer explained. *Id.* He further elaborated, "There was no evidence of how frequently drivers may encounter these situations, or of how likely crashes are to occur where one of these situations is encountered, or of how often drivers who cannot meet the DOT hearing standard actually crash in these situations." *Id.* For example, even if hearing is required to detect particular vehicle maintenance issues, this does not demonstrate that failing to detect those issues immediately will result in a greater risk of accident. [18] [*86] Without knowing whether lack of hearing sufficient to pass the DOT hearing test actually would result in accidents or is likely to result in accidents, it is of little use to the Court's present analysis -- focused on whether deaf drivers pose an increased safety risk -- to discuss "hearing critical" tasks.

This is all the more true because Robinson and his colleagues failed to include interviews or questionnaires with deaf drivers in their study. The Court agrees with Dr. Songer's conclusion that a population consisting of only hearing drivers "would not be expected to be able to [*87] evaluate the ability of hearing impaired individuals to drive safely or to understand the degree to which hearing impaired individuals can compensate for their lack of hearing." *Id.* P 87. Nor has UPS demonstrated that Robinson, *et al.*, in any way considered whether drivers with impaired hearing are able to compensate for their impairments by, for example, employing safe driving tactics learned through driver training, being more aware of visual cues in the environment, or using technological devices such as those that provide visual alerts when hearing persons would be alerted by sound. [19] Another court in this district concluded in the monocular vision case against UPS that, "resilient, an individual losing vision in one eye normally learns to adapt and to learn alternative means for tasks such as driving safely." *EEOC v. UPS*, 149 F. Supp. 2d at 1144. The same holds true for individuals who have experienced some degree of hearing loss. For example, "hearing-impaired persons, especially deaf persons who have never been able to rely on horns as warning signals, may be able to compensate for their loss and may have different behaviors at rail crossings than [*88] normal-hearing drivers." JX69 at D001255 (1993 Songer, *et al.*, study).

Through Dr. Staplin's testimony regarding channel capacity, UPS argues that deaf drivers cannot compensate for diminished hearing by using additional visual cues, but the Court is not persuaded by this testimony. The Court agrees that channel capacity is a valid scientific theory that holds that there are limits to the amount of information that an individual can process through any given sense (e.g., hearing or vision). In addition, driving undoubtedly demands the visual attention of a driver, and UPS's seeing habits and ten-point commentary emphasize the amount of information that the UPS package-car driver is expected to absorb through vision. However, UPS has failed to convince the Court that the [*89] task of UPS package-car driving is so visually intense that a UPS package-car driver would be unable to process additional visual cues, such as those from devices that provide visual warnings of sirens or other loud noises in the vicinity of a vehicle. Dr. Staplin testified that he had "very strong doubts" that providing additional visual information would be effective, Tr. at 5998:8-11, but this is insufficient to meet UPS's burden. Dr. Staplin has never investigated, nor is he aware of any studies that have investigated, whether technological devices would allow deaf drivers to compensate effectively for their hearing impairment. He has also never interviewed, observed, or studied a single deaf driver, nor is he aware of any studies that have investigated the habits of deaf drivers or how deaf drivers might be able to compensate for their hearing loss. Furthermore, there is no evidence in the record that systematically analyzes the visual demands of driving a package car, nor is there any evidence regarding what the functional limits of a person's channel capacity actually are, or even whether all individuals have the same channel capacities. Thus, although the Court agrees that [*90] there is a point at which a person may not be able to process any additional information through a particular sense, like vision, UPS has not demonstrated that UPS package-car drivers approach that functional limit. Accordingly, UPS has failed to show that deaf drivers cannot compensate for their impaired hearing or, by using compensatory techniques and mechanisms, drive safely.

The Court agrees with UPS that, all other things being equal, a driver with perfect hearing would likely pose less of a safety risk

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[18] To the extent that UPS is concerned that deaf drivers would never be able to detect certain problems, that concern is adequately addressed by UPS's regular vehicle maintenance program. If UPS found its regular maintenance checks to be insufficient, an obvious potential accommodation would be having a hearing employee assist deaf drivers with certain parts of the drivers' pre-trip vehicle inspection in which hearing may be useful.

[19] Such visual warning signals are "generally mounted on the dashboard." JX69 at D001175. Although Plaintiffs have not provided evidence that these signals would necessarily be effective, the burden is on UPS to show that they would not be.

than a driver with impaired hearing. As a result, 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. This does not, however, answer the question of whether UPS's application of the DOT hearing standard to non-DOT-regulated vehicles is consistent with business necessity for two main reasons. First, UPS has 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. While UPS offered anecdotal testimony involving situations where [*91] a driver avoided an accident because he or she heard a warning sound, the company, as discussed above, failed to show that those accidents would not also have been avoided by a deaf driver who has compensated for his or her loss of hearing by, for example, adapting modified driving techniques or using compensatory devices such as backing cameras or additional mirrors.

Second, even if a hearing driver would pose less of a safety risk than a driver with the exact same characteristics and training but with impaired hearing, that would not establish that *all or substantially all* deaf drivers pose a heightened safety risk compared with hearing drivers. This one-to-one comparison is of little use in answering the question at hand because it does nothing to establish whether there is a significant portion of deaf drivers who are able to drive as safely as or more safely than the typical hearing driver. Put another way, hearing alone does not make someone a safe driver. *See EEOC v. UPS*, 149 F. Supp. 2d at 1144-45 ("The median monocular driver may pose more risk than the median binocular driver, but both groups have many safe individuals. Many with excellent vision but [*92] only in one eye are actually safer drivers than the median binocular driver. As a result, the Court rejects the proposition that all or substantially all monocular drivers pose a greater than average risk of accident.").

