

1998

Max Hobbs v. Utah Labor Commission; Utah Labor Commission Appeals Board; and Delta Air Lines Inc. : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

BUCKET NO. 981742

PR7

Julia D'Alesandro
Clerk of the Court

IN THE UTAH COURT OF APPEALS

MAX HOBBS,)	
)	
Petitioner,)	
)	
vs.)	Industrial Commission Case No. 8950692
)	
UTAH LABOR COMMISSION; UTAH)	Court of Appeals Case No.: 981742
LABOR COMMISSION APPEALS)	
BOARD; and DELTA AIR LINES,)	
INC.)	
)	
Respondents.		

PETITIONER'S REPLY BRIEF

**Petition for Review of an Order of the Labor Commission
of the State of Utah**

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TABLE OF CONTENTS

ARGUMENT	1
DELTA’S CLAIMED JUSTIFICATION FOR DISCHARGING MR. HOBBS (SAFETY CONCERNS) IS A DISPUTED FACT WHICH THE ALJ AND APPEALS BOARD IMPROPERLY DECIDED IN DELTA’S FAVOR.....	1
THE ADA PREEMPTION PROVISION EXCLUDES ANY BROAD NOTION THAT CONGRESS INTENDED TO PROHIBIT STATE EMPLOYMENT DISCRIMINATION LAWS	2
No Mention of Safety in the ADA Preemption Provision	3
No Field Preemption	4
Safety Concerns Too Tenuous, Remote and Peripheral.....	5
THE TERM "SERVICES" UNDER THE ADA PREEMPTION PROVISION DOES NOT ENCOMPASS AIRLINE SAFETY	6
CONCLUSION.....	10

TABLE OF AUTHORITIES

CASES

<u>Air Transport Association of America v. City and County of San Francisco</u> , 992 F. Supp. 1149 (N.D. Cal. 1998).....	9
<u>Aloha Islandair Inc. v. Tseu</u> , 128 F.3d 1301 (9 th Cir. 1997).....	4, 5, 9
<u>Anderson v. Evergreen International Airlines, Inc.</u> , 886 P.2d 1068 (Ore. Ct. App. 1994) ..	3, 4, 8
<u>Belgard v. United Airlines</u> , 857 P.2d 467 (Colo. Ct. App. 1992)	6, 7, 8, 9, 10
<u>Charas v. Trans World Airlines, Inc.</u> , 160 F.3d 1259 (9 th Cir. 1998).....	7
<u>Cipollone v. Liggett Group, Inc.</u> , 505 U.S. 504, 120 L. Ed. 2d 407 (1992)	3, 4, 7
<u>LaRosa v. United Parcel Service, Inc.</u> , 23 F. Supp. 2d 136 (D. Mass. 1998).....	5, 8
<u>Morales v. Trans World Airlines, Inc.</u> , 504 U.S. 374 (1992)	5, 9
<u>O’Hern v. Delta Airlines, Inc.</u> , 838 F. Supp. 1264 (N.D. Ill., 1993).....	7
<u>Parise v. Delta Air Lines, Inc.</u> , 141 F.3d 1463 (11 th Cir. 1998)	2, 6
<u>Smith v. America West Airlines, Inc.</u> , 44 F.3d 344 (5 th Cir. 1995)	8

STATUTES

49 U.S.C. § 1506	4
49 U.S.C. § 41713(b)(1) (1998) (formerly 49 U.S.C. § 1305(a)(1)).....	1
Americans with Disabilities Act, 42 U.S.C. § 12111, <i>et seq.</i>	4

ARGUMENT

In this case, Petitioner Max Hobbs (“Mr. Hobbs”) asserts two errors were made by the Labor Commission Appeals Board and the Administrative Law Judge: first, that factual determinations were improperly made in considering a motion to dismiss, and second, that the Airline Deregulation Act (“ADA”) broadly preempts state law disability discrimination claims. In response, Delta Air Lines, Inc. (“Delta”) completely failed to address the first assignment of error, and argues that the ADA preempts any state law or regulation which is “tied to” airline safety, although the ADA preemption provision, 49 U.S.C. § 41713(b)(1) (1998) (formerly 49 U.S.C. § 1305(a)(1)), does not so provide and more recent, better reasoned decisions have rejected that argument.

