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The Supreme Court's Kirkingburg Decision and the Impact of Federal Safety Regulations in ADA Cases

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In *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555 (1999), the Supreme Court of the United States ruled that the defendant employer was entitled to rely on a Department of Transportation (DOT) visual acuity standard as a job qualification criterion for a truckdriver position. This policy brief in the National Council on Disability's *Righting the ADA* series examines the intersection of the Americans with Disabilities Act requirements with safety standards imposed under other federal laws, and the ramifications of the Court's decision in *Kirkingburg* on this issue.

CONFLICTS OF FEDERAL LAW

A provision of a later-enacted federal statute generally takes priority over an inconsistent provision of a prior federal law or regulation. This is because Congress is assumed to have been aware of the inconsistency and to have intended to change the law as reflected in the later Act. On the other hand, courts generally try to avoid ruling that one federal law supersedes another, and do so only when certain conditions are met. Thus, a federal statute will normally not be construed as superseding a prior federal law unless there is either a clearly expressed congressional intent that it should, or there is a clear incongruity between the two that cannot be avoided by some plausible statutory interpretation that would render them compatible with one another. In the absence of a congressional indication that a new law should take precedence over a prior statute, the courts will try to read statutes so as to give effect to both. In addition, typically it is assumed that Congress does not intend for a specific statute on a subject to be controlled or nullified by a subsequent law that is more general.

Prior to the enactment of the ADA, the U.S. Court of Appeals for the Eleventh Circuit had occasion to apply such legal principles in the context of a disability nondiscrimination law in the case of *Smith v. Christian*.[1] In that case, the Eleventh Circuit had to determine whether nondiscrimination provisions of the Vocational Rehabilitation Act of 1973 (Rehabilitation Act) should take precedence over fitness qualifications for service in the armed forces. The court declared:

> Under the applicable rules of statutory construction, when two statutes are capable of coexistence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective. Furthermore, when there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of an enactment.[2]

Applying such principles, the Eleventh Circuit ruled that U.S. Navy physical standards for service eligibility were not invalidated by Section 504 of the Rehabilitation Act, reasoning that "the specific authority in [the statutes authorizing the Secretary of the Navy to establish qualifications] must take precedence over the general guidelines of the Rehabilitation Act."[3]

THE ADA AND OTHER FEDERAL LAWS

The ADA includes a provision indicating that the ADA's requirements *should* prevail over prior federal laws and regulations in certain circumstances. Title V of the ADA contains a provision that addresses the Act's "Relationship to Other Laws." It provides that the ADA does not "invalidate or limit" the rights or remedies of any federal law or any state or local law "that provides greater or equal protection" for people with disabilities than is provided in the ADA.[4] A logical implication of this wording is that the ADA may "invalidate or limit" rights or remedies of a law that does not provide equal or greater protection for individuals with disabilities. If it wished to do so, Congress might simply have declared that the requirements of the ADA do not invalidate or limit the requirements of other federal laws. In not doing so, and instead shielding only other laws that afford "greater or equal protection," Congress unequivocally expressed its intent that the ADA would invalidate or limit federal laws whose application would result in less protection for individuals with disabilities.

As discussed in the preceding section of this policy brief, the obligation of courts to interpret the conflicting provisions of separate federal laws so as to give effect to both where possible applies only "absent a clearly expressed congressional intention to the contrary." The ADA's "Relationship to Other Laws" provision constitutes just such a specific expression of congressional intent that the ADA's requirements should take precedence over conflicting portions of other federal laws. Accordingly, the provision calls into question the continuing validity of portions of prior federal statutes or regulations whose application would result in a loss or diminution of rights or remedies available to people with disabilities under the ADA.