Next, even if UPS could demonstrate that deaf drivers would likely be involved in one or more accidents each year if they were allowed to drive package cars, this would be insufficient to meet UPS's burden. To establish business necessity, UPS must show that deaf drivers pose a greater safety risk than that already accepted by the company. Here, the evidence demonstrates that UPS tolerates some level of risk among its drivers and does not require them to be accident-free. Grady Brown, Corporate Fleet Safety Manager, created a spreadsheet (DX2223) listing the total number of accidents by year at UPS for feeder, package, and part-time drivers for the years 1997 through 2002. The number of package-car drivers during that time period ranged from 63,957 to 68,037. The number of accidents, which includes any incident that resulted in personal injury or property damage, regardless of severity, ranged from 21,687 to 30,359, and the number of DOT accidents, which are considered [*93] more severe because they resulted in serious injuries or property damage, ranged from 1295 to 1804. This equates to an average of 0.33 to 0.45 accidents per package-car driver per year, and 0.020 to 0.027 DOT accidents per package-car driver per year. These figures indicate that approximately one in three package-car drivers is likely to be involved in an accident in any given year, and approximately two out of every hundred drivers is likely to be involved in a serious accident. [20] UPS has not demonstrated that deaf drivers would exceed these accident rates. Nor does UPS terminate all drivers who are involved in accidents. For example, one district allows drivers to have three accidents in a nine-month period before automatically terminating the driver, while another region allows drivers to have three accidents in a twelve-month period. Tr. at 3562:20-3563:5; 3372:4-16. UPS also provides "repeaters" -- those with two or more accidents in a two-year period -- with additional training, Tr. at 4204:9-22, indicating that this level of accident rate is not considered ideal, but that UPS hopes to retain "repeaters" by training them to become more safe. This further indicates, as does [*94] UPS's entire package-car training program, that UPS believes it can train people to become safer drivers. There is no reason why this principle should not apply equally to deaf drivers. [21]

[*95] The Court next rejects UPS's proposition that the mere existence of the DOT standard supports UPS's assertion that hearing is necessary to drive non-DOT-regulated vehicles. The Ninth Circuit squarely considered and rejected this argument in *Morton*, explaining that the Supreme Court's decision in *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555, 144 L. Ed. 2d 518, 119 S. Ct. 2162 (1999), does not stand for the proposition that an employer may simply apply, without additional justification, government safety standards beyond their intended scope. *Morton*, 272 F.3d at 1263-64. Thus, as the Ninth Circuit concluded, "the existence of the -- by its own terms inapplicable -- DOT standard cannot shoulder UPS's statutory burden" under the ADA. *Id.* at 1264.

UPS argues that the same physical standards should apply to drivers of non-DOT-regulated vehicles because such vehicles pose the same risk of danger as DOT vehicles. However, the DOT itself previously considered and rejected this argument, finding that "most vehicles having a GVWR of 10,000 pounds or less have operating characteristics similar to a large automobile and generally pose no greater safety risk than other vehicles [*96] of similar or lesser weight when used on the highway." *53 Fed. Reg. 18,042 (1988)*. UPS introduced vehicle aggressivity studies and testimony from its expert witnesses, Dr. Staplin and Dr. Kip Viscusi, suggesting that heavier vehicles are more likely

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[20] This assumes that most drivers who got into accidents were only involved in one accident each year. The average number of accidents per driver cannot be exactly translated to the proportion of drivers who were involved in accidents because a driver may have been involved in more than one accident. Nonetheless, the Court finds this approximation to be reasonable. Moreover, even if every driver involved in an accident were involved in two accidents, leaving more drivers who were accident-free, UPS would still tolerate a not insignificant accident risk. Under that scenario, roughly one in six drivers would be involved in an accident each year, and one in a hundred would be involved in a serious accident.

[21] The Court addresses this point in greater detail below, in the "Training and Assessing Deaf Driver Applicants' section of this opinion.

to cause greater damage when involved in accidents, but this evidence is insufficient to meet UPS's burden. While vehicle aggressivity studies were found to raise a triable issue by the Ninth Circuit in *Morton*, 272 F.3d at 1264-65, such studies are ultimately only probative of UPS's business necessity defense if there is also evidence regarding the relative risk of deaf drivers. Because the Court has already found insufficient evidence to conclude that deaf drivers are more likely to get into accidents than hearing drivers, the impact of accidents involving a UPS package car is not relevant.

The Court also does not find Dr. Viscusi's testimony regarding the "safety first" approach of federal agencies to be relevant to the Court's analysis. First, UPS is obviously not a federal agency. Second, the Court does not question UPS's right to give safety the highest priority. This does not mean, however, that UPS [*97] is free to decide what it will consider "safe" without also considering the requirements of anti-discrimination statutes such as the ADA. The law is clear that it would not be unlawful for UPS to screen out deaf drivers if it could show that deaf drivers were categorically unsafe. The Court today does not reject that proposition but instead finds that UPS has failed to make the requisite showing.