DELTA’S CLAIMED JUSTIFICATION FOR DISCHARGING MR. HOBBS (SAFETY CONCERNS) IS A DISPUTED FACT WHICH THE ALJ AND APPEALS BOARD IMPROPERLY DECIDED IN DELTA’S FAVOR.

Though not a legitimate reason for preempting state law, Delta’s claimed motivation for discharging Mr. Hobbs, a concern for airline safety, is a disputed fact which the Appeals Board and the ALJ improperly determined in Delta’s favor. In his opening Brief, Mr. Hobbs addressed this assignment of error by referencing the record and citing supporting caselaw. However, Delta failed to even address this point, thereby relieving Mr. Hobbs of any need to substantively reply. It is enough to state again that by merely claiming an impact on airline safety, Delta has not shown that its motivation for discharging Mr. Hobbs, rather than accommodating his disability, was in fact a legitimate

concern for airline safety. Mr. Hobbs is entitled to a trial on that question. See Mr. Hobbs' first Argument, Petitioners' Brief on Appeal at 10-15.

In a footnote (Respondent's Brief at 28 n. 9), Delta brushes off any question of the propriety of the ALJ's conduct by asserting that "[c]ourts routinely examine the factual allegations surrounding a Complaint to see if the issues presented are ones completely preempted by federal law." (citations omitted). While it may be appropriate to consider the allegations *in* the Complaint, or undisputed facts, it is wholly inappropriate to accept an employer's disputed justifications for discrimination when addressing a motion to dismiss on preemption grounds. In Parise v. Delta Air Lines, Inc., 141 F.3d 1463 (11th Cir. 1998), the court reversed a lower court decision preempting an employment discrimination claim on the grounds that it was improper for the court to rely on Delta's claimed safety justifications to find preemption. Of course that is exactly what Delta has done in this instance, prior to the Parise decision. For the same reason, the same result should hold here. See also the opinion of L. Zane Gill dissenting from the decision of the Appeals Board. R. 407-8, Attachment 3 to Petitioner's Brief.

**THE ADA PREEMPTION PROVISION PRECLUDES ANY BROAD NOTION
THAT CONGRESS INTENDED TO PROHIBIT STATE EMPLOYMENT
DISCRIMINATION LAWS.**

Courts rejecting arguments like Delta's that airline safety concerns justify insulation of airlines from state regulation, have relied on one or more of three basic approaches to finding no preemption. First, those courts have found that since "safety" is

not mentioned in the ADA preemption provision, Congress did not intend to preempt state laws which may have some relationship to airline services. Second, those courts have not found any congressional intent to preempt the field of airline regulation, particularly employment discrimination. Third, safety considerations are too tenuous, remote and peripheral to the goal of airline economic deregulation to be included in the preemption reach of the concept of airline “services”. These cases are discussed below.

No Mention of Safety in the ADA Preemption Provision

By expressly stating the scope of ADA preemption as prohibiting state regulation of rates, routes and services, Congress implied that other matters beyond that reach are not preempted. Yet without citing any authority on point, Delta argues that when the ADA and other airline regulations are considered as a whole, given the importance of safe airline travel, it must be concluded that Congress intended that state employment regulation be preempted.

In Anderson v. Evergreen International Airlines, Inc., 886 P.2d 1068 (Or. Ct. App. 1994), an employee was terminated for refusing to violate federal aviation regulations. The defendant there made the same argument as Delta that a “`complex and pervasive federal regulatory scheme’ governing aircraft operations and safety, `occupied the field,’ leaving no room for a state common law wrongful discharge action.” Id. at 1070. Citing Cipollone v. Liggett Group, Inc., 505 U.S. 504, 120 L. Ed. 2d 407 (1992),

the Oregon Court of Appeals held that Congress did not intend broad “field” preemption when enacting the ADA.