EEOC INTERPRETATIONS

On the issue of the relationship of the ADA to other laws, the Equal Employment Opportunity Commission's (EEOC) regulations contain internal inconsistencies. In certain provisions in its ADA regulations and guidance the EEOC restates the Act's provision regarding the ADA's interaction with prior federal laws quite accurately. One provision of the regulations, for example, provides a faithful paraphrase of the statutory provision; it declares:

> *Relationship to Other Laws.* This part does not invalidate or limit the remedies, rights, and procedures of any Federal law or any law of any State or political subdivision of any State or jurisdiction that provides greater or equal protection for the rights of individuals with disabilities than are afforded by this part.[5]

The EEOC's regulatory guidance regarding this provision is also basically consistent with the statutory language. The relevant portions provide:

> The ADA does not preempt any Federal law, or any state or local law, that grants to individuals with disabilities protection greater than or equivalent to that provided by the ADA. This means that the existence of a lesser standard of protection to individuals

> with disabilities under the ADA will not provide a defense to failing to meet a higher standard under another law. ... [T]he existence of a lesser standard under another law will not provide a defense to failing to meet a higher standard under the ADA.
> ...
> The ADA does not automatically preempt medical standards or safety requirements established by Federal law or regulations.[6]

The "not automatically preempt" language accurately reflects that the ADA does not preempt all overlapping federal requirements, *i.e.*, those that provide greater or equal protection, but does preempt conflicting provisions that provide less protection.

Another section of the regulatory guidance recognizes that physical examinations or medical monitoring may be permitted if they are required by medical standards or requirements under a federal, state, or local law, if such standards or requirements "are consistent with the ADA and this part in that they are job-related and consistent with business necessity."[7] The clear implication is that the ADA will prevail over standards or requirements under other laws if they are inconsistent with the ADA, not job-related, or not consistent with business necessity. The guidance adds:

> Such standards may include federal safety regulations that regulate bus and truck driver qualifications, as well as laws establishing medical requirements for pilots or other air transportation personnel. These standards also include health standards promulgated pursuant to the Occupational Safety and Health Act of 1970, the Federal Coal Mine Health and Safety Act of 1969, or other similar statutes that require that employees exposed to certain toxic and hazardous substances be medically monitored at specific intervals.[8]

Accordingly, such standards would not be valid if they do not meet ADA requirements that they be shown to be job-related and consistent with business necessity.

However, in other places in the regulations and guidance, the EEOC, without explanation or any basis in the language of the Act, advanced a greatly reduced view of the ADA's impact. The EEOC added a new defense termed "Conflict with other federal laws"[9] to those already provided by the Act. This additional defense provides as follows:

> It may be a defense to a charge of discrimination under this part that a challenged action is required or necessitated by another Federal law or regulation, or that another Federal law or regulation prohibits an action (including the provision of a particular reasonable accommodation) that would otherwise be required by this part.[10]

The regulatory guidance explaining this provision did not describe its origin or purpose, but merely declared that:

> "[t]here are several Federal laws and regulations that address medical standards and safety requirements. If the alleged discriminatory action was taken in compliance with another Federal law or regulation, the employer may offer its obligation to comply with the conflicting standard as a defense."[11]

EEOC tempered the newly manufactured defense somewhat by adding that

> "[t]he employer's defense of a conflicting Federal requirement or regulation may be rebutted by a showing of pretext, or by showing that the Federal standard did not require the discriminatory action, or that there was a nonexclusionary means to comply with the standard that would not conflict with this part."[12]

Accordingly, the rebuttals EEOC would recognize are essentially ones that sidestep the applicability of the defense, *i.e.*, by showing that the conflicting federal standard was applied merely as a pretext to cover discrimination, that the standard really does not require the action alleged to be discriminatory under the ADA, or that there is another way to comply with the standard without violating the ADA. The EEOC's crafted defense fails to acknowledge that a requirement of a federal law or regulation that conflicts with the ADA and whose application would violate or reduce the rights of individuals with disabilities under the ADA is invalid. Accordingly, the EEOC's approach in these instances represents an unauthorized attempt to reduce the ADA's reach, to make it bow to conflicting provisions of prior federal laws, beyond the carefully constructed category of situations in which Congress said the ADA should not invalidate requirements of other laws.