Nor has UPS demonstrated that it is impossible to do a valid study comparing the relative risks posed by deaf drivers. Although Dr. Songer identified only a handful of deaf commercial drivers in 1992, there is no evidence in the record regarding the number of such drivers more than a decade later. [22] For example, it is not clear whether companies other than UPS employ deaf individuals to drive vehicles weighing 10,000 pounds or less. If they do, then that would be an obvious source of data regarding the risks posed by deaf individuals who drive non-DOT-regulated vehicles commercially. Similarly, Dr. Songer explained that it may be possible to do valid epidemiological studies of deaf commercial drivers in other countries that have different rules governing who may drive which vehicles. Tr. [*98] at 3049:12-18. Beyond that, it is undisputed that states routinely license deaf individuals to drive passenger vehicles without restriction, and UPS has not demonstrated that it would be impossible to do a more reliable study involving deaf passenger-car drivers. Although driving a passenger car is not in all ways equivalent to driving a UPS package car, studies involving deaf passenger-car drivers would nonetheless be relevant to the level of risk posed by deaf drivers. For instance, UPS's expert, Dr. Staplin, agrees that there would be some overlap between studies of deaf passenger-car drivers and deaf commercial drivers, Tr. at 4921:24-4922:8, and UPS also attempted to rely on studies of deaf passenger-car drivers to meet its burden in this case. Finally, UPS has also failed to demonstrate that it would be impossible to do studies using computer simulators, or studies using actual vehicles on closed courses, regarding the situations in which UPS believes deaf drivers would be unsafe or the extent to which compensatory mechanisms may assist deaf drivers in avoiding accidents. The Court does not find Dr. Staplin's conclusory testimony on this point to be persuasive.

[*99] In the end, after considering all of the evidence presented by the parties, the Court concludes that the evidence is inconclusive as to whether deaf drivers pose an increased risk compared with hearing drivers. As Dr. Songer concluded, based on the available evidence, it is possible that deaf drivers may pose an increased risk, the same risk, or even a decreased risk when compared with their hearing counterparts. Because UPS bears the burden of proving business necessity, the lack of conclusive evidence requires the Court to rule against the company; UPS simply has not proven that all or substantially all deaf drivers pose an increased safety risk.

Ability to Determine Which Deaf Driver Applicants Pose an Increased Risk

UPS next asserts that it is entitled to judgment because it meets the second prong of the business necessity defense set forth in *Morton*, 272 F.3d at 1263: that it is impossible to determine which deaf driver applicants pose an increased safety risk and which do not. UPS first attempts to rely on testimony that it would be impossible to predict which deaf drivers will have accidents and which will not. This is obviously true, just as it is [*100] true that it is impossible to predict which hearing drivers will have accidents and which will not. *See EEOC v. UPS*, 149 F. Supp. 2d at 1169 ("UPS relies on the obvious truism that it is impossible to predict which monocular drivers will and which will not have accidents. The same could be said of binocular individuals. The truism leads nowhere.") The question in this case is not whether UPS can predict future accidents, but whether UPS can determine which deaf drivers are more likely to be safe drivers in the same way that the company evaluates which hearing drivers are more likely to be safe drivers.

UPS also attempts to rely on Dr. Songer's statement that "there is no evidence available at this point that can point to characteristics amongst individuals who are deaf or hearing impaired that say that this one may be more likely to crash *because of the hearing impairment* than another one." Tr. at 3051:12-15 (emphasis added). However, UPS ignores the next statement made by Dr. Songer: "There's other things you could do that are unrelated to hearing that may be potentially helpful. But with respect to hearing, there's nothing that we know at this point in time. [*101] " *Id.* at 3051:16-19. The Court interprets Dr. Songer's testimony to mean that it would be impossible to say, for example, whether an individual who is profoundly deaf would be more or less likely to crash because of that impairment than someone who has a lesser degree of hearing impairment, or whether an individual who was born with a hearing impairment would be more or less likely to crash because of that impairment than someone who acquired a hearing impairment later in life.

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[22] Dr. Songer testified on cross-examination that it would be impossible to do a study of deaf commercial drivers in the United States without modifying the rules governing who is allowed to drive commercially. Tr. at 3049:1-18. Read in context, this testimony only states the obvious: that it would currently be impossible to do a study on deaf individuals driving DOT-regulated vehicles because deaf drivers are not currently allowed to drive DOT-regulated vehicles. Dr. Songer's comments clearly do not refer to deaf drivers of non-DOT-regulated vehicles.

The Court does not find this testimony to be dispositive of the ultimate legal issue because it fails to address whether UPS's driver assessment and training programs or other similar tools could be effectively applied to screen deaf drivers.

On that issue, UPS argues that it could not effectively screen deaf driving applicants because deaf individuals' driving records are unreliable. In addition, the company asserts that it would be impossible to train and assess deaf driver candidates. The Court rejects both arguments for the reasons discussed below.