Defendant’s first argument, that, by providing a ‘complete scheme for governing airline safety,’ Congress has ‘occupied the field’ of aviation safety, fails because ‘[w]hen Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing the issue, and when that provision provides a reliable indicium of congressional intent with respect to state authority, . . . there is no need to infer congressional intent to pre-empt state laws from the substantive provision of the legislation. . . . Such reasoning is a variant of the familiar principle of *expressio unius est exclusio alterius*: Congress’ enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted.’

Id. (quoting Cipollone, 505 U.S. at 517) (omissions in original). The Court then noted that Congress’ inclusion of a savings clause, 49 U.S.C. § 1506, “precluded implicit ‘field preemption’”. Id. at 1070.

No Field Preemption

Delta further argues, again without any authority on point, that Congress intended regulation of the airline employment relationship to be federalized since the choice of employees and decisions affecting them may “relate to” safety considerations. This argument fails for at least two reasons. First, as recognized in Anderson, Congress made no provision in the ADA for a remedy for wrongful termination. Id. at 1072. Likewise, the Court of Appeals for the Ninth Circuit in Aloha Islandair Inc. v. Tseu, 128 F.3d 1301, 1303 (9th Cir. 1997), observed that in passing the Americans with Disabilities Act, 42 U.S.C. § 12111, *et seq.*, Congress provided remedies enforceable in both federal and

state courts “without exempting pilots or expressing any concern whatsoever that airline safety would be compromised . . . and we see no reason why Congress would have had any such concerns about the enforcement of state disability discrimination laws when it enacted the Airline Deregulation Act.” Id.

Second, an argument that variations in state anti-discrimination laws would defeat the congressional purpose of the ADA was rejected recently by the federal district court for the District of Massachusetts in LaRosa v. United Parcel Service, Inc., 23 F. Supp. 2d 136, 143 (D. Mass. 1998). In LaRosa, the court, quoting from a recent Second Circuit decision, held that Massachusetts handicap and age discrimination laws were not preempted by the ADA, noting that any variation in state anti-discrimination laws is “‘little different from generally applicable tax, environmental, or blue sky laws, which as a general matter are not preempted under the ADA.’” Id. (quoting Abdu-Brisson v. Delta Air Lines, Inc., 128 F.3d 77 (2nd Cir. 1997)).

Safety Concerns Too Tenuous, Remote and Peripheral

In Morales v. Trans World Airlines, Inc., 504 U.S. 374, 391 (1992), an ADA preemption case, the Supreme Court recognized that “‘some state actions may affect [airline fares] in too tenuous, remote, or peripheral a manner’ to have pre-emptive effect.” Relying on the Supreme Court’s limitation on the preemptive scope of the ADA, the Ninth Circuit Court of Appeals in Tseu, 128 F.3d at 1303, found safety concerns too tenuous, remote and peripheral to justify preemption of a state law disability discrimination claim.

THE TERM “SERVICES” UNDER THE ADA PREEMPTION PROVISION DOES NOT ENCOMPASS AIRLINE SAFETY.

Delta’s argument that state regulations that “intertwine with airline safety” are within the ADA’s preemptive scope has been rejected by most every court that has recently considered it. In addition, the only case cited by Delta in support of that argument, Belgard v. United Airlines, 857 P.2d 467 (Colo. Ct. App. 1992) has been discredited or rejected outright. The only recent case cited by Delta, Parise v. Delta Air Lines, Inc., 141 F.3d 1463 (11th Cir. 1998), is replete with dicta concerning preemption, but reversed Delta’s lower court victory on the same grounds urged here, that Delta’s “safety” justification for discrimination was not properly to be considered upon a motion to dismiss. Delta’s reliance on dicta and a discredited decision, and lack of any accurate attempt to distinguish other authorities cited by Mr. Hobbs, leaves Delta’s repeated cry of “SAFETY” as no support for preemption of valid state anti-discrimination laws.