THE *ALBERTSON'S, INC. v. KIRKINGBURG* DECISION

The *Albertson's, Inc. v. Kirkingburg* case[13] arose from a situation in which Albertson's fired Mr. Kirkingburg from his truckdriver position when he failed to meet DOT vision standards, and refused to rehire him after he received a waiver from DOT. Mr. Kirkingburg charged that Albertson's' use of the vision standard violated the ADA, and that the company could not demonstrate that the vision standard met ADA standards that it be "job-related" and "consistent with business necessity." The case thus centered on whether Albertson's was legally entitled to rely on the DOT standard as a job qualification requirement in the face of allegations that such reliance would conflict with requirements of the ADA.

Remarkably, in reaching its decision in the case, the Supreme Court did not consider or even mention the ADA provision addressing the Act's "Relationship to Other Laws."[14] It simply assumed that Albertson's was bound to comply with the DOT standard and that that fact was sufficient to justify noncompliance with applicable ADA requirements. The Court declared:

> It is crucial to its position that Albertson's here was not insisting upon a job qualification merely of its own devising, subject to possible questions about genuine appropriateness

> and justifiable application to an individual for whom some accommodation may be reasonable. The job qualification it was applying was the distant visual acuity standard of the Federal Motor Carrier Safety Regulations, 49 CFR ‘ 391.41(b)(10) (1998), which is made binding on Albertson’s by ‘ 391.11: “[A] motor carrier shall not ... permit a person to drive a commercial motor vehicle unless that person is qualified to drive,” by, among other things, meeting the physical qualification standards set forth in ‘ 391.41.[15]

The Court added that “[t]he validity of these regulations is unchallenged, they have the force of law, and they contain no qualifying language about individualized determinations.”[16]

While the basic validity of the regulations as legitimate regulatory standards properly promulgated pursuant to lawful authority of the DOT was “unchallenged,” the legitimacy of Albertson’s’ application of the DOT standard was very much challenged. The plaintiff and the U.S. government claimed that such an application of the vision standard violated the ADA in five different respects: (1) that Albertson’s could not demonstrate that the vision standard was job-related; (2) that Albertson’s could not demonstrate that the vision standard was consistent with business necessity; (3) that Albertson’s could not demonstrate that the vision standard met the “direct threat” standard for safety criteria; (4) that a reasonable accommodation would permit Mr. Kirkingburg to perform the essential tasks of the job notwithstanding his failure to meet the vision standard; and (5) that Mr. Kirkingburg’s receiving a waiver of the vision requirement from DOT demonstrated that he was qualified for the position.

Although it is true that the DOT regulation (apart from the waiver program) does not mandate “individualized determinations” of ability to drive a truck, the ADA’s reasonable accommodation provision requires precisely that. Thus, the Court’s assumption that the DOT regulations “have the force of law” is true in the context of an ADA case only if such regulations somehow have a standing superior to the requirements of the ADA -- a subsequently enacted federal law setting specific standards for nondiscrimination. This question would seem to depend heavily upon what the ADA’s “Relationship to Other Laws” provision[17] has to say, but the Court never discusses or even refers to this provision.

In a footnote, the Court did mention the EEOC regulatory provision that recognizes “a defense to liability under the ADA that ‘a challenged action is required or necessitated by another Federal law or regulation.’”[18] But the Court did not rely on that provision either, stating that “[a]s the parties do not invoke this specific regulation, we have no occasion to consider its effect.”[19] And had the Court attempted to apply the provision, it might have proven helpful to Mr. Kirkingburg, because he could then have invoked the EEOC’s regulatory guidance, discussed previously, that indicates that “[t]he employer’s defense of a conflicting Federal requirement or regulation may be rebutted ... by showing that the Federal standard did not require the discriminatory action, or that there was a nonexclusionary means to comply with the standard that would not conflict with this part”[20] -- both of which rebuttals appear to apply to the waiver Mr. Kirkingburg obtained from DOT.

