

1998

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

Utah Court of Appeals

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Recommended Citation

Brief of Appellee, *Hobbs v. Utah Labor Commission*, No. 981742 (Utah Court of Appeals, 1998).
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IN THE ~~UTAH~~ COURT OF APPEALS

MAX L. HOBBS,

Petitioner,

v.

UTAH LABOR COMMISSION; UTAH :
LABOR COMMISSION APPEALS :
BOARD; and DELTA AIR LINES, INC.:

Respondents.

Industrial Commission Case No. 8950692

Court of Appeals Case No. 981742

Priority No. 7

BRIEF

UTAH
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SECRET NO. 981742

RESPONDENT'S BRIEF ON APPEAL

Appeal from an Order Entered by the Labor Commission of the State of Utah

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FILED

MAR 29 1999

Julia D'Alesandro
Clerk of the Court

IN THE UTAH COURT OF APPEALS

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	:	
Petitioner,	:	Industrial Commission Case No. 8950692
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BOARD; and DELTA AIR LINES, INC.:	:	
	:	
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STATEMENT OF JURISDICTION

The Utah Court of Appeals has jurisdiction to review orders of the Appeals Board of the Utah Labor Commission pursuant to Utah Code Ann. §§ 34A-1-303(6), 34A-2-801(8)(a), 63-46b-16(1) and 78-2a-3(2)(a) (1997).

STATEMENT OF ISSUE ON APPEAL AND STANDARD OF APPELLATE REVIEW

Statement of Issue

Whether the decision of the Utah Labor Commission Appeals Board dismissing Petitioner Max Hobbs' claims should be disturbed when it logically and correctly concluded that the federal Airline Deregulation Act, which prohibits states from enforcing laws "relating to" the "services" of commercial air carriers, preempts the use of the Utah Anti-Discrimination Act in a way that may interfere with a commercial airline's ability to provide safe and secure air transportation to the traveling public.

Standard of Review

While the "correction-of-error" standard of review is generally applied to a state agency's statutory interpretations, see Utah Dep't of Admin. Serv. v. Public Serv. Comm'n, 658 P.2d 601, 608-12 (Utah 1993), in this case the Court should afford deference to the Appeals Board's decision. Deference to the Appeals Board is appropriate based on the Appeals Board's "expertise gleaned from its accumulated

practical, first-hand experience” as to the manner in which the Utah Anti-Discrimination Act operates and the extent to which Utah state law will necessitate an inquiry into, and potential interference with, issues of airline safety. See Bennett v. Industrial Comm’n, 726 P.2d 427, 429 (Utah 1986).

DETERMINATIVE STATUTES

The Airline Deregulation Act, Pub. L. No. 92 Stat. 1705 (1978), 1978 U.S. Code Cong. & Admin. News (92 Stat.) 1705.

Factors For Interstate And Overseas Air Transportation

Sec. 102. (a) In the exercise and performance of its powers and duties under this Act with respect to interstate and overseas air transportation, the Board shall consider the following, among other things, as being in the public interest...:

- (1) The assignment and maintenance of safety as the highest priority in air commerce and prior to the authorization of new air transportation services, full evaluation of the recommendations of the Secretary of Transportation on the safety implications of such new services...

(emphasis supplied)

49 U.S.C. § 41713(b)(1) (1998) (formerly 49 U.S.C. § 1305(a)(1))

Preemptive authority over prices, routes and service

(b) **Preemption.** (1) Except as provided in this subsection, a State, political subdivision of a State, or political authority of at least 2 States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart.

(emphasis supplied)

Utah Code Ann. § 34A-5-106(1)(a)(i) (1997) (formerly § 34-35-6 (1989))

Discriminatory or unfair employment practices - Permitted practices.

(1) It is a discriminatory or prohibited employment practice:

(a)(i) for an employer to refuse to hire, or promote, or to discharge, demote terminate any person, or to retaliate against, harass, or discriminate in matters of compensation or in terms, privileges, and conditions of employment against any person otherwise qualified, because of race, color sex, pregnancy, childbirth, or pregnancy-related conditions, age, if the individual is 40 years of age or older, religion, national origin or handicap. No applicant nor candidate for any job or position may be considered “otherwise qualified,” unless he possesses the education, training, ability, moral character, integrity, disposition to work, adherence to reasonable rules and regulations, and other job related qualifications required by an employer for any particular job, job classification, or position to be filled or created.

STATEMENT OF THE CASE

Nature of the Case

Petitioner Max Hobbs (“Mr. Hobbs” or “Petitioner”) is a former Customer Service Agent (“CSA”) employed by Respondent Delta Air Lines, Inc. (“Delta” or “Respondent”). (R. 1) As a substantial part of his job responsibilities, Mr. Hobbs drove vehicles (including tugs designed to carry baggage) and directed equipment, including aircraft, at the Salt Lake City Airport. (R. 1, 5-6, 13-16, 19-20) He was terminated from this safety-sensitive position after he repeatedly drove baggage tugs into Delta’s planes.

(Id.)

Following his accidents and termination, Mr. Hobbs filed a Charge of Discrimination against Delta with the Utah Anti-Discrimination Division of the Utah Industrial Commission (now known as the Utah Anti-Discrimination and Labor Division or the “UALD”). (R. 1) Through his Charge, Mr. Hobbs seeks to regain employment at Delta because he was allegedly disabled during his repeated accidents. More specifically, Mr. Hobbs alleges that he had a bi-polar disorder; and that this disorder made it difficult for him to avoid crashing into planes while driving Delta’s motorized vehicles.¹ Because of this, Mr. Hobbs contends that Utah law demands he be returned to his position notwithstanding any impact that this may have on Delta’s ability to provide safe air transportation to the traveling public.