In Belgard, a lower Colorado appeals court decided in 1992, without the benefit of the many state and federal decisions addressing the question, preempted state law disability discrimination claims by pilots who were denied employment because they had undergone corrective eye surgery, although they held proper airman’s certificates evidencing physical qualifications for the job. The court’s basis for finding express preemption was that broadly defined, airline “services” are implicated by enforcement of employment discrimination laws because it would affect an airline’s ability to determine the “quality” of its employees and thereby the “safety” of its services. The court accepted

that safety was the ultimate goal and priority of aviation regulation, and then speculated that enforcement of state law disability discrimination claims could impact the quality of airline employees and therefore the “services” they provide. Of course that approach ignores the fact that the ADA was intended to bring about economic deregulation. Charas v. Trans World Airlines, Inc., 160 F.3d 1259, 1266 (9th Cir. 1998). The Belgard court justified the breadth of its holding by further speculating that state regulation could have inconsistent results (unlike racial discrimination laws) where one state could compel employment of disabled persons, another could prohibit such employment¹, and yet a third could leave the decision to the discretion of the airlines. Belgard, 857 P.2d at 471. Later decisions have rejected the Belgard analysis and holding.

In 1993, Delta asked the federal district court for the Northern District of Illinois to find “that ‘services’ impliedly encompasses matters concerning ‘safety’” since they relate to services. O’Hern v. Delta Airlines, Inc., 838 F. Supp. 1264, 1266 (N.D. Ill. 1993). O’Hern involved a passenger’s state law negligence claim for hearing loss due to rapid airplane ascent. The court found that Congress did not intend to include concepts of safety in the ADA preemption provision because of the absence of any mention of safety therein, citing Cipollone for the proposition noted above that definition of “the preemptive reach of the statute implies that matters beyond that reach are not preempted.” Id. at 1267 (quoting Cipollone, 505 U.S. at 517).

¹ That a state would prohibit the employment of a disabled person otherwise qualified defies credibility.

The Illinois federal court further noted that the Tenth Circuit Court of Appeals found no inconsistency between the federal goal of aviation safety and pursuit of state common law claims for negligence, thus concluding that “services” does not encompass “safety”. *Id.* (citing Cleveland v. Piper Aircraft Corp., 985 F.2d 1438 (10th Cir. 1993)); *cert. denied* 510 U.S. 908 (1993). Moreover, the court adopted an analogy made in a Seventh Circuit decision as to the lack of federal preemption in both aviation safety regulation and nuclear safety regulation, finding the absence in the latter supports a finding of an absence in the former. *Id.* (citing and quoting Bieneman v. Chicago, 864 F.2d 463 (7th Cir. 1988); *cert. denied* 490 U.S. 1080 (1989)).

In the 1994 decision in Anderson, *supra*, the court addressed the same argument, that “services” as used in the ADA encompasses “safety”. 886 P.2d at 1071. Calling the notion a “problematic premise”, the court found that safety issues are so tangential to a wrongful discharge claim that preemption is precluded.

In 1995, the Fifth Circuit Court of Appeals addressed a request to preempt passengers’ claims for failing to prevent a hijacking on the grounds that such claim implicated the “safety” of an airline’s boarding procedures. The court rejected the argument on the grounds that the scope of preemption was limited to the economic or contractual dimension of the boarding procedures, not the safety of the flight. Smith v. America West Airlines, Inc., 44 F.3d 344, 347 (5th Cir. 1995). In two 1998 decisions, the Belgard decision was criticized as too broad. LaRosa v. United Parcel Service, Inc.,

23 F. Supp. 2d 136, 142 (D. Mass. 1998)(age and handicap discrimination claim); Air Transport Ass'n of America v. City and County of San Francisco, 992 F. Supp. 1149, 1184 (Cal. N.D. 1998) (attack on ordinance prohibiting discrimination based on marital status). Both courts relied on the decision of the Ninth Circuit Court of Appeals in Tseu, *supra*.