Instead, without statutory basis in the ADA, the Court simply made a bald assertion that the DOT vision standard was legally valid and that Albertson's was subject to an "unconditional obligation to follow the regulations ...."[21] As support for such a conclusion, the Court did not rely on any relevant statutory language but on its supposition that "[w]hen Congress enacted the ADA, it recognized that federal safety rules would limit application of the ADA as a matter of law."[22] As evidence of this congressional understanding, the Court referred to the statement in the Senate Labor and Human Resources Committee Report on the ADA that "a person with a disability applying for or currently holding a job subject to [DOT standards for drivers] must be able to satisfy these physical qualification standards in order to be considered a qualified individual with a disability under title I of this legislation."[23] The Court added that "[t]he two primary House Committees shared this understanding."[24] The latter statement is quite misleading. The House Committees had actually crafted a more refined and carefully worded position than the somewhat primitive declaration in the Senate report. What the House Committee reports actually say regarding the DOT physical qualifications for motor vehicle drivers is the following:

> [T]he Committee intends that a person with a disability applying for or currently holding a job subject to these standards must be able to satisfy any physical qualification standard that is job-related and required by business necessity in order to be considered a qualified individual with a disability.[25]

This report language states clearly that DOT physical qualification standards will be applicable in ADA cases only to the extent that the standards meet ADA requirements that they are "job-related and required by business necessity."

Moreover, the Senate report and both of the relevant House Committee reports call upon the Secretary of Transportation to review DOJ's qualification standards and to make necessary changes prior to the effective date of Title I of the ADA.[26] The Senate report describes the purpose of this review in somewhat nebulous terms as being "to ascertain whether the standards conform with current knowledge about the capabilities of persons with disabilities and currently available technological aids and devices and in light of Section 504 of the Rehabilitation Act of 1973 ...."[27] The House reports are much more direct, however, in stating that the review is to determine whether the DOT regulations are "valid" under the ADA.[28]

Accordingly, far from Congress expecting that the DOT driver qualification standards would subject Title I covered entities to an, in the words of the Court, "unconditional obligation to follow the regulations,"[29] the committee reports are quite clear that requirements of the ADA could render provisions of the DOT standards inapplicable or invalid. Thus, both an explicit statutory provision of the ADA and the legislative history of the Act make it clear that DOT physical qualification standards for drivers could be superseded by ADA requirements. Moreover, neither DOT, which granted a waiver of the vision standard to Mr. Kirkingburg, nor the Solicitor General, which represented the U.S. Government in support of Mr. Kirkingburg's position, believed that the vision standard should prevail over Mr. Kirkingburg's rights under the

ADA.

Indeed, as the Court noted, the United States had urged that in applying a qualification standard grounded in safety concerns, it should read subsections (a) -- "job-related and consistent with business necessity, and ... performance cannot be accomplished by reasonable accommodation"[30] -- and (b) -- "direct threat"[31] -- together, so that whenever an employer imposes any safety qualification standard tending to screen out individuals with disabilities, the application of the requirement would also have to satisfy the ADA's "direct threat" criterion.[32] Under such an approach, all safety criteria imposed by employers would be evaluated under the direct threat standard. The Court expressed some doubts about the Government's interpretation, but stated that it did not need to confront the validity of that reading in the *Kirkingburg* case.[33] Instead, the Court simply ruled that Albertson's was entitled to rely on the DOT visual acuity standard as a job qualification criterion without regard to ADA requirements.

