

No. 07-4588

**IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

MARK HOHIDER and ROBERT DIPAOLO,
on behalf of themselves and all others similarly situated,
Plaintiffs-Appellees,

v.

UNITED PARCEL SERVICE, INC.,
Defendant-Appellant.

PRESTON EUGENE BRANUM,
on behalf of himself and all others similarly situated,
Plaintiff-Appellee,

v.

UNITED PARCEL SERVICE, INC.,
Defendant-Appellant.

On Appeal From the United States District Court
for the Western District of Pennsylvania
No. 04-363 JFC

**BRIEF OF *AMICI CURIAE* THE PUBLIC INTEREST LAW CENTER OF
PHILADELPHIA, DISABILITY RIGHTS NETWORK OF PENNSYLVANIA,
DISABILITY RIGHTS EDUCATION AND DEFENSE FUND, DISABILITY
RIGHTS LEGAL CENTER, THE IMPACT FUND, THE LEGAL AID SOCIETY –
EMPLOYMENT LAW CENTER, THE NATIONAL DISABILITY RIGHTS
NETWORK, AND NEW JERSEY PROTECTION AND ADVOCACY, INC. IN
SUPPORT OF PLAINTIFF-APPELLEES’ BRIEF SUPPORTING AFFIRMANCE
OF CLASS CERTIFICATION**

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STATEMENT OF INTEREST OF THE *AMICI CURIAE*
AND SOURCE OF AUTHORITY TO FILE

Amici the Public Interest Law Center of Philadelphia, Disability Rights Network of Pennsylvania, Disability Rights Education and Defense Fund, Disability Rights Legal Center, the Impact Fund, the Legal Aid Society – Employment Law Center, the National Disability Rights Network, and New Jersey Protection and Advocacy, Inc. respectfully submit this brief in support of Plaintiff-Appellees Opposition Brief. This case presents the important question of the ability of individuals with disabilities to litigate a class action discrimination claim under the Americans with Disabilities Act under a pattern or practice framework.

Amici Curiae are nonprofit organizations dedicated to advancing and protecting the civil rights of minority groups, persons with disabilities, and other classes protected by anti-discrimination laws through class actions. *Amici* also have extensive legislative and litigation experience with the disability discrimination issues raised herein, and are recognized for their expertise in the interpretation of both federal and state employment and disability rights statutes.

The Public Interest Law Center of Philadelphia is a not for profit law firm dedicated to advancing the constitutional promise of equal citizenship to all persons irrespective of race, ethnicity, national origin, disability, gender or poverty. Throughout its history, the Law Center has been a leader in establishing rights on behalf of individuals with disabilities in areas of education, community services,

transportation, employment and the criminal justice system.

Disability Rights Network of Pennsylvania (“DRN”) is a non-profit Pennsylvania corporation that provides legal and other advocacy services to persons with disabilities, their families, and their groups. DRN is Pennsylvania’s designated protection and advocacy system authorized under federal law to pursue legal and administrative remedies for persons with disabilities. For more than 30 years, DRN (and its predecessor organizations) has provided legal services to thousands of persons with disabilities and litigated hundreds of cases concerning a wide variety of issues, including employment; housing; access to community services; access to health care; architectural barriers; and guardianship and consent. DRN has a significant interest in assuring that persons with disabilities have available to them the full range of procedural mechanisms necessary to assert their claims.

Disability Rights Education and Defense Fund, Inc. (“DREDF”), based in Berkeley, California, is a national law and policy center dedicated to advancing and protecting the civil rights of people with disabilities. Recognized for its expertise in the interpretation of federal disability civil rights laws, DREDF pursues its mission through education, advocacy and law reform efforts, fighting to ensure that people with disabilities have the legal protections necessary to vindicate their right to be free from discrimination.

Disability Rights Legal Center (“DRLC”) is a nonprofit organization that promotes the rights of people with disabilities and the public interest in and awareness of those rights by providing legal and related services. Since 1975, DRLC has handled disability rights cases, including numerous employment, housing, and access cases, under federal civil rights laws. DRLC has been class counsel in numerous cases on behalf of individuals with disabilities, and works to ensure the advancement of the rights of persons with disabilities on both a state and national level.

The Impact Fund is a non-profit foundation that provides funding, training, and co-counsel to public interest litigators across the country, assisting in civil rights cases. It offers training programs, advice and counseling, and amicus representation regarding class action and related issues. The Impact Fund is lead counsel in *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137 (N.D. Cal. 2002), *aff’d*, 509 F.3d 1168 (9th Cir. 2007), and other major class action lawsuits, including disability discrimination cases.