Course of Proceedings and Disposition

In response to the Charge of Discrimination, the UALD issued a preliminary determination. (R. 18-23) Among other things, the UALD reached the illogical and alarming conclusion that Delta was obliged by Utah law to ignore Mr. Hobbs’ repeated aircraft incidents, and leave him employed at the airport – working in and around Delta’s aircraft. The UALD reached this conclusion simply because, after his repeated accidents, Mr. Hobbs alleged that his unsafe actions were caused by an alleged disability (bi-polar disorder). (R. 18-23)

¹ It should be noted that throughout these proceedings, Mr. Hobbs has vacillated on the precise cause of his repeated aircraft accidents. While he now claims that it was as a result of an alleged bi-polar disorder, he has previously stated that his accident was due to inadvertent misjudging of distance and poor “weather conditions.” (R. 5, 14)

Following the UALD's determination, Delta requested an evidentiary hearing on the grounds that the determination was not supported by either law or fact and, in any event, the claim was preempted by federal law -- the Airline Deregulation Act of 1978, 49 U.S.C. § 41713(b)(1) (the "ADA"). (R. 27-35) Delta's request was granted, and the matter was transferred to the Adjudication Division of the Industrial Commission of Utah for a full hearing. (R. 37)

Following the transfer, Delta filed a Motion to Dismiss the claim based on federal preemption. As Delta explained to Administrative Law Judge Kathleen Switzer ("ALJ Switzer"), Mr. Hobbs' claim is intimately tied to Delta's most important, federally-mandated obligation -- to provide safe and secure transportation to its passengers. The claim is intimately tied to matters of safety because it requires a Utah state agency to: (a) carefully analyze and judge the steps that Delta considers necessary to maintain the highest levels of airline safety; (b) decide whether these safety practices are lawful under Utah state law as they pertained to Mr. Hobbs; and (c) decide whether the steps that Delta takes to ensure the safest possible travel environment should nonetheless be overruled under Utah law in order to reinstate Mr. Hobbs to his position working in and around Delta's aircraft.

Following full briefing on Delta's motion and oral argument, ALJ Switzer issued her decision. (R. 340-47) In a painstakingly researched and thorough opinion, the ALJ

recognized that Mr. Hobbs' claim relates to Delta's safety obligation and is thus preempted by the ADA.

ALJ Switzer's opinion contains one of the most comprehensive discussions of the ADA that has been issued by any Court or Administrative Agency. As she correctly finds from the text of the ADA and interpretive case law: (1) the ADA preempts any state law claim that "relates to" the "services" of a commercial air carrier; and (2) the most critical "service" provided by Delta, or any commercial air carrier, is the provision of safe and secure transportation to its passengers. ALJ Switzer correctly recognized, based on Mr. Hobbs' statements and admissions in his Charge, that his claim here cannot be resolved without completing a sweeping review of Delta's federally-mandated safety obligations and a weighing of those safety obligations against the dictates of Utah law. ALJ Switzer concluded that because this matter is so intertwined with Delta's safety responsibilities, it must be deemed to be "related to" Delta's "service" of providing safe air transportation and deemed preempted by the ADA.²

It should be noted that, contrary to Mr. Hobbs' current spin on the prior proceedings, ALJ Switzer did not make any improper factual determinations in finding preemption. Instead, the only facts she relied on were those derived from Mr. Hobbs'

² Importantly, Delta has never argued that it is immune from anti-discrimination laws as a result of ADA preemption. Indeed, preemption of a Utah state law claim does not permit an airline to utilize discriminatory policies. Airline policies are subject to scrutiny under federal law, including Title VII, the Age Discrimination in Employment Act, the Americans with Disabilities Act, and a host of other federal anti-discrimination laws.

Charge and accompanying submissions showing that: (1) during one thirty-three (33) day period in 1995, Mr. Hobbs twice crashed a motorized vehicle into a parked airplane and damaged the plane; (2) Mr. Hobbs was terminated immediately following his repeated accidents; and (3) Mr. Hobbs attributed his unsafe conduct to his alleged bi-polar disorder. (R. 341-42, 405)³ Based on these facts alone, the ALJ correctly recognized that complex issues of airline safety would need to be extensively reviewed and considered during the course of this case. The ALJ also correctly found that the future resolution of this dispute may impact on Delta's mandate to provide the highest levels of safety for its passengers and employees. It was this necessity of delving into and perhaps ultimately interfering with Delta's federally-mandated safety obligation that led to ALJ Switzer's conclusion that this state-law claim must be deemed preempted by the ADA and properly resolved in a federal forum. (R. 344-46)

Mr. Hobbs appealed ALJ Switzer's Order to the Appeals board of the Utah Labor Commission. (R. 351) After careful consideration, the Appeals Board affirmed ALJ Switzer's decision. First, the Appeals Board recognized that ALJ Switzer had not made any determinations of fact – but instead relied only on the facts set forth by Mr. Hobbs in his Charge and accompanying materials regarding his repeated collisions with aircraft and

³ Each of these determinations was plain from the face of the Charge, and indeed Mr. Hobbs has himself recognized his violations of Delta's safety obligations. After his suspension and recommended termination for his repeatedly unsafe conduct, Mr. Hobbs' submitted a letter to Delta which acknowledged his "equipment handling problems" as well as the fact that he needed to correct his problems so as to "operate safely the equipment associated with his job at Delta Air Lines." (R. 17)

his attempt to attribute his actions to bi-polar disorder. (R. 405) The Appeals Board then reviewed applicable precedent and concluded that, based on the facts set forth in the Charge, Mr. Hobbs' claim was inextricably intertwined with issues of commercial airline safety. The Appeals Board correctly recognized that because this area is one that is necessarily off-limits to varying and conflicting state regulations, Mr. Hobbs' claim must be deemed to be preempted and must be resolved in a federal forum and under federal law. (R. 406)

Following the Appeals Board's decision, Mr. Hobbs filed the present Petition for Review. (R. 410-12) As is evident from his Brief, Mr. Hobbs recognizes that he is facing well-reasoned and persuasive decisions from ALJ Switzer and the Appeals Board. His only defense is to attack the decision by incorrectly accusing ALJ Switzer and the Appeals Board of making improper factual determinations, and by attempting to overly-circumscribe the case law authority regarding ADA preemption. As set forth below, both of Mr. Hobbs' arguments are misplaced. The decision of ALJ Switzer and the Appeals Board, that the UADA is preempted by the ADA in cases where it intertwines with the safety obligations of commercial air carriers, should be affirmed.

Statement of Facts

Mr. Hobbs worked for Delta as a Customer Service Agent ("CSA") at the Salt Lake City Airport. (R. 1) A CSA's duties include driving ground equipment on the

ramp,⁴ directing aircraft, and loading and unloading baggage, cargo, and mail into and out of aircraft. ((R. 1, 5-6, 13-16, 19-20) While working on the ramp, Mr. Hobbs was involved in several accidents in which he collided with Delta's aircraft and caused damage to the body of the plane. (Id.; R. 341-42).