IMPACT OF THE DECISION

Lower court decisions have begun to reflect the impact of the *Kirkingburg* decision. Illustrative is the decision of the United States Court of Appeals for the Seventh Circuit in *Bay v. Cassens Transport Company*.[34] In that case, the Seventh Circuit ruled that a truck driver was not a "qualified individual" under the ADA during a period when he did not have DOT certification that he was physically qualified for a truckdriving position, even though the physician engaged by the employer incorrectly applied DOT standards when she denied the man his certification.[35] The Court ruled that "under the circumstances presented in this case, we will not look behind Bay's initial inability to attain certification and second-guess the medical determination of Dr. Patterson," and declared:

> At the point Dr. Patterson refused to recertify Bay, Cassens was not only entitled to rely on that judgment, but was legally required to refuse Bay's request to return to driving a commercial motor vehicle until he presented the proper certification. *See Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555 (1999) (stating that employers have an "unconditional obligation to follow the [DOT] regulation[s] and [a] consequent right to do so").[36]

Similarly, in *Mink v. Wal-Mart Stores, Inc.*,[37] a federal district court relied upon the *Kirkingburg* decision for the proposition that "DOT mandated regulations must be used as qualification standards by any company wishing to employ commercial motor vehicle drivers."[38] Accordingly, the court ruled that Wal-Mart was "bound to obey" the DOT regulations, and the plaintiff's employment as a truck driver was contingent on maintenance of his DOT certification. The court ruled that because the plaintiff "was not qualified to operate a commercial motor vehicle under DOT regulations at the time of his termination, his inability to perform the essential functions of his job was an uncontestable reason for Wal-Mart to terminate his employment."[39] The court reasoned that ADA concerns regarding "the rights of disabled individuals to obtain meaningful employment" had to give way in instances in which they "conflict with National DOT

regulations which are implemented for purposes of public safety."[40] By rendering DOT safety standards "uncontestable" grounds for finding an individual not "qualified," the court's view precluded consideration of possible reasonable accommodations that might permit the individual to perform the job without any danger to the public safety.

Such an absolute view is reflected in the words of other courts that have declared that, in light of the *Kirkingburg* decision, "the DOT safety regulations reign supreme"[41] and that "the DOT standards trump the ADA ...."[42]

In *Conley v. Belden Wire & Cable Company, Inc.*,[43] an employee requested, as a reasonable accommodation, that his employer permit him not to wear certain "side shield" safety glasses required under Occupational Safety and Health Act (OSHA) regulations, and offered to sign a waiver of liability to protect the employer. Despite the fact that a prior employer had granted such an accommodation, the court held that a waiver of the safety glasses would not be reasonable; relying on the Supreme Court's ruling in *Kirkingburg*, the court held that an employer was not required to waive safety requirements to account for individual circumstances.[44]

To avoid the harsh results that flow from the *Kirkingburg* decision's according conclusive preeminence over federal safety standards, several lower courts have distinguished the decision or restricted its application. Thus, courts have ruled that the *Kirkingburg* rationale does not apply to visual acuity standards not grounded in public safety concerns,[45] to truckdriving positions involving vehicles smaller than the 10,000 pound minimum for applicability of DOT regulations,[46] to truckdriving positions involving only intrastate transit,[47] to circumstances in which an employer is not bound by the DOT regulations but only adopts them voluntarily,[48] to blanket exclusions of individuals with particular disabilities from experimental programs,[49] and to exclusions of individuals with disabilities based on unfounded stereotypes rather than an accurate assessment of the actual safety consequences of an individual's condition.[50] Such decisions reflect a desire by these courts not to permit federal safety regulations to run roughshod over ADA requirements by accepting an expansive reading of the *Kirkingburg* precedent. Of course, such narrowing of the impact of the ruling does nothing to prevent the harmful effects engendered by the decision in situations that fall foursquare within the scope of the factual situation and legal principles it addresses.

CONCLUSION

The ADA's provision addressing the Act's "Relationship to Other Laws" indicates that the ADA will invalidate or limit federal laws whose application would result in less protection for individuals with disabilities than is provided in the ADA. Without any discussion or reference to this provision, the Supreme Court in its *Albertson's, Inc. v. Kirkingburg* decision permitted DOT truckdriver safety regulations to override ADA requirements. In doing so, the Court blunted the

effect of carefully crafted criteria the ADA applies to safety criteria, including that they must (1) be job-related, (2) be consistent with business necessity, (3) involve an individual assessment to establish a direct threat to health or safety, and (4) take into account reasonable accommodations that would reduce or eliminate safety concerns.

