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The employer successfully established the “safety-of-others” defense in a disability discrimination action.

EEOC v. UPS, 05 C.D.O.S. 8382 (9th Circuit – No. 04-15928)

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The federal Department of Transportation (“DOT”) requires all drivers of regulated vehicles to pass the Department’s vision standards. UPS, however, made an accommodation that would allow vision-impaired employees to drive non-regulated cars if they passed the “Vision Protocol” test. The Vision Protocol is less rigorous than the vision standards required by the DOT.

In this case, the plaintiffs suffered from monocular vision, a condition that results in decreased peripheral vision and difficulty with near-field depth perception. Each group of plaintiffs accused UPS of disability discrimination on the grounds that UPS applied the Vision Protocol to deny driving positions to employees that suffered from monocular vision.

The four issues before the court were: (1) whether the plaintiffs are disabled with respect to the major life activity of seeing; (2) whether the plaintiffs are disabled with respect to the major life activity of working; (3) whether UPS can avoid liability because of an affirmative defense; and (4) whether the

District Court abused its discretion by awarding attorney fees to UPS.

The Ninth Circuit held that the plaintiffs were limited in the major life activity of seeing. The threshold question in a discrimination claim under the Fair Employment and Housing Act (“FEHA”) is whether the plaintiff’s qualifying medical condition “[l]imits a major life activity.” Judging depths at near distances is a significant aspect of the major life activity of seeing. It is also important to a number of activities that sight normally is used to perform. Further, the FEHA does not require that the disability result in utter inability or even substantial limitation on the individual’s ability to perform major life activities - a limitation is sufficient. Finally, the California Fair Employment and Housing Commission (“FEHC”) has held that a monocular individual is disabled under FEHA.

The Court also held that the plaintiffs were limited in the major life activity of working. FEHA’s definition of disability encompasses a limitation in a “particular employment.” Here, plaintiffs demonstrated that they were

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limited in working as commercial delivery drivers, not only because they are excluded from working as full-time package drivers for UPS, but also because they are excluded from any commercial driving positions that require DOT or state certification. The fact that plaintiffs were eligible for other commercial driving positions, such as those that require only a Class C driver's license in California, did not mean that they failed to demonstrate a sufficient limitation to satisfy FEHA.

Next, however, the Court held that UPS satisfied the safety-of-others defense. FEHA does **not** prohibit an employer from refusing to hire or discharging an employee where the employee, because of his or her disability, cannot perform the job in a manner that would not endanger the health or safety of others even with reasonable accommodations. Here, the Court found in favor of UPS because its Vision Protocol rests on objective and statistical evidence that monocular drivers are involved in somewhat more accidents than binocular drivers, the risk of harm to others is high, the UPS standard does not categorically exclude monocular individuals from working as full-time package car drivers, and the application of the protocol is individualized to each employee or applicant.

Finally, the Court held that the District Court abused its discretion when it awarded attorney fees under California Government Code § 12965 to UPS. The District Court was within its discretion to determine that some kind of sanction was applicable due to the fact that plaintiffs' counsel knew that one of the plaintiffs had not exhausted his remedies and had reason to suspect that another plaintiff had not. When summary judgment is entered without a decision

on the merits because the plaintiff failed to exhaust, however, the defendant is not a prevailing party that is eligible for fees under § 12965.

This decision should provide some guidance for employers who employ persons with conditions that affect their eyesight. It is a good example of the limitation required in the major life activity of seeing or working under FEHA. Further, it demonstrates to employers the facts that a court looks to when it examines whether an employer has plead the safety-of-others defense.

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