Screening Deaf Driver Applicants

The Court took judicial notice of several settlement agreements (DX2250) between the United States Department [*102] of Justice and various municipal police departments and state patrols. These agreements, which resulted from claims brought under Title II of the ADA, provide guidance for police officers' interactions with hearing-impaired individuals. In particular, portions of the agreements discuss what police officers should do if they stop a hearing-impaired individual for a non-criminal citation, such as a traffic ticket, and would ordinarily conduct an interview before issuing the citation. The agreements provide that, in that situation, the police officer should attempt to communicate with the hearing-impaired individual using a note pad or other means of communication. If the officer is unable to communicate effectively without using an interpreter, then the officer has the discretion either to call a qualified interpreter to the scene or to issue a warning instead of a citation. Under the settlement agreements, the officer cannot issue a citation without waiting for a qualified interpreter if the officer is unable to communicate effectively with the hearing-impaired individual. UPS argues that these agreements demonstrate that DMV driving records for deaf individuals are unreliable because [*103] deaf drivers are more likely to be stopped for traffic violations without being cited.

However, the settlement agreements, standing alone, do not establish UPS's proposition, and UPS has cited no evidence that the agreements have any quantifiable impact on the rates at which deaf drivers are cited for traffic violations in comparison with the rates at which non-deaf drivers are cited. Moreover, the settlement agreements are operative in only a small handful of police departments around the country, and there is no evidence in the record to support even the suggestion that, in areas where no settlement agreement is in place, deaf drivers are cited less frequently than their non-deaf counterparts.

Plaintiffs' expert, Dr. Songer, explained that the evidence on the citation rates for deaf drivers is inconclusive. One study suggested that violations may be pursued more aggressively against deaf drivers, while another study hypothesized that police officers tended to be more lenient in citing deaf drivers for non-major violations. Songer Trial Decl. P 45. As Dr. Songer explained, no reliable data exists to support UPS's theory that the citation rates of deaf drivers are inherently unreliable, [*104] and a controlled study needs to be performed before any conclusions can be drawn regarding whether deaf drivers are cited more or less frequently than non-deaf drivers. *Id.* P 47. The Court finds Dr. Songer's testimony on this point to be credible and persuasive, and it therefore rejects UPS's argument that the DMV records of deaf drivers are unreliable and cannot be used to screen deaf driver applicants.

UPS cites one anecdotal example to support its position, but the Court finds such evidence unpersuasive because it is just that -- anecdotal -- and also because Plaintiffs have offered anecdotal evidence to the contrary. For example, Plaintiff Eric Bumbala, a hearing-impaired individual, has, in fact, been stopped for speeding on multiple occasions by police officers without receiving a citation. On the other hand, however, Plaintiffs Eric Bates and Babaranti Oloyede have never been stopped by a police officer for a traffic violation and not been given a ticket. Given the evidence in this case, the Court can only conclude that deaf drivers are not always cited every time they are pulled over for a minor traffic violation. This conclusion is insufficient to support UPS's position [*105] because, although non-deaf drivers are also not cited every time they are pulled over, UPS has never asserted that it is unable to rely on DMV records as part of its initial screening of non-deaf driver applicants.

Nor has the company made any effort to determine whether any particular group of drivers, such as women or people of color, are disproportionately stopped or cited for moving violations. UPS therefore has no way to compare the reliability of DMV records for any subgroup of driver applicants. As a result, even if UPS could demonstrate that deaf drivers are cited less frequently for traffic violations than non-deaf drivers, this would not establish that the DMV records of deaf drivers are any less reliable than other DMV records that UPS unquestionably relies on as part of its initial screening.

Moreover, UPS does not rely solely on DMV records to establish that a driver applicant is able to drive a UPS package car safely. As discussed, UPS relies on its training and orientation program to instill safe driving skills into its driver trainees, and it will not allow someone to become a package-car driver if that person has not demonstrated the ability to drive safely during [*106] a thirty-day probationary period. In fact, Grady Brown, UPS's corporate transportation safety manager, even went so far as to say that he thought anyone could be trained to drive safely using UPS's methods. Tr. at 4097:19-4099:9. Similarly, although another UPS manager, Greg Hunnicutt, testified that a clean driving record would perhaps indicate a greater concern for safety, he downplayed the role that a clean record could play in predicting whether someone would actually be a safe package-car driver. Tr. at 3543:22-3546:20, 3574:7-13.

Training and Assessing Deaf Driver Applicants

UPS does not argue that deaf individuals cannot effectively participate in the classroom portion of driver training. However, as noted, the process of becoming a package-car driver also includes both a road test and on-road training. Multiple UPS witnesses with experience in driver training testified to the importance of verbal communication during the on-car evaluation and training. For example, during both the road test and on-road training, trainers verbally give trainees driving directions, such as where to turn or where to pull over. In addition, because training cars do not have any brakes [*107] or

steering mechanism on the trainer's side of the car, trainers rely on their ability to give immediate verbal commands to the trainees in cases of emergency, such as when a trainee fails to see a hazard observed by the trainer and could, without intervention, cause an accident.

The UPS driver trainers who testified told the Court that they did not believe they could assess whether drivers were learning and internalizing UPS's safe-driving techniques if they could not communicate verbally with the trainees. Some trainers also testified that they could not think of any way to train a UPS driver on-car without communicating verbally. However, none of these trainers has ever attempted to evaluate the ability of any person who failed the DOT hearing standard to become a UPS driver. Nor has UPS ever conducted any tests or studies on the feasibility of using anything other than verbal communication between a driver trainer and trainee.