On May 30, 1995 while loading a plane, Mr. Hobbs failed to allow sufficient clearance, causing a cargo container to strike the aircraft wing. (R. 1, 5-6, 9, 14, 19, 341-42) As this was only the most recent in a series of accidents, Delta suspended him for his misconduct and placed him on disciplinary probation. He was also told that any further infraction of Company policy or failure to meet Company standards would result in further disciplinary action. (Id.)

Despite this warning and severe discipline, only a month later and while still on probation Mr. Hobbs again caused another accident. This time he drove a tug underneath an aircraft wing, in violation of Company policy, causing damage to the plane and cargo container. (Id.) Mr. Hobbs' only explanation was that he never bothered to look behind

⁴ The ramp is the outdoors portion of the airport where planes arrive and depart, and cargo is loaded, unloaded and transferred. As may be obvious, the ramp is a very dangerous place -- planes are constantly moving in and out of the ramp area along with countless pieces of ground equipment. Thus, a CSA must perform his job duties with the highest degree of safety possible. If a CSA is careless or negligent, disastrous consequences can occur. For instance, a CSA driving a piece of ground equipment could run into a plane causing an accident which could result in significant injury and even death to Delta's passengers, employees, and cause substantial property damage. Despite the strict maintenance of safety rules, CSA's have suffered serious injuries and death because of accidents on the ramp. See e.g., Parise v. Delta Airlines, Inc., 73 Fair Emp. Prac. Cas. (BNA) 1829 (M.D. Fl. 1997), rev'd on other grounds, 141 F.3d 1463 (11th Cir. 1998).

him and thought the cargo containers were not hooked to the tug. (R. 5-6, 14) He was suspended pending review for termination for his misconduct. (R. 1, 5-6, 19-20; 341-42)

After being suspended pending termination, Mr. Hobbs came forward for the first time and claimed he suffered from a disability which affected his concentration. (R. 15, 17, 19) He asked that he not be required to perform any essential functions of the CSA position involving operation of motorized equipment. (Id.) Given the serious consequences of his repeated accidents and its determination that Mr. Hobbs had repeatedly violated safety rules and regulations, however, Delta concluded that it had no choice other than to terminate his employment.⁵ (Id.)

⁵ While not directly relevant to this appeal, it should be noted that Mr. Hobbs' belated request did not prevent his termination for at least two reasons. First, his latest misconduct and triggering accident was caused by Mr. Hobbs' decision not to comply with safety procedures by driving a vehicle under a wing and by failing to look to see if anything was attached to his tug before driving it, and not any effects from an alleged disability. Second, regardless of his alleged disability, Mr. Hobbs was simply not qualified and his misconduct warranted his termination.

It is well-settled under the Americans With Disabilities Act that an employer is not prohibited from terminating an employee for violations of policy -- particularly safety policy -- even if the employee claims the violation was caused by a disability. It is also well established that an employer is not required to absolve an employee of a violation, or relieve him from performing essential functions of his job, as an accommodation to a disability. Accordingly, given Mr. Hobbs' repeated accidents and failure to correct his deficient safety record, Delta had no alternative but to ensure the safety of its services and terminate his employment. Although the Utah courts have interpreted the UADA's disability discrimination provisions to be analogous to the Americans With Disabilities Act, the UALD issued a probable cause finding on Mr. Hobbs' disability discrimination charge, concluding that Mr. Hobbs should not have been terminated and that Delta was required to continue his employment despite his undisputed poor safety record. The UALD's decision would require Delta to retain the employment of an individual with a demonstrated history of accidents and unsafe acts, thereby unnecessarily jeopardizing the safety and well-being of Delta's passengers and employees.

Despite the logical basis for Delta's decision, the UALD determined that Delta is obliged, under Utah law, to reinstate Mr. Hobbs to his former position, and provide him with wide-ranging additional relief. (R. 24-25) Although it has never controverted that Hobbs was terminated because of his dangerous record of accidents involving motorized vehicles and Delta aircraft, the UALD determined that Delta was nevertheless required to reinstate Hobbs because he made an accommodation request on the eve of his termination. (R. 21-22, 24-25)

The UALD's determination -- coupled with Mr. Hobbs' attempt to enforce it against Delta -- goes to the heart of Delta's obligation to provide the safest possible air transportation. Because this safety obligation is Delta's single most important mandate (indeed, one that is compelled by federal law) the federal ADA preempts the claim, and demands that it be resolved under federal law.

SUMMARY OF ARGUMENT

Mr. Hobbs challenges Delta's decision to terminate him as a Delta Customer Service Agent after a series of accidents. His challenge is based on the allegation that he had a bi-polar disorder that contributed to these accidents -- and therefore that Delta was obliged to ignore his safety problems and retain his employment in and around aircraft. As ALJ Switzer and the Appeals Board correctly recognized, however, this claim is intimately tied to Delta's federally-mandated safety obligation, and thus is preempted by the federal Airline Deregulation Act.

The ADA is a wide-ranging amendment to the Federal Aviation Act – the statute comprehensively regulating commercial air travel in the United States. When Congress enacted the ADA, it addressed a number of areas relating to commercial air travel, including issues of economic deregulation. As is apparent from the text and legislative history of the statute, however, the first and foremost concern of Congress in enacting the ADA was airline safety. Through the ADA, Congress promulgated substantial rules and regulations covering commercial air carriers that were designed to ensure that airline safety remained “the highest priority in air commerce.”

At the same time it did this, Congress also enacted the ADA’s preemption provision – to ensure that States did not undo the work of the ADA with rules and regulations of their own. Congress recognized when it enacted the preemption provision that allowing fifty different states to enact or enforce rules that impinged upon airline safety would ultimately diminish the airlines’ ability to consistently ensure not only safe air travel, but the very safest air travel possible.

The plain language of the ADA’s preemption provision broadly preempts any state law claim that “relates to” the “services” of a commercial air carrier. As set forth below, Congress recognized through the ADA that Delta’s most critical “service” is the provision of safe and secure transportation to its passengers. The text of the ADA’s preemption provision, its context within the broad-sweeping Federal Aviation Act, its legislative

history, and interpretive case law all show that state laws which are closely tied to issues of airline safety -- like the one at issue -- are preempted by the ADA.