In Tseu, the court reversed a lower court decision granting injunctive relief to prohibit enforcement of disability discrimination claims by a monocular pilot in reliance on Belgard. The airline justified its policy on safety grounds and claimed that pilot qualification related to services and was preempted under the ADA. While the court did not rule that all state safety laws were or were not preempted, the court clearly held that an argument that physical disability discrimination claims were preempted because they affect safety (and therefore “services”), was “as untenable as an argument that racial or gender discrimination claims are preempted.” Id. at 1303. The court noted that pilot qualification was sufficiently regulated to render any relation between safety and services “too tenuous, remote and peripheral” to support preemption. Id. (citing Morales v. Trans World Airlines, Inc., 504 U.S. 374 (1992)). Most notably, though, the court in a footnote recognized that its analysis was at odds with Belgard, and therefore declined to follow it. Tseu, 128 F.3d at 1304 n.4.

In relegating its discussion of Tseu to a footnote, Delta attempts to downplay its significance. Respondent’s Brief on Appeal at 26 n. 8. However, Delta goes beyond

slighting the treatment to affirmatively misrepresenting the court's holding. Nowhere in its decision does the court even recognize "that laws affecting the safety of aircraft operations may be preempted by the ADA because they related [sic] to services provided by air carriers." Id. Indeed the court referred to such a notion as "untenable". Id. at 1303. A discriminatory hiring practice cannot be couched as a mere qualification standard, even if it invokes a concern for safety as its animating force." Id. at 1304. By rejecting Belgard, and finding the airlines' "safety" argument untenable, the "recognition" Delta ascribes to the court couldn't be further from the truth.

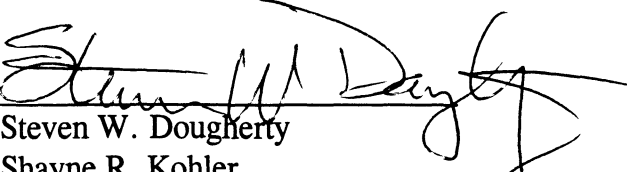
CONCLUSION

Delta has provided no compelling support for its argument for preemption, has failed to address more recent and compelling authority to the contrary, and wholly failed to address Mr. Hobbs' claim that the Appeals Board and ALJ improperly made determinations of disputed fact, thereby denying Mr. Hobbs a fair trial. For these reasons and those stated in his opening Brief, Petitioner Max Hobbs requests that the Court vacate

the Appeals Boards' and ALJ Switzer's Orders dismissing Mr. Hobbs' Charge of Discrimination, and remand the matter to the Utah Labor Commission for an evidentiary hearing on such Charge.

RESPECTFULLY SUBMITTED this 30th day of April, 1999.

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CERTIFICATE OF MAILING

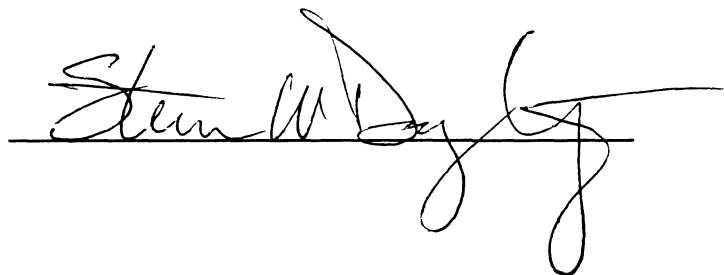
I hereby certify that a copy of the foregoing APPELLANT'S REPLY BRIEF was mailed, postage prepaid, this 30th day of April, 1999, to the following:

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A handwritten signature in black ink, appearing to read "Steven W. Day", is written over a horizontal line. The signature is stylized with a large, looping initial "S" and a long, sweeping horizontal stroke.