While UPS has never tried to give a road test or on-road training to any individual who failed the DOT hearing test, the company has trained at least two hearing-impaired individuals to become package-car drivers: Eric Bates and Oscar Valencia. Both Bates [*108] and Valencia are DOT-certified, and both are able to communicate verbally, though this may be difficult for them in settings where they are unable to read speakers' lips, such as on the telephone. Although their DOT certification removes Bates and Valencia from the class for purposes of Plaintiffs' driving claim, their experiences are nonetheless relevant because they shed light on UPS's driver-training practices.

For example, Bates testified about both his road test with Doug Tilbury and his on-road training with Dan Thorne. Tilbury also testified, but Thorne did not. Tilbury's testimony contradicted portions of Bates's testimony, and it is therefore unclear whether Bates and Tilbury communicated in rudimentary sign language (e.g., simple signs for "turn right," "turn left," and "stop") during the road test. However, the evidence is undisputed that Bates and Tilbury at times communicated verbally, with Tilbury speaking in a louder-than-normal voice and Bates at times, but not continually, looking at Tilbury so that he could read Tilbury's lips. Tilbury also pulled the vehicle over and stopped at one point during Bates's road test to discuss particular training issues and testified [*109] that such stops were "pretty typical in most rides." Tr. at 3931:5-10.

During Bates's on-road training, Thome sometimes communicated with Bates by writing notes to him while stopped at a red light or before starting the vehicle following a delivery stop. Thorne also sometimes spoke to Bates, although Bates found Thome difficult to understand, even when lip reading, because of Thome's fast speaking pace. Bates responded to Thorne mostly by speaking. Bates and Thorne also communicated by typing on a computer in the morning before starting out on the road.

Evidence regarding Oscar Valencia's driver training is less detailed. The only evidence presented to the Court on this issue is that Valencia communicated with his on-road trainer by lip-reading during delivery stops. The Court finds this evidence to be credible, even though Valencia has partial hearing in one ear and can sometimes understand people he cannot see. During the trial, Valencia was able to understand questions from UPS's counsel without an interpreter, but counsel was speaking more slowly than her usual pace, was standing only six feet away from him while she was speaking, and faced him at all times. Valencia also provided [*110] testimony without an interpreter, and the Court could understand his spoken testimony. Notwithstanding these demonstrated communication skills, it appears more likely than not, based on the Court's personal observations of Valencia, that Valencia had to rely at least in part on lip-reading to understand his driver trainer.

Both Bates and Valencia passed the DOT hearing test, so their experiences do not conclusively demonstrate that UPS's training practices can be readily applied to deaf drivers. On the other hand, their experiences do suggest modifications that UPS could make to its training practices so that individuals who fail the DOT hearing test could be adequately assessed and trained. For example, not all individuals who fail the DOT hearing test are completely deaf. The DOT hearing standard requires individuals to be able to hear a forced whisper from five feet away. An individual who fails this test may nevertheless be able to hear a normal speaking voice or a louder-than-normal speaking voice from five feet away (or possibly from even further away). Thus, some individuals who fail the DOT hearing test may be able to receive verbal instructions, including in an emergency [*111] situation, from a trainer during a road test or on-road training without lip-reading, provided that trainer speaks loudly enough.

Bates's and Valencia's experiences also show that driver trainers are able to communicate safely in writing and by facing the trainee and speaking when the vehicle is not moving. Although pulling the vehicle over during the training or taking more time to provide instructions in the morning or following a delivery stop might extend the time required for training, the Court does not find that doing so would pose any significant safety or efficiency concerns.

By contrast, having the trainer and trainee communicate by lip-reading or passing notes back and forth while the vehicle is moving would present obvious safety concerns. Doing either would take the trainee's eyes away from the road for prolonged periods of time, and the trainee could not use his or her hands to write notes and steer at the same time.

Similarly, the Court finds that relying on the trainer to communicate by hand signals in the trainee's peripheral vision would be unworkable. Plaintiffs presented testimony from Daniel Cox, a driver trainer from the Heights Driving School in Ohio. Mr. [*112] Cox uses a combination of hand signals and written notes (the latter only when the vehicle is stopped) to communicate with deaf driver trainees. These hand signals, which were distributed to driving schools throughout the state of Ohio, communicate the following instructions: straight ahead, turn right, turn left, slow down, stop, look ahead, change lanes, and reverse. Another hand sign is used to indicate to the trainee that he or she has performed a task well. Mr. Cox has successfully used these hand signals to train deaf passenger-car drivers, but he has never tried to train a deaf individual how to drive a commercial vehicle. This distinction is relevant because

the trainer sits much closer to the trainee in a passenger car than in a commercial vehicle, such as a UPS P5 package car, and a commercial driving trainee might therefore not be able to see the same hand signals in his or her peripheral vision. In addition, the communication between a UPS trainer and trainee is more complex than the nine hand signals developed by Mr. Cox, and there is no evidence to support a finding that it would be possible to develop signals that could be seen in a trainee's peripheral vision for all [*113] of the necessary communication.