In a step-by-step approach below, the history, context and relevant case law is discussed. All of these lead inevitably to the conclusion that individual states should not regulate airline safety nor make value judgments about when their laws outweigh commercial airlines' safety practices.

ARGUMENT

A. ALJ Switzer And The Appeals Board Correctly Concluded That The Airline Deregulation Act Preempts Utah State-Law Claims That Relate To Airline Safety.

1. The touchstone of preemption is Congressional intent.

As set forth in the Constitution, the laws of the United States are “the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the constitution or the Laws of any State to the Contrary notwithstanding.” U.S. Const., art VI, cl. 2. Under this Constitutional provision, the United States Supreme Court and the lower federal courts have frequently invalidated the application of state laws which may in any manner intrude upon the execution of a federal statutory scheme. See e.g., Louisiana Public Service Comm’n v. FCC, 476 U.S. 355, 368-69 (1986).

The Supreme Court has explained that the Supremacy Clause “may entail preemption of state law either by express provision, by implication, or by a conflict between federal and state law.” New York Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 654 (1995). As both Mr. Hobbs and Delta agree,

however, under any of these pre-emption analyses the “ultimate touchstone” is whether Congress intended, via legislation, to exclusively federalize the regulation of a particular subject matter. See Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 45 (1987).

As set forth below, it is readily apparent from a host of sources that Congressional intent is to federalize the regulation of airline safety, and to prohibit states from interfering with its uniform national scheme, because the matter is of such paramount importance to the traveling public.

2. Congress has made clear its intent that only the federal government and not a multitude of individual states should regulate matters relating to airline safety.

For decades, Congress has made clear its view that “[t]he regulation of interstate flight ... must of necessity be monolithic. Its very nature permits no other conclusion.” French v. Pan Am Express, Inc., 869 F.2d 1, 6 (1st Cir. 1989) (citing City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624, 638 (1973)). It has also made clear its view that nowhere is the need for a single, uniform set of guidelines and regulations more necessary than in the area of airline safety.

Safety is so critical that Congress and the Federal Aviation Administration (“FAA”) have become intimately involved in the area, and have federalized the area by promulgating statutes and pervasive regulations relating to it.⁶ These enactments by Congress and the

⁶ A host of federal statutes and regulations have been enacted to protect the safety of the flying public. Entire volumes of the Code of Federal Regulations are devoted to requirements of aircraft design and maintenance See 14 C.F.R. Parts 21-49. Elsewhere, Congress and the FAA have comprehensively regulated every aspect of air travel to ensure

FAA have sent a single, unmistakable message -- that providing safe air travel is the very "essence" of an airline's business:

The safe transportation of its passengers is the essence of [an airline's] business ... and there exists a Congressional mandate that an airline must operate its business with "the highest possible degree" of care... . As the district court observed and emphasized, the airline industry is one in which safety is of the utmost importance. The staggering death tolls and resulting human suffering which have followed some of our nation's horrible air disasters attest to this fact . . . [T]he "safest" possible air transportation is the ultimate goal.

Murnane v. American Airlines, Inc., 667 F.2d 98, 101 (D.C. Cir. 1981) (citations and emphasis omitted). See also Harriss v. Pan Am. World Airways, Inc., 437 F. Supp. 413, 434 (N.D. Cal. 1977) (describing Pan Am "[a]s an air carrier with a public duty to operate with the highest degree of safety... ."), aff'd in relevant part, 649 F.2d 670 (9th Cir. 1980).

Congress' intimate involvement in the area confirms that ensuring aviation safety is a matter of substantial federal concern. As set forth below, the necessity of maintaining a

safety. For instance, by statute and Part 121 of the Code of Federal Regulations, commercial air carriers like Delta are required to maintain an FAA-approved security program. 49 U.S.C. § 44903(c); 14 C.F.R. Part 107; Public Citizen, Inc. v. F.A.A., 988 F.2d 186, 193 (D.C. Cir. 1993). Under such a security program, a carrier like Delta must, among other things, perform criminal and other background checks on its employees. This serves to protect passengers and employees from violence, criminal acts, etc. U.S. Air, Inc. v. Occupational Safety and Health Review Comm'n, 689 F.2d 1191, 1193, 1195 (4th Cir. 1982); Kabo v. UAL, Inc., 762 F. Supp. 1190, 1193 (E.D. Pa. 1991). Further, rules and regulations ranging from those that dictate minimum medical qualifications for airline flight crews; to those that require random drug and alcohol testing of "safety sensitive" airline employees; to those that set training and rest period requirements for pilots and Flight Attendants, pervade the federal code. See generally 14 C.F.R. Parts 121, 124, 125, and 135 and Appendix I.

uniform set of guidelines was itself a stated reason for enactment of the Airline Deregulation Act.

3. The plain language, legislative history and statutory context of the Airline Deregulation Act indicates that the ADA is intended to further Congress' intent to federalize matters relating to airline safety.

In 1978, Congress enacted the Airline Deregulation Act. Pub. L. No. 92 Stat. 1705; 1978 U.S. Code Cong. & Admn. News (92 Stat.) 1705; Morales v. Trans World Airlines, Inc., 504 U.S. 374, 378-79 (1992). The purposes of the ADA were multi-fold. As the Supreme Court has recognized, a central purpose was economic -- to encourage, within the airline industry "maximum reliance on competitive market forces." Morales, 504 U.S. at 378. However, economic motivations were far from the only purpose of the ADA.

Congress itself noted that the ADA had a number of "other purposes," and the first pronouncements of the ADA had nothing at all to do with economics -- but rather related to airline safety. Pub. L. No. 92 Stat. 1705-06. In enumerating the responsibilities of the Civil Aeronautics Board (now vested in the Secretary of Transportation) under the ADA, Congress reiterated its desire for the federal government to remain active in the area of airlines safety by stating that the Board's first and foremost responsibility was:

[t]he assignment and maintenance of safety as the highest priority in air commerce

Pub. L. No. 92 Stat 1706 (amending 49 U.S.C. § 1305).