In the absence of the *Kirkingburg* decision, the ADA could be construed to override prior federal safety rules to the extent that they involve unfair and unnecessary exclusion of particular individuals with disabilities from equal employment opportunities. Contrary to the Court's conclusion that DOT rules were absolutely "binding" on firms such as Albertson's, a more enlightened view would be that a covered entity would be excused from complying with pre-ADA safety standards to the extent necessary to comply with specific ADA requirements. The ADA's specific provision regarding its relationship to other federal laws would authorize the ADA's taking precedence over prior laws to the extent necessary to accomplish the ADA's nondiscrimination objectives. This would not involve wholesale deviation from the federal safety regimens or engender serious threats to public safety; exceptions to the federal safety requirements would only occur in particular circumstances where either there would not be a direct threat to safety or a reasonable accommodation would permit safe job performance. It is for this reason that both the DOT and the official position of the United States government supported Mr. Kirkingburg's eligibility to drive trucks for Albertson's.

The Court's elevation of prior federal safety regulations to a superior position relative to the ADA was imprudent and contrary to congressional intent. Such an approach does not give maximum effect to the requirements of both the ADA and prior laws, but instead underestimates the importance of the requirements imposed in the ADA and relinquishes them in favor of the provisions of earlier federal safety programs. In enacting the ADA, Congress declared that its principal purposes were "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities,"[51] "to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities,"[52] and "to ensure that the Federal Government plays a central role in enforcing the standards established in this Act on behalf of individuals with disabilities."[53] Each of these vital goals has been seriously compromised by the Supreme Court's overblown deference to preexisting regulatory safety criteria in its decision in *Albertson's, Inc. v. Kirkingburg*.

This policy brief was written for the National Council on Disability by Professor Robert L. Burgdorf Jr. of the University of the District of Columbia, David A. Clarke School of Law.

ENDNOTES

1. 763 F.2d 1322 (11th Cir. 1985).

2. *Id.* at 1325.

3. *Id.*

4. 42 U.S.C. ‘ 12201(b). The full language of the provision reads as follows:

> Nothing in this Act shall be construed to invalidate or limit the remedies, rights, and procedures of any Federal law or law of any State or political subdivision ... that provides greater or equal protection for the rights of individuals with disabilities than are afforded by this Act.

5. 29 C.F.R. ‘ 1630.1(c)(2).

6. 29 C.F.R. part 1630 app. (commentary on ‘ 1630.1(b) & (c)).

7. 29 C.F.R. part 1630 app. (commentary on ‘ 1630.14(c)).

8. *Id.*

9. 29 C.F.R. ‘ 1630.15(e).

10. *Id.*

11. 29 C.F.R. part 1630 app. (commentary on ‘ 1630.15(e)).

12. *Id.*

13. 527 U.S. 555 (1999).

14. 42 U.S.C. ‘ 12201(b).

15. 527 U.S. at 570.

16. *Id.*

17. 42 U.S.C. ‘ 12201(b).

18. 527 U.S. at 570 n. 16, quoting 29 CFR ‘ 1630.15(e) (1998).

19. *Id.*

20. 29 C.F.R. part 1630 app. (commentary on ‘ 1630.15(e)).

21. 527 U.S. at 570.

22. *Id.* at 573.

23. *Id.*, quoting S.Rep. No. 101-116, pp. 27-28 (1998).

24. 527 U.S. at 574, citing H.R.Rep. No. 101-485, pt. 2, p. 57 (1990) (House Education and Labor Committee Report); *id.*, pt. 3, at 34 (House Judiciary Committee Report).