Consequently, the Court concludes that it would be impossible for UPS to apply its current interactive "driver drill" technique to any trainee who could not hear or speak at all, though not all persons who fail the DOT hearing test fall into this category. [23] It is not clear, however, that UPS's current assessment and training process is the only one by which the company could evaluate whether a trainee had effectively learned the five seeing habits, ten-point commentary, and other techniques used by UPS drivers. For example, although UPS's computer-based driver training does not currently simulate a real-world driving experience, this does not mean that it would be impossible to train and assess drivers by computer simulation. Similarly, the evidence does not establish that pulling over periodically, or answering questions at each delivery stop about hazards and other issues that trainers ask about during the driver drill, would be ineffective. Evaluating trainees in a non-real-time setting would obviously require both the trainee and the trainer to remember more details for processing later because they would be unable to answer or review answers [*114] to questions instantaneously, but that does not mean that a non-real-time-based system of evaluation would be ineffective or unworkable. UPS trainers who testified that they require immediate feedback to be able to evaluate a trainee have never tried a different system of evaluation.

Additionally, although the testimony of Daniel Cox is of limited value because it relates only to training passenger-car drivers, it nonetheless demonstrates that it is possible to train deaf individuals how to drive a vehicle. Mr. Cox has trained approximately fifty deaf drivers during the course of his 22-year career as a driving instructor at the Heights Driving School, though only two or three of these drivers were so profoundly deaf that they were unable to communicate verbally with Mr. Cox. Instructors at the Heights Driving School instruct [*115] driver trainees using the Smith technique, which teaches the same five seeing habits that UPS instills as part of its driver training. To evaluate whether deaf driver trainees adequately understand the five seeing habits while they are driving, Mr. Cox asks the trainees to point to hazards they see or to how far up the road they are looking. He also uses an eye-check mirror, which is mounted on the windshield and allows the driver trainer to see where the trainee's eyes are looking and moving. If Mr. Cox does not believe that a trainee is mastering a particular skill, he pulls the vehicle over and re-explains the task and techniques in writing or pictorially. Mr. Cox and his school do not track drivers after they finish the program, so they do not know whether graduates of their training have clean driving records or even if they ever obtain a driver's license. However, Mr. Cox will not issue a certificate of completion to a trainee unless he is confident that the trainee has learned how to drive safely. Thus, Mr. Cox has developed methods by which he can evaluate whether deaf individuals have adequately assimilated the knowledge of the five seeing habits and can apply them on the [*116] road. He uses a checklist (PX326) to assist him in making this evaluation.

The vehicles Mr. Cox uses to train drivers have generally been modified to include additional safety mechanisms. [24] For example, the vehicles have been equipped with an auxiliary brake system that the trainer can use to stop the vehicle, and they also have an auxiliary mirror on the passenger side that allows the trainer to see as much as the driver trainee. In addition, trainers from the Heights Driving School are trained to reach over and grab the steering wheel if necessary to avoid an accident, and the vehicles carry "student driver" designations, as required by state law, that alert other drivers that the vehicle is being driven by a trainee and not a licensed driver.

UPS package-car training vehicles, by contrast, do not have any of these safety mechanisms in place. However, there is [*117] no evidence that it would be infeasible or unreasonable to install an auxiliary brake system or mirror in these vehicles. Nor has UPS explained why, if it is concerned about alerting the general public that a driver trainee is behind the wheel, it could not label its training vehicles with appropriate indicators. One UPS trainer did testify that trainers could not safely reach over and grab the steering wheel of a package car because "then two people are driving the car," Tr. at 4193:12-13, but the Court does not find this testimony convincing as to emergency situations. While it would not be feasible for a trainer to reach over and co-steer the vehicle as a matter of regular practice, the Court finds that it would not be impossible for a trainer to do so if required by an emergency situation. As a result, the Court rejects UPS's assertion that driver trainees must be able to hear verbal instructions to avoid an accident in cases of emergency.

In short, the Court finds that UPS could not use its current "driver drill" technique with all deaf driver candidates, but the evidence suggests several possible alternatives. The Court also notes that the evidence in this case on both sides [*118] could have been much stronger. For example, Plaintiffs have failed to establish conclusively that any of the alternatives discussed would necessarily work in the context of UPS package-car training for all deaf driver trainees. Plaintiffs have also failed to produce evidence of any deaf commercial drivers at any of UPS's competitors, despite promises that it would present testimony from deaf drivers who drove delivery vehicles for the United States Postal Service. On the other hand, UPS has never tried to

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[23] As noted, an individual who cannot pass the DOT hearing standard may nonetheless be able to hear sufficiently to understand a UPS on-car trainer's speech without the aid of lip-reading.

[24] Upon special request, Mr. Cox also sometimes trains drivers using a non-modified vehicle, such as a vehicle provided by the trainee's family.

train a deaf driver, nor has it ever investigated ways in which it might do so. Instead, its witnesses simply repeated throughout this trial that they did not think their current methods would work with someone who could not hear or speak and that, despite having never tried to train a deaf driver, they could think of no way in which deaf drivers could be adequately and safely trained. This testimony demonstrates UPS's failure to consider ways in which it might train deaf drivers, but it does not establish that UPS cannot train and assess deaf driver candidates safely and effectively.