To ensure that this responsibility was fulfilled, the ADA created a comprehensive mechanism for studying, reporting on and maintaining the highest levels of air safety. It stated that each year the Secretary of Transportation was required to prepare and submit a comprehensive annual report on airline safety, including:

- (1) All relevant data on accidents and incidents occurring during the calendar year covered by such report in air transportation and on violations of safety regulations issued by the Secretary of Transportation occurring during such calendar year
- (2) Current and anticipated personnel requirements of the Administrator with respect to enforcement of air safety regulations
- (3) Effects on current levels of air safety of changes or proposals for changes in air carrier operating practices and procedures which occurred during the calendar year covered by such report
- (4) The adequacy of air safety regulations taking into consideration changes in air carrier operating practices and procedures which occurred during the calendar year covered by such report.

Pub. L. No. 92 Stat 1709. The ADA went on to direct that “[b]ased on such report, the Secretary shall take those steps necessary to ensure that the high standard of safety in air transportation . . . is maintained in all aspects of air transportation in the United States. Id.

This yearly report was in addition to other, new safety obligations that the ADA imposed on the overseers of airline safety:

Not later than July 1, 1979, the Secretary of Transportation shall complete a thorough review, and submit a report thereon to the appropriate authorizing committees of the Congress... of the safety regulations and inspection procedures... in order to ensure that all classes of air carriers are providing the highest possible level of safe, reliable air transportation to all the communities served by these air carriers. Based on such review, the Administrator shall promulgate such safety regulations and establish such

inspection procedures as the Administrator deems necessary to maintain the highest standard of safe, reliable air transportation in the United States.

Pub. L. No. 92 Stat 1709 (amending 49 U.S.C. § 1371)

These provisions are just a small sampling of the pervasive safety rules and regulations that Congress enacted as part of the ADA -- all evidencing Congress' strong desire to closely monitor and control matters touching on commercial air carrier safety. And as set forth below, at the same time, Congress was careful to include as an integral part of the ADA, a provision to expressly preempt the states involvement in this critical area.

4. The ADA's preemption provision was enacted as an integral part of the ADA's other enactments governing airline safety.

It was against the backdrop of safety rules and regulations contained within the ADA that Congress enacted the ADA's preemption provision. As the Supreme Court explains, Congress did so to ensure that the States would not undo the work of the ADA. Morales, 504 U.S. at 378. The preemption provision serves, among other things, to ensure that in the areas covered by the ADA there will not arise "a patchwork of state laws in this airspace, some in conflict with each other, [that] would create a crazy quilt effect." French, 869 F.2d at 6.

The ADA's preemption provision states that:

[A] State ... may not enact or enforce a law, regulation or other provision

having the force and effect of law related to a price, route, or service of an air carrier... .

49 U.S.C. § 41713(b)(1) (1997) (emphasis supplied).

Standing alone, the very broad language of the ADA's preemption clause, especially when juxtaposed with the other safety provisions of the ADA, strongly indicates a Congressional intent to bar individual states from legislating on matters relating to airline safety. Indeed, the Supreme Court has confirmed the wide-reaching scope of the ADA's preemption provision. The Court has held that the ADA's prohibition against state-law enforcement evidences a substantial "breadth of ... preemptive reach [that] is apparent from [its] language." Morales v. Trans World Airlines, Inc., 504 U.S. 374, 384 (1992). Specifically noting the ADA's "expansive sweep," broa[d] word[ing]," "deliberat[e] expansive[ness]," and "broad scope," the Supreme Court in Morales ruled that the ADA preemption threshold is a low one -- crossed by the enactment or enforcement of any state law that has "a connection with, or reference to" airline services. Id. at 375, 383.

It should be noted that, in addition to the expansive language of the ADA, there are at least two other compelling indicators that the ADA's preemption provision is intended to broadly preempt state-laws relating to the important service of airline safety – and not simply economic issues as Mr. Hobbs apparently contends.

First, the ADA's preemption provision was carefully chosen over other, less broad preemption provisions. Prior to enacting the ADA, Congress rejected a Senate bill which contained preemption language that related purely to economic matters. That Senate

version of the ADA's preemption provision provided that "No State shall enact any law... determining route schedules, or rates, fares, or charges... ." See Morales, 504 U.S. at 385 n.2 (citing S. 2493, § 423(a)(1) reprinted in S. Rep. No. 95-631, p. 39 (1978)). To state the obvious, the fact that this narrow preemption provision, covering only issues of economic regulation, was rejected in favor of the much broader provision forbidding states from enacting or enforcing any law "relating to" airline "services" provides strong evidence that Congress intended to include more than economic issues within the broad sweep of the ADA's preemption section.

Second, and perhaps more compellingly, the ADA and its preemption provision were enacted to amend the section of the Federal Aviation Act covering "Operations of Carriers." See 49 U.S.C. § 41701 et seq. The statutory provisions contained within that section of the Federal Aviation Act contain a number of independent requirements on air carriers which have nothing to do with economic regulation, including safety obligations. Indeed, the Chapter begins by imposing safety obligations on carriers:

An air carrier shall provide safe and adequate interstate air transportation

49 U.S.C. § 41702. This section of the Federal Aviation Act goes on to cover a host of safety and other issues. See e.g., 49 U.S.C. § 41738 (requiring the Secretary of Transportation to confirm that air carriers "conform[s] to the safety standards prescribed by the FAA's Administrator"). Indeed, this chapter of the Act contains its own requirements on a host of other non-economic issues, including a prohibition of discrimination against

handicapped individuals by air carriers. 49 U.S.C. § 41705. The fact that the ADA's preemption provision was enacted to amend this section of the Federal Aviation Act provides compelling proof that it is intended to preempt state laws that touch on the core services provided by airlines -- including the provision of safe and reliable air transportation.

Given the clear direction from Congress, and the plain words of the United States Supreme Court, a host of federal and state courts have recognized that state laws -- including state employment statutes -- that intertwine with and may affect airline safety are preempted because they have a strong logical connection and relationship to the core "service" provided by an airline. It was these cases on which ALJ Switzer and later the Appeals Board correctly relied in concluding that Mr. Hobbs' claim here is preempted.⁷

⁷ Mr. Hobbs spends a substantial portion of his Brief arguing that "with few exceptions, state law discrimination claims have not been preempted." (Appellant's Brief, pp. 26-29). Of course, he acknowledges, as he must, that there are a substantial number of cases, including those cited below, in which employment discrimination claims that are intertwined with safety considerations are preempted. (Id.)