The Legal Aid Society - Employment Law Center (“LAS-ELC”) is a public interest legal organization that advocates to improve the working lives of disadvantaged people. Since 1970, The LAS-ELC has represented clients in cases covering a broad range of employment-related issues including discrimination on the basis of race, gender, age, disability, pregnancy, sexual orientation, and

national origin.

The National Disability Rights Network (“NDRN”) is the membership association of protection and advocacy (“P&A”) agencies that are located in all 50 states, the District of Columbia, Native American community, Puerto Rico, and the territories. P&As are authorized under various federal statutes to provide legal representation and related advocacy services on behalf of persons with all types of disabilities in a variety of settings. In 2005, P&As served over 73,000 persons with disabilities through individual case representation and systemic advocacy. The P&A system comprises the nation’s largest provider of legally based advocacy services for persons with disabilities.

New Jersey Protection and Advocacy, Inc. (“NJPA”) is a non-profit public interest legal organization and has served as New Jersey’s designated protection and advocacy system for individuals with disabilities pursuant to the Developmental Disabilities Assistance and Bill of Rights Act of 2000, the Rehabilitation Act, and related statutes since 1994. In accordance with the purpose of this legislation, NJPA’s mission is to advocate and advance the human, civil, and legal rights of persons with disabilities. NJPA has represented individuals with disabilities in a broad range of issues including employment discrimination.

Plaintiff-Appellees and Defendant-Appellants consented to the filing of this brief. Fed. R. App. P. 29(a).

SUMMARY OF ARGUMENT

There are no “structural” differences between the Americans with Disabilities Act (“ADA”) and Title VII that would justify rejection of class certification or the pattern or practice theory of liability, as appellant argues. In addition to affording individual rights to persons with disabilities, the ADA by its terms protects a “class of individuals with disabilities” and includes theories of liability that are class-wide in nature. Congress intended the ADA to provide civil rights protections for persons with disabilities parallel to those available under Title VII of the Civil Rights Act of 1964 to people of color, women and persons of differing religious beliefs. To this end, the ADA expressly incorporated the enforcement and procedural protections of Title VII. The legislative history confirms that this incorporation of Title VII remedies and procedures was intended to include class action litigation and pattern or practice authority.

In *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977), the United States Supreme Court established the pattern or practice framework, under Title VII, by which plaintiffs may challenge an employer’s systemic discriminatory policies. At liability proceedings, plaintiffs have the burden to prove that unlawful discrimination is the employer’s standard operating procedure. If plaintiffs meet this burden, the district court is empowered to order prospective relief for the class. It is only at the second stage of proceedings that

issues of individual relief arise. In the thirty years since *Teamsters*, courts have applied the pattern or practice framework to a number of claims seeking injunctive relief and individual damages, including cases brought under the ADA.

The remedy stage of a pattern or practice case may involve individualized determinations of each class members' entitlement to relief. Even when these determinations are complex, however, they do not undermine class certification or the utility of the pattern or practice theory in Title VII or ADA actions seeking declaratory and injunctive relief.

The ADA was aimed, in part, against broad policies of discrimination. To preclude class adjudication would undermine the goals of the ADA and result in fragmentary, inconsistent, and burdensome litigation.

ARGUMENT

I. The Language and the Legislative History of the ADA Confirm that Plaintiffs May Bring Pattern or Practice Class Actions to Challenge Discriminatory Policies and Practices

A. The Provisions of the ADA Contemplate Class Actions

Although Appellant United Parcel Service, Inc. ("UPS") asserts that class litigation is inconsistent with the ADA, the text of the ADA is unambiguously to the contrary. The broad types of discriminatory conduct prohibited by the ADA make clear that the class action vehicle is both relevant and appropriate. Instead of limiting the liability for disability discrimination to actions directed at individuals,

the ADA defines disability discrimination broadly to preclude policies or practices that affect classes of persons with disabilities. For example, it prohibits:

(1) limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee;

...

(3) utilizing standards, criteria, or methods of administration – (A) that have the effect of discrimination on the basis of disability; or (B) that perpetuate the discrimination of others who are subject to common administrative control;

... [and]

(6) using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability *or a class of individuals* with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity[.]

42 U.S.C. § 12112(b) (emphasis added). Subsection (6) explicitly contemplates class liability. Subsections (1) and (3) prohibit conduct which would justify class injunctive relief and certification under Federal Rule of Civil Procedure 23(b)(2).

Additional provisions found in the other titles of the ADA likewise prohibit class-wide policies and practices. *See, e.g.*, 42 U.S.C. § 12182(b)(1)(A)(i)-(iii) (protecting an “individual or class of individuals” with disabilities from discrimination on the basis of their disabilities in the form of denial of services and accommodations, unequal benefit, and separate services and accommodations), (b)(2)(A)(i) (prohibiting the imposition of “eligibility criteria that screen out or

tend to screen out an individual . . . or *any class of individuals* with disabilities” from full enjoyment of goods or services (emphasis added)).