The Court has also reviewed Judge William Alsup's opinion in the monocular vision case and agrees [*119] with his conclusion that several obvious criteria present themselves for evaluating which disabled applicants are safer than others:

> *First*, UPS can and should consider whether the applicant has had the benefit of rehabilitative or specialized driver training to compensate for the impairment. *Second*, UPS can and should consider whether the applicant has a sustained driving record (with the impairment) indicating he or she has successfully overcome the impairment. In this connection, it would not be sufficient for an applicant to show an accident was not his or her fault. UPS could insist on the ability to avoid avoidable accidents regardless of fault. UPS could also insist on reliable proof of one's driving history and would not be at the mercy of the applicant's version of accidents. *Third*, UPS can and should consider whether the applicant has previously successfully driven commercial delivery vehicles (such as Federal Express, newspaper delivery trucks, or postal vehicles) with the impairment. *Fourth*, UPS could require the [disabled] applicant to take a supplemental driving test specifically designed to simulate the scenarios of concern, such as [backing, [*120] approaching railroad crossings, or hearing sirens of emergency vehicles, to name a few examples]. Any and all of these approaches would provide additional evidence on the critical issue of whether the applicant has adjusted to and compensated for the disability sufficiently to be as safe a driver as those typically hired by UPS.*EEOC v. UPS*, 149 F. Supp. 2d at 1170. Similarly, the Ninth Circuit has also suggested some "obvious considerations . . . including the drivers' personal driving record, the precise nature of the hearing loss (Morton, for example, says that she can hear car horns), and whether they have had or could have in the future special training concerning particular safety precautions that can mitigate loss of hearing as a driving risk." *Morton*, 272 F.3d at 1265. UPS has not demonstrated that any of these considerations would be ineffective mechanisms to screen out unsafe deaf drivers.

Based on all of the above evidence, the Court concludes that UPS has demonstrated neither that all or substantially all deaf drivers pose a higher risk of accidents than non-deaf drivers nor that there are no practical criteria for determining [*121] which deaf drivers pose a heightened risk and which do not. Additionally, UPS has not demonstrated that it would be impossible to develop empirical evidence that would be sufficient to make either showing. As a result, UPS has failed to establish that its application of the DOT hearing standard to all package-car driving positions is consistent with business necessity.

UPS's Undue Hardship Defense

In addition to the business necessity defense, the ADA provides for an undue hardship defense, on which the employer also bears the burden of proof. *Morton*, 272 F.3d at 1256-57. The ADA only requires an employer to make reasonable accommodations that do not impose "an undue hardship on the operation of the business" of the employer. *42 U.S.C. § 12112(b)(5)(A)*. The statute defines "undue hardship" as "an action requiring significant difficulty or expense, when considered in light of [a list of enumerated factors, including the nature and cost of the accommodation, the size and resources of the employer, and the effect of the accommodation on the employers' operations]." 42 U.S.C. § 12111(10).

Both parties [*122] contend that the undue hardship defense does not apply here, and the Court agrees. First, under Ninth Circuit precedent, the question of undue hardship only arises when plaintiffs seek a reasonable accommodation to allow them to perform an essential function, not when plaintiffs argue that a disputed job function is not essential. *Cripe v. City of San Jose*, 261 F.3d 877, 885 (9th Cir. 2001). In this case, the Court has determined that being able to drive all UPS package cars, including DOT-regulated vehicles, is not an essential job function. As a result, the undue hardship analysis does not come into play with respect to this purported job function.

The two essential job functions at issue are the ability to drive safely and the ability to communicate effectively. Although it is not clear that all deaf individuals need such accommodations to be able to perform these two essential job functions, it is clear that at least some such individuals would require accommodations. Thus, UPS would ordinarily be entitled to raise undue hardship as a defense. However, the undue hardship defense is an individualized inquiry; it "is used to determine whether it is too onerous for [*123] a particular employer to make a specific accommodation sought by a specific employee, given the employer's size, economic circumstances, and other relevant conditions." *Cripe*, 261 F.3d at 890. This type of particularized analysis does not belong in this first phase of trial, in which the Court is focused on broader class issues.

Additionally, as the Ninth Circuit further explained in *Cripe*, to "excuse a generally discriminatory provision" such as the one at issue in this case, an employer must make out a business necessity defense, which the Court discussed at length above. *Id.* This requires a greater showing than that which is "needed to excuse an employer from accommodating a specific employee under the undue hardship standard." *Id.* In other words, the undue hardship defense is insufficient to establish that a generally discriminatory provision is lawful under the ADA.

Moreover, UPS has failed to engage in the required interactive process to help disabled individuals identify effective reasonable accommodations, and the company has also never attempted to provide deaf driving applicants with any accommodations. Under these circumstances, it would be [*124] premature to evaluate whether doing so would pose an undue hardship. This Court again agrees with Judge Alsup, who wrote that, "until UPS has carried out its affirmative obligation to try, it is premature to determine whether UPS would encounter undue hardships or insurmountable barriers. . . . If UPS allegedly tries and fails [to find a reasonable accommodation], then the issue of undue hardship will be decided on an individual basis." *EEOC v. UPS*, 149 F. Supp. 2d at 1172.

Finally, even if the undue hardship defense did apply at this stage of the case, the Court would find that UPS has failed to meet its burden. For instance, Dr. Viscusi's testimony regarding jury verdicts UPS might face if a deaf driver were involved in an accident is far too speculative, and based on far too long a series of assumptions, to be persuasive. In addition, as a key part of the undue hardship analysis, the Court must consider the costs of the proposed accommodations and the resources of the employer. In this case, the only accommodation for which UPS has presented any cost data is the provision of interpreters -- an accommodation that Plaintiffs do not seek on their driving claim. [*125] It is also undisputed that UPS is an extremely large employer with vast resources. According to UPS's 2000 annual report, the company had $ 29.8 billion in total revenue and an operating profit of $ 4.5 billion in 2000, including a $ 3.9 billion operating profit in the United States domestic package segment. PX22 at 7, 16. Given those resources, UPS has hardly demonstrated that the accommodations regarding safe driving or effective communication suggested in this order would pose an undue hardship to the company's operations, especially since the parties do not dispute that UPS is a sophisticated employer with well-developed, well-staffed systems for handling human resources and engineering issues. Clearly, UPS will have to make some changes to accommodate deaf drivers, but the company simply has not established that those changes will pose an undue hardship.