Importantly, the other cases he cites, including Doricent v. American Airlines, Inc., 1993 U.S. Dist. LEXIS 15143 (D. Mass. October 19, 1993), Price v. Delta Air Lines, Inc., 5 F. Supp. 2d 226, 235 (D. Vt. 1998); Rivera v. Delta Air Lines, Inc., 1997 U.S. Dist. LEXIS 14989 (E.D. Pa. September 26, 1997); and Anderson v. American Airlines, Inc., 2 F.3d 590 (5th Cir. 1993) have no bearing whatsoever on airline safety or the other matters covered by the ADA. It is for this reason that the claims were not held to be preempted.

5. Federal and state courts have recognized that state laws -- including state employment statutes -- that operate in a manner that intertwines with airline safety are preempted.

Perhaps the most often-cited case on the issue of ADA preemption in the area of airline safety is Belgard v. United Airlines, 857 P.2d 467 (Colo. Ct. App. 1992). There, for the first time, a Court recognized the ADA's preemptive reach in areas which concern airline safety.

In Belgard, two applicants for airline pilot positions were rejected by United Airlines. They filed suit alleging that United violated Colorado's anti-discrimination statute by obtaining information about their prior medical histories in connection with their applications. The court held that the ADA preempted the claims because such an application of the Colorado statute would regulate United's employment practices in a manner that could affect safety, and would therefore have a connection with United's "services." 857 P.2d at 470-71.

The court first recognized, consistent with the language of the statute, that one of the primary purposes of the ADA was "the maintenance of safety as the highest priority in air commerce ..." and that an airline's services "must emphasize safety as a primary consideration... ." 857 P.2d at 470 (internal marks omitted). The court then went on to explain that United's pilot hiring standards were inextricably tied to its ability to provide safe flights to its passengers -- and that the state should not be an active participant in re-writing, or passing on, these airline safety standards:

[F]ew factors are more important in determining the nature of the services that an airline is to provide than the quality of its employees... . [A]ny law or regulation that restricts an airline's selection of employees ... must necessarily have a connection with and reference to, and therefore must be one "relating to," the services to be rendered by that airline.

Id. at 471 (emphasis supplied).

As the Belgard Court recognized, the plaintiffs' claim under Colorado law would necessarily oblige state authorities to delve deeply into the intricacies of airline safety practices, and to ultimately make judgments regarding whether airline safety practices pass muster under state law. These judgments could ultimately lead to a conclusion that an airline safety practice -- while complying with the federal mandate to make safety the "highest priority" -- runs afoul of a particular state law or regulation. The Belgard court recognized that this possibility in just one state (Colorado) was troubling, but that the risk to airline safety exponentially increased when such decisions can occur in fifty different states -- all of which may reach different conclusions about what airlines must do, or cannot do, in order to ensure the safety of the traveling public:

If the states were free to regulate an airline's hiring practices with respect to applicants having, or being perceived to have, a physical handicap, the area of possible conflict would be nearly limitless. Not only could each state define for itself the very concept of a "handicap," but one state could compel the employment of persons with a particular disability and a second could prohibit such employment, while yet a third could leave the decision within the discretion of the particular airline.

The fact that such an accumulation of conflicting regulations might be

possible... reinforces our conclusion that Congress' expressed intent was to prohibit such a result.

857 P.2d at 471.

Other Courts since Belgard have reached the same conclusion. Most recent is the Eleventh Circuit's decision in Parise v. Delta Air Lines, Inc., 141 F.3d 1463 (11th Cir. 1998) -- in which the Eleventh Circuit predicted the precise facts that are at issue here.

In Parise, the district court held that an age discrimination claim under Florida's anti-discrimination statute was preempted by the ADA because it sought to require Delta to retain the employment of an individual who had made violent threats on airport property and who Delta determined jeopardized the safety and well-being of Delta's passengers, employees and equipment. The district court's decision dismissing the Parise case was appealed to the Eleventh Circuit, and on May 28, 1998, the Court of Appeals rendered its decision -- remanding the case back to the district court for certain additional factual findings.

As is evident from a review of the decision, the Court of Appeals began with the indisputably correct proposition that matters which relate to the "valid safety concerns of an airline" will be preempted by the ADA. Parise, 141 F.3d at 1466. The Parise Court found, however, that because the safety concerns were not apparent from the four-corners of the Plaintiff's age discrimination claim and because Plaintiff apparently denied engaging in the conduct alleged, it would be necessary to remand the matter to the district court for additional factual findings. In other words, the Eleventh Circuit held that

Plaintiff's age discrimination Complaint could be dismissed based on preemption, but not until there was some factual determination that Plaintiff's conduct in fact affected Delta's ability to provide a safe and secure travel environment for its passengers and crew. (Id.)

Critically, the Eleventh Circuit differentiated the facts in Parise from facts (like those presented here) in which preemption is immediately apparent from the face of the Complaint. As the Court of Appeals explained, where an employee admits to repeated unsafe acts, but seeks the protection of state-law on the theory that the violations were caused by a disability, preemption is demanded because use of a state-law in this manner indisputably and obviously "relates to" an airline's services. The Eleventh Circuit explained:

[b]y way of illustration, if Parise had claimed that Delta discriminated against him on the basis of a mental illness that sometimes caused him to exhibit violent tendencies and had relied on a state civil rights statute protecting emotionally disabled individuals from termination due to their disability, Delta's argument in favor of preemption analytically would carry greater weight; in other words, the basis of the cause of action -- without reference to the answer or any affirmative defense -- conceivably would conflict with the underlying purposes of the ADA and therefore give rise to a finding of preemption.

Parise, 141 F.3d at 1466 n.3 (emphasis supplied)

The Eleventh Circuit has, of course, described the precise facts at issue here. As Mr. Hobbs acknowledges, and as ALJ Switzer and the Appeals Board recognized, Mr. Hobbs repeatedly engaged in unsafe acts by ramming a motorized vehicle into Delta's planes. Mr. Hobbs contends, however, that his actions were caused by a mental condition

(bipolar disorder) that sometimes prompts him to engage in unsafe conduct. Because it was this condition that allegedly led to his repeated violations, the UALD determined that Utah law protects him from discharge. As the Eleventh Circuit recognized, it is precisely this type of claim that is preempted on its face. Indeed, the Eleventh Circuit made this even clearer when it cited with approval the court decision in Belgard.⁸ Id. at 1466.

