

# Fenwick Employment Brief

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## DEAF EMPLOYEES NEED NOT BE “QUALIFIED” TO BRING ADA CLAIMS

On October 10, 2006, the Ninth Circuit Court of Appeals held that a disabled employee need not prove he was a “qualified” individual to demonstrate disability discrimination. In *Bates v. United Parcel Service, Inc.*, plaintiffs, deaf employees of UPS, alleged that the company violated the Americans with Disabilities Act (“ADA”) by requiring all applicants for driver jobs to pass hearing standards that the Department of Transportation (“DOT”) applied only to drivers of trucks weighing over 10,000 pounds. After conducting a trial on liability, the district court found that UPS’s practice violated the ADA.

On appeal, UPS argued, among other things, that the plaintiffs had to prove they were “qualified” for the job—that they could perform the essential function of driving safely with or without reasonable accommodation—to bring their claims. The Ninth Circuit, however, rejected UPS’s argument as “inconsistent with the language of the ADA.” The court noted that UPS used the DOT hearing standard to determine whether individuals were even qualified to apply for the driver positions; thus, the requirement was “clearly” a qualification standard. Once plaintiffs showed UPS’s qualification standard excluded an individual because of the individual’s disability, the focus turned to UPS to show the standard was job-related and consistent with business necessity. Unlike other disability discrimination claims, such as failure to accommodate, the deaf employees did not have to prove they could safely drive UPS trucks.

Employers should be aware that, when they use broad qualification standards, the focus of a disability discrimination inquiry will be on whether the standard excluded an individual because of his or her disability *regardless of whether the individual was capable of performing the job*. If so, the employer will be put to the test of proving the relatedness and necessity of the standard. Employers would be well-advised to consider whether they employ any such qualification standards and, if so, assess whether such standards are necessary and job-related.

## KENTUCKY RIVER TRILOGY: NLRB CLARIFIES DEFINITION OF “SUPERVISOR”

The National Labor Relations Board (“NLRB”) recently issued three decisions re-examining and defining the terms “independent judgment,” “assign,” and “responsibly to direct,” as they are used in Section 2(11) of the National Labor Relations Act (“Act”). Under Section 2(11), an employee is a supervisor and not subject to the protections of the Act if she assigns work to other employees or responsibly directs them and uses independent judgment in doing so. Under these decisions, a supervisor “assigns” work to others by “designating an employee to a place (such as a location, department, or wing), appointing an individual to a time (such as a shift or overtime period), or giving significant overall duties, *i.e.* tasks, to an employee.” She “responsibly . . . directs” them where her employer has delegated to her authority to “direct the work” and “take corrective action, if necessary” and she is held accountable for the performance of those employees. Independent judgment can be professional or technical, but must not be (a) effectively controlled by another authority, such as guidelines, schedules, instructions, or regulations, or (b) routine or clerical in nature. These follow-on decisions to the Supreme Court’s 2001 decision in *NLRB v. Kentucky River Community Care* responded to the Court’s criticism of the NLRB’s prior narrow interpretation of the term “independent judgment.”

As a practical matter, the trilogy, more popularly referred to as the *Kentucky River* decisions, effectively reduces the field of employees that may be organized under the Act—good news for employers. Characterized by unions as “sweeping,” “blatantly anti-labor,” or “very bad,” the Board’s decisions extend supervisory status to a much larger segment of the employee population.

In addition, the analyses articulated in the decisions may prove instructive even in the non-union context. For instance, both federal and California law require that exempt employees exercise “independent judgment.” Among other concepts discussed in the trilogy, the NLRB emphasized that

judgment is not “independent” when guided by “detailed instruction, whether set forth in company policies or rules [or] the verbal instructions of a higher authority.” This interpretation, although only truly applicable before the NLRB, may also aid employers to better understand similar terms—such as “independent judgment”—as they apply in wage and hour analyses.

## NEWS BITES

### California Court Affirms \$500K Verdict for Racially Oppressive Environment

A California appellate court recently affirmed a \$500,000 jury verdict for an employee who claimed the “racially oppressive” environment of a Union Pacific Railroad railyard deprived him of, among other things, informal training opportunities. In *Franklin v. Union Pacific Railroad Co.*, plaintiff Thomas Franklin, an African-American signalman, claimed the racist attitudes of his coworkers and leadman – “self-described ‘rednecks’” – resulted in him performing a disproportionate amount of menial work and denial of on-the-job training necessary to perform his position and advance in his career. The court recognized that denial of such opportunities, notwithstanding their informal nature, nonetheless constituted an adverse employment action.

### Is Your Arbitration Agreement with Employees Up To Date?

Recently, the National Labor Relations Board (“NLRB”) found that an employer violated the National Labor Relations Act by adopting a broad, mandatory arbitration clause that did not expressly exempt NLRB unfair labor practice claims from arbitration. Employers should review their arbitration agreements to ensure they contain an appropriate “carve-out” for certain administrative claims, including those before the NLRB, the California Department of Fair Employment and Housing, and the Equal Employment Opportunity Commission. Further, the applicable American Arbitration Association (“AAA”) rule set for employment disputes, the “National Rules for the Resolution of Employment Disputes,” are now referred to by the AAA as the “Employment Arbitration Rules and Mediation Procedures.” Newly implemented arbitration agreements, to the extent they apply AAA rules, should reflect this new title.

### \$61M Verdict Against FedEx Slashed to \$12M, Jury Impacted by “Passion and Prejudice”

An Alameda County Superior Court judge reduced a \$61 million jury verdict awarded against FedEx Ground for national origin and race discrimination to \$12 million. In *Issa v. FedEx Ground*, two Lebanese independent contractors for FedEx sued FedEx and a supervisor for discrimination and harassment, including subjecting them to a host of epithets such as “camel jockeys” and “sand niggers.” Notwithstanding its distaste for FedEx’s conduct, including FedEx’s lack of regret and potentially false testimony, the court characterized the \$11 million compensatory award as excessive in light of the dearth of evidence of special damages. “We need little more proof that the jury was affected by passion and prejudice than the fact that it awarded each plaintiff twice what their attorney asked them to award.”

### Wal-Mart Slapped with \$78.5M Damages Award for Wage and Hour Violations

In *Braun v. Wal-Mart Stores, Inc.*, a Pennsylvania jury awarded nearly \$78.5 million to a class of 170,000 Wal-Mart employees for off-the-clock work and missed breaks. Nearly \$76 million was attributed to missed breaks, according to plaintiffs’ counsel. Plaintiffs are expected to request an additional \$62 million in liquidated damages for alleged willfulness and bad faith in denying employees breaks. Wal-Mart has been facing similar lawsuits throughout the country, including in California and Washington.

### Starbucks Punished for Assistant Manager’s Sexual Harassment

In *Robb v. Starbucks Corp.*, a jury awarded \$257,500 to a former Starbucks employee in a same-sex harassment case, as reported in the Daily Labor Report and the San Diego Union-Tribune. Plaintiff Sean Robb sued Starbucks and former assistant manager Michael Sewell for repeated sexual harassment in 2004 and Starbucks’ alleged failure to cure the harassment. Sewell’s conduct reportedly included touching Robb on the face and ears, grinding his body against Robb and other male employees, and calling Robb a “little bitch.” Robb alleged he reported the conduct to the Starbucks human resources department, but Starbucks told Robb that Sewell had not violated the sexual harassment policy and fired Robb three weeks after the complaint. According to his attorney, the jury awarded Robb \$7,500 for emotional distress and \$250,000 in punitive damages.

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