California State Law Claims

Beyond Plaintiffs' ADA claim, a subclass of Plaintiffs also challenges UPS's ban on deaf drivers under California state law. Specifically, the California subclass asserts claims under the Fair Employment and Housing Act ("FEHA"), Cal. Gov't Code §§ 12940, *et seq.*; the Unruh Civil [*126] Rights Act, Cal. Civ. Code §§ 51 *et seq.*; and California Government Code section 12920, which states that it is "the public policy of this state that it is necessary to protect and safeguard the right and opportunity of all persons to seek, obtain and hold employment without discrimination or abridgment on account of . . . physical disability." The parties agree that resolution of the state claims follows resolution of the ADA claim, and the Court concurs. First, FEHA provides more wide-reaching protections against disability discrimination than the ADA because it includes a broader definition of "disability" than its federal counterpart. *Colmenares v. Braemar Country Club, Inc.*, 29 Cal. 4th 1019, 1024-28, 130 Cal. Rptr. 2d 662, 63 P.3d 220 (2003). The parties do not contest that a violation in this case under the more narrow ADA would therefore also constitute a violation under FEHA. Second, this Court has already ruled that an ADA violation constitutes a violation under the Unruh Act. Nov. 4, 1999 Order at 4-9 (denying UPS's motion to dismiss Plaintiffs' Unruh Act claim). Third, a violation of Plaintiffs' rights under federal and state anti-discrimination statutes would clearly violate the public [*127] policy of protecting such rights. Consequently, because the Court has already found that UPS has violated Plaintiffs' rights under the ADA, it follows that the California subclass should prevail on their claims under state law.

CONCLUSION

In sum, UPS has not shown that the class of individuals who lack sufficient hearing to pass the DOT hearing standard are categorically unable to drive safely or communicate with the public effectively. In addition, UPS has failed to show that it is impossible to determine which members of that class are able to do so and which are not. Accordingly, UPS's application of the DOT standard to non-DOT-regulated vehicles is not consistent with business necessity and, as a result, violates the ADA and California anti-discrimination statutes. Based on these conclusions, IT IS HEREBY ORDERED that:

1. Within thirty calendar days of the date of this order, UPS shall cease using the DOT hearing standard to screen applicants for package-car driving positions. However, nothing in this order requires UPS to allow applicants who cannot pass the DOT hearing standard to drive vehicles weighing more than 10,000 pounds. Indeed, to do so would violate the DOT [*128] regulations, which Plaintiffs do not challenge.

2. After that time, if a package-car driver applicant cannot pass the DOT hearing standard but meets all other threshold qualifications, including having the necessary seniority and meeting the applicable driving record requirements, then UPS shall perform an individualized assessment of that individual's ability to become a package-car driver. As part of that assessment, UPS must engage in an interactive process designed to identify specific accommodations that would enable the deaf individual to obtain driving work in vehicles weighing 10,000 pounds or less. These accommodations must include reasonable accommodations that allow the deaf driver to drive safely and communicate effectively, if that individual is not able to perform these job functions without accommodation.

3. Within sixty calendar days of the date of this order, the parties shall meet and confer regarding how to proceed with Phase II of this case, which will address damages and Plaintiffs' non-class claims. After meeting and conferring, the parties shall file a joint status statement with the Court on or before **Monday, January 10, 2005.** The parties shall then [*129] appear for a case management conference on **Thursday, January 20, 2005, at 10:00 AM.**

In enjoining UPS from continuing to apply the DOT hearing standard beyond its intended scope, the Court wishes to make clear that it is not requiring that UPS allow all deaf driver applicants with the requisite seniority to become package-car

drivers. Nor is it requiring, or even asking, UPS to compromise safety. If, after performing an individualized assessment and engaging in the required interactive process, UPS determines that any particular deaf driver cannot do the job safely, then neither this Court's order nor the ADA requires UPS to hire that person as a package-car driver.

Instead, what both require is that Plaintiffs be given the same opportunities that a hearing applicant would be given to show that they can perform the job of package-car driver safely and effectively. Plaintiffs have not demonstrated that every deaf individual would be a safe driver, nor, does the Court suspect, could they. But that is not what this case is about. The issue here is whether UPS's blanket qualification standard is lawful under federal and state anti-discrimination laws. For the reasons discussed at [*130] length in this opinion, the Court concludes that it is not. Deaf individuals who meet UPS's threshold requirements cannot be categorically excluded and must instead be permitted to proceed through the company's regular processes for becoming a package-car driver, with reasonable accommodations provided to them as needed. UPS relies on these processes to screen out unsafe hearing drivers, and the Court now requires that deaf drivers be treated no differently.

IT IS SO ORDERED.

DATED October 21, 2004

THELTON E. HENDERSON, JUDGE

UNITED STATES DISTRICT COURT