As ALJ Switzer and the Appeals Board recognized, Mr. Hobbs' claim here cannot be resolved without a thorough review, analysis and judgment about Delta's actions in carrying out its federally-mandated safety obligations. That is, the Judge reviewing this matter will be presented with intimate details of Delta's safety rules and policies

⁸ Mr. Hobbs cites a series of cases which he maintains demonstrate that the "ADA does not address airline 'safety.'" (Petitioner's Brief, p. 25) Of course, as indicated by the discussion above, this proposition is demonstrably incorrect. Moreover, the cases he cites do not stand at all for the proposition that the "ADA does not address airline safety."

For instance, Petitioner cites the Ninth Circuit's decision in Aloha Islandair v. Tseu, 128 F.3d 1301 (9th Cir. 1997) as a case which allegedly "reject[s the] argument that safety concerns justify preemption of state law disability discrimination claim[s]." (Petitioner's Brief, p. 25) Tseu, in fact, stands for exactly the opposite proposition. In that case, the Court considered a policy by Aloha in which the airline refused to hire monocular pilots. The policy was challenged as "disability discrimination" under Hawaiian law by the plaintiff, and the airline filed a summary judgment motion on the grounds that the claim was "related to" Aloha's safety, and thus preempted by the ADA. The Ninth Circuit recognized that laws affecting the safety of aircraft operation may be preempted by the ADA because they related to services provided by air carriers. 128 F.3d at 1302. The Ninth Circuit, however, found it unnecessary to definitively answer that question because it found as a matter of undisputed fact that Aloha's policy was not related to its safety. Id. More specifically, the Ninth Circuit held that the fact that the pilot applicant had satisfied FAA physical requirements demonstrate that he could operate an aircraft without any safety risk.

including their origins, rationale, and relationship to federal law. Consideration of these matters will be integral to a final resolution of this matter.

Given that Delta's federally-mandated safety obligations are front and center in this matter and will be extensively reviewed and considered, and given that the outcome of this claim may well impact on Delta's federally-mandated safety obligation, cases like Morales, Belgard, and Parise, demand that the claim presented here be preempted by the ADA and that it be resolved under federal law.

B. Mr. Hobbs' Allegation That the Labor Commission Made Improper Factual Determinations, Or Ignored The Manifest Purpose of The ADA, Is Wrong.

As is evident from the above discussion, the decision of the ALJ and the Appeals Board was far from erroneous -- it was compelled by existing law. Mr. Hobbs, however, has launched two attacks on the decision. Both fail.

First, Mr. Hobbs claims that ALJ Switzer (and, hence, the Appeals Board) made forbidden factual findings about the ultimate reasons behind Delta's termination decision. His contention is incorrect. As the Judge correctly recognized, the only material facts were undisputed and apparent from the face of Mr. Hobbs' charge, or the accompanying materials he submitted. From these documents, it is apparent (and the UALD found) that Mr. Hobbs, who worked in an airport environment, was terminated after he was involved in a repeated series of accidents and attempted to attribute his safety problems to bi-polar disorder. (R. 341-42) From these undisputed facts, ALJ Switzer correctly recognized that "safety issues must be considered in resolving Mr. Hobbs' state UALD claim" and

that the outcome of this matter could have a substantial affect on Delta's ability to maintain a safe and secure traveling and working environment. (R.345) ("Thus, Mr. Hobbs' antidiscrimination claim affects the way in which Delta regulates ground vehicles around airplanes on the ramp and implements its safety policies.")⁹

Second, Mr. Hobbs contends that the ruling of preemption is improper here because the ADA is concerned solely with economic matters – and is not at all concerned with issues of safety. (Petitioner's Brief, pp. 23-26) As indicated above, this contention is at odds with the plain language of the statute, its legislative history and its context. Before discussing any economic issues at all, the ADA emphasizes that the "assignment and maintenance of safety" must be "the highest priority in air commerce." Based on this and other provisions of the ADA, various Courts have recognized that one of the primary purposes of the ADA was to ensure that an airline's services "emphasize safety as a primary consideration... ." Belgard, 857 P.2d at 470 (internal marks omitted).

Mr. Hobbs does correctly note that in a recent case – Charas v. Trans World Airlines, Inc., 160 F.3d 1259 (9th Cir. 1998) – the Ninth Circuit held that the ADA did not preempt certain tort claims brought by passengers who had been injured by beverage carts

⁹ Notably, even if ALJ Switzer had gone beyond those facts apparent from the face of the Charge and the accompanying materials, this would have been appropriate. Courts routinely examine the factual allegations surrounding a Complaint to see if the issues presented are ones completely preempted by federal law. See e.g., Boggs v. Boggs, 117 S. Ct. 1754 (1997) (examining the underlying facts to determine whether a claim is preempted by ERISA); Shaw v. Delta Air Lines, Inc., 463 U.S. 85 (1983) (same).

or luggage accidents. However, the Ninth Circuit’s analysis in reaching its conclusion in Charas actually leads to the conclusion urged by Delta here.

In determining whether common-law tort claims were preempted by the ADA, the Ninth Circuit performed the precise analysis that this Court must perform. It reviewed the plain language and legislative history and concluded that nothing would support the notion that the ADA intended to deal with such personal injury claims:

Nowhere in the legislative history, or in what remains of the federal airline regulatory statutes, does Congress intimate that “service” [as set forth in the ADA], in the context of deregulation, includes the dispensing of food and drinks, flight attendant assistance, or the like. ...

... In that context, “service” does not refer to the pushing of beverage carts, keeping the aisles clear of stumbling blocks, the safe handling and storage of luggage, assistance to passengers in need, or like functions.