25. The quoted language is from the report of the Committee on the Judiciary, H.R.Rep. No. 101-485, pt. 3, at 34. The substantially identical section from the report of the House Education and Labor Committee declares:

> [I]t is the Committee’s intent that a person with a disability applying for or currently holding a job subject to these standards must be able to satisfy any physical qualification standard that is job-related and required by business necessity in order to be considered a qualified individual with a disability under title I of this legislation.

H.R.Rep. No. 101-485, pt. 2, p. 57 (1990).

26. S.Rep. No. 101-116, at 27-28; H.R.Rep. No. 101-485, pt. 2, at 57; *id.,* pt. 3, at 34.

27. S.Rep. No. 101-116, at 28.

28. H.R.Rep. No. 101-485, pt. 2, at 57 (“whether such regulations are valid under this Act”); *id.,* pt. 3, at 34 (“whether they are valid under this Act”).

29. 527 U.S. at 570.

30. 42 U.S.C. ‘ 12113(a).

31. 42 U.S.C. ‘ 12113(b).

32. 527 U.S. at 569.

33. *Id.* at 569 n. 15.

34. 212 F.3d 969 (7th Cir. 2000).

35. *Id.* at 974.

36. *Id.*

37. 185 F.Supp.2d 659 (N.D. Miss. 2002).

38. *Id.* at 664.

39. *Id.*

40. *Id.*

41. *EEOC v. United Parcel Services, Inc.*, 149 F.Supp.2d 1115, 1159 (N.D.Cal. 2000) ("Given *Kirkingburg,* it is common ground among the parties that as to vehicles over 10,001 pounds, the DOT safety regulations reign supreme.").

42. *Id.* at 1130 ("It is common ground herein that the DOT standards trump the ADA as to any vehicles covered by the DOT regulations."). *See also Thoms v. ABF Freight System, Inc.*, 31 F.Supp.2d 1119 (E.D. Wisconsin, 1998) (decided prior to the Supreme Court's ruling in *Kirkingburg*), in which the court ruled that the ADA does not prohibit a blanket exclusion established under DOT regulations that prevents insulin-dependent diabetics from driving commercial vehicles in interstate commerce. The court found that the federal safety standards have "primacy" over ADA requirements and eliminate any requirement of an individualized assessment of physical condition and risk of harm to public safety in regard to driving large commercial vehicles. *Id.* at 1127.

43. 2001 WL 1699320 (D.S.C. 2001).

44. *Id.* at *8, citing *Kirkingburg*, 527 U.S. at 577-78.

45. *Hoehn v. International Security Services and Investigations, Inc.*, 120 F.Supp.2d 257, 266 (W.D.N.Y. 2000).

46. *See Morton v. United Parcel Service, Inc.*, 272 F.3d 1249 (9th Cir. 2001); *EEOC v. United Parcel Services, Inc.*, 149 F.Supp.2d 1115, 1159 (N.D.Cal. 2000).

47. *Tinjum v. Atlantic Richfield Company*, 34 P.3d 855, 859 n.3, 109 Wash.App. 203, 210 n.3 (2001) (characterized *Albertson's, Inc. v. Kirkingburg* as "not to the contrary").

48. *Surprenant v. Potter*, Appeal No. 01996186, 2001 WL 885325, at p. *5 (EEOC July 26, 2001).

49. *Lovell v. Chandler*, 303 F.3d 1039, 1055 (9th Cir. 2002) ("We read *Albertson's* to say that it

does not violate the ADA for a private employer to deny an individual an accommodation based on his participation in an experimental government program when that program does not substantively modify the generally applicable governing regulations. We do not, however, read it to say that experimental programs themselves need not comply with the ADA and RA.").

50. *Gillen v. Fallon Ambulance Service, Inc.*, 283 F.3d 11, 29 (1st Cir. 2002).

51. 42 U.S.C. ' 12101(b)(1).

52. *Id.*, ' 12101(b)(2).

53. *Id.*, ' 12101(b)(3).