Congressional findings confirm that the ADA mandates broad enforcement against general policies or practices of discrimination. In its section of findings and purposes, Congress noted the “the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, . . . exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities[.]” 42 U.S.C. § 12101(a)(5). In light of such findings, Congress concluded, it is the purpose of the ADA “to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities,” and “to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities.” 42 U.S.C. § 12101(b). This language – endorsing “comprehensive” legislation providing “strong” and “enforceable” standards to eliminate discriminatory rules, policies, standards, and criteria – is contrary to any construction of the ADA that limits or eliminates class actions brought under Rule 23.¹ Consistently, the legislative history is rife with passages

¹ See also H.R. Rep. No. 101-485(II), at 22-23 (1990) (“The purpose of the ADA is to provide a clear and comprehensive national mandate to end discrimination against individuals with disabilities and to bring persons with disabilities into the economic and social mainstream of American life; [and] to provide enforceable standards addressing discrimination against individuals with disabilities . . .”), 50

underscoring the importance of strong and effective remedies.² Such remedies include class-wide relief from an employer’s pattern or practice of disability discrimination.

B. The ADA Incorporates Title VII Procedures and Remedies, Including the “Pattern or Practice” Theory of Liability

Class actions based on the pattern or practice theory have long been the hallmark of Title VII of the Civil Rights Act of 1964. The pattern or practice theory derives from Title VII’s express statutory provision granting the Attorney General authority to litigate such actions. *See* 42 U.S.C. § 2000e-6(a)³; *Teamsters*, 431 U.S. at 329 n.2, 336 n.16.⁴ When it adopted the ADA, Congress expressly incorporated *all* of Title VII’s remedies and procedures, including Section 2000e-6(a):

(“[T]here is a compelling need to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities and for the integration of persons with disabilities into the economic and social mainstream of American life. Further, there is a need to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities.”).

² *See, e.g.*, S. Rep. No. 101-116, at 15 (1989) (“Several witnesses emphasized that the rights guaranteed by the ADA are meaningless without effective enforcement provisions.”); H.R. Rep. No. 101-485(II), at 40 (same).

³ This authority was subsequently transferred to the Equal Employment Opportunity Commission. *See* 42 U.S.C. § 2000e-6(c).

⁴ Although *Teamsters* was not a class action, the Supreme Court has confirmed that “the elements of a prima facie pattern-or-practice case are the same in a private class action.” *Cooper v. Fed. Reserve Bank of Richmond*, 467 U.S. 867, 876 n.9 (1984).

SEC. 107. ENFORCEMENT.

(a) POWERS, REMEDIES, AND PROCEDURES.--The powers, remedies, and procedures set forth in [Title VII] of the Civil Rights Act of 1964 (42 U.S.C. 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9) shall be the powers, remedies, and procedures this title provides to the Commission, to the Attorney General, or to any person alleging discrimination on the basis of disability in violation of any provision of this Act

Pub. L. 101-336, Title I, § 107 (codified at 42 U.S.C. § 12117).

Generally, when Congress incorporates sections of other statutes into statutory text, it is assumed Congress understood and intended to incorporate all the legal interpretations and meanings attached to the referenced statute. *Lorillard v. Pons*, 434 U.S. 575, 581 (1978). Thus, contrary to UPS's assertion that pattern or practice theory is incompatible with the ADA, Congress explicitly incorporated its statutory basis. Accordingly, under the ADA as under Title VII, a person alleging discrimination may seek relief on a class-wide basis. *Accord Hendricks-Robinson v. Excel Corp.*, 164 F.R.D. 667, 669, 672 (C.D. Ill. 1996) (certifying class of employees with permanent restrictions subjected to medical layoff policy in violation of Title I of the ADA).

Congress's decision to incorporate into the ADA all of the remedies and procedures set forth in Title VII was deliberately made. Congress rejected an amendment that would have incorporated only a portion of the remedies and procedures of Title VII, and would have limited recovery under the ADA to back pay, reinstatement, and equitable relief. *See* 136 Cong. Rec. H2612-22 (daily ed.

May 22, 1990). In so acting, Congress sought to make clear that the remedies and procedures available under the ADA would remain equivalent to those of Title VII.

Stated the House Judiciary Committee:

This amendment [eliminating incorporation by reference] was rejected as antithetical to the purposes of the ADA – *to provide civil rights protections for persons with disabilities that are parallel to those available to minorities and women*. By retaining the cross-reference to title VII, the Committee’s intent is that the remedies of title VII, currently and as amended in the future, will be available to persons with disabilities.

...

The Committee adopted this amendment [