160 F.3d at 1265.¹⁰

Of course, contrary to the “personal injury” claims considered in Charas, which are plainly outside the scope of “services” provided by airlines, a review of the ADA’s plain language, context and legislative history lead inevitably to the conclusion that the ADA

¹⁰ In reaching this conclusion in Charas, the Ninth Circuit not only relied on its review of the text of the ADA and its legislative history, but also on the finding that commercial air carriers are obligated to maintain insurance that covers “amounts for which... air carriers may become liable for bodily injuries to or the death of any person...” Id. at 1264-65. (citing 49 U.S.C. § 41112(a)). As the Ninth Circuit recognized, preemption of state law personal injury claims “would have rendered pointless this requirement for insurance coverage.” Id. There is no similar provision for insurance coverage for claims similar to the one asserted here by Mr. Hobbs – lending further support to the view that safe air transportation is among the services the ADA intended to preempt.

intended to include issues of core airline safety within the scope of “service” and thus intended to prevent states from impinging on this area.

As an aside, Mr. Hobbs does correctly state that the Ninth Circuit in Charas focused on the economic deregulation provisions of the ADA in concluding that the ADA did not preempt passenger personal injury tort claims. Contrary to Mr. Hobbs’ contention, however, the Ninth Circuit did not preclude the possibility that other matters, including airline safety, would fall within the ambit of ADA preemption. Indeed, the Ninth Circuit was not asked to address the issue of whether the provision of safe air transportation fell within the realm of ADA preemption, and thus its decision in Charas affords no material analytical guidance on this narrow issue. ¹¹

¹¹ In addition to Charas, Plaintiff also relies on Taj Mahal Travel, Inc. v. Delta Air Lines, Inc., 14 F.3d 186 (3rd Cir. 1998). Taj Mahal, however, simply adopts the rationale of the Ninth Circuit’s Charas decision – and breaks no new ground.

Mr. Hobbs’ reliance on other decisions, like Abdu-Brisson v. Delta Air Lines, Inc., 128 F.3d 77, 82 (2^d Cir. 1997); Delta Air Lines, Inc. v. New York State Div. of Human Rts., 689 N.E.2d 989 (N.Y.Ct. App. 1997); Doricent v. American Airlines, Inc., 1993 U.S. Dist. LEXIS 15143 (D. Mass. October 19, 1993) and Price v. Delta Air Lines, Inc., 5 F. Supp. 2d 226 (D. Vt. 1998) is equally misplaced. In none of these cases did the Court consider the issue critical to this case -- whether a state-law claim that is closely intertwined with airline safety is “related to” airline “services.” Indeed, in none of these cases was airline safety a central focus.

In Abdu-Brisson, for instance, the issue presented was whether a state-law claim challenging the integration of pilot seniority lists would have a significant impact on the prices charged by Delta, or any of Delta’s services. There was no basis to find that airline safety was at issue. After review, the Court concluded that there would be no demonstrable impact on prices (nor on any of Delta’s routes or services) and therefore no basis for ADA preemption. Similarly, in New York State Div. of Human Rts., the Court considered whether Delta’s weight-based appearance standards would have any demonstrable impact on Delta’s services -- and concluded that they would not and that therefore there was no basis for finding ADA preemption.

Notably, another case heavily relied upon by Mr. Hobbs, Somes v. United Airlines, Inc., ___ F. Supp. 2d ___ (D. Mass. 1999) (reprinted at 1999 WL 21238) only serves to support the view that safe air transportation is within the ambit of “services” contemplated by the ADA. In Somes, the widow of a United passenger brought a wrongful death tort claim against the airline arising out her husband’s cardiac arrest and United’s failure to stock its planes with external defibrillators. In finding the claim not to be preempted, the District Court relied primarily on two factors – neither of which is present here.

First, the District Court noted that “common-law based personal injury action[s are areas] traditionally regulated by the states pursuant to their police powers.” Id. at *3. Of course, this is not the case in the area of safe air transportation – which is an area of exclusively federal concern.

Second, the District Court noted that the provision of defibrillators on aircraft is “not encompassed under [a widely accepted] definition of “services.” Id. at *4. As the Court explained:

“services” is restricted to items which are regular, recurrent or necessary features of actual flight or airline operations. Because the provision of emergency medical equipment is not inherent in the nature of an airline’s operations and is typically not a “bargained-for or anticipated” service, it is not an airline “service”... .

In the present case, of course, the opposite is true. Mr. Hobbs admittedly violated safety rules at Delta, and presented an impediment to Delta’s most important service -- its ability to provide the highest degree of safety to its passengers and employees. It is this fact which is of central import here. And it is this fact which shows that the use of Utah law to mandate Mr. Hobbs’ return to the ramp is prohibited by the ADA.

Id. at *5. Of course, while the provision of defibrillators is not a “bargained-for or anticipated” service, the provision of safe airline travel certainly is. It is for this reason that the states may not enact or enforce laws that “relate to” or are intimately intertwined with the area of safe airline transportation.

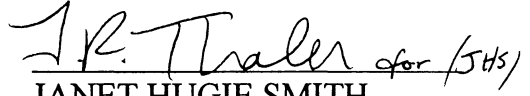
CONCLUSION

Congress’s intent in enacting the ADA is clear and unmistakable. Among the first thing that the ADA recognizes is that the safety of commercial airlines is of paramount national importance, and that the federal government must ensure airline safety. By its enactments, the ADA helps to ensure consistent and uniform enforcement of airline safety rules, and helps to provide the safest possible environment for airline passengers and employees.

The ADA’s preemption provision was enacted to ensure that the intent of Congress is not overridden in the area of airline safety and other airline services. Congress made this clear through the statute, and a host of persuasive Court authority has recognized it. Given this clear intent, ALJ Switzer and the Appeals Board were correct in holding that Mr. Hobbs' claim is preempted by the ADA. His claim here is closely "related to" Delta's federally-mandated obligation to provide safe and secure air transportation. These obligations will be closely reviewed and considered in this case -- and may be affected by the final outcome. As such, Delta respectfully requests that the well-reasoned decision of ALJ Switzer and the Appeals Board be affirmed.

Dated this 29 day of March, 1999.

Respectfully submitted,

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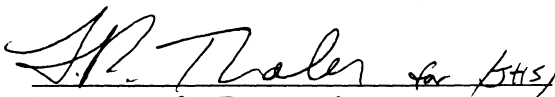
CERTIFICATE OF SERVICE

This is to certify that two true and correct copies of RESPONDENT'S BRIEF ON APPEAL were mailed, postage prepaid, on this 29 day of March, 1999 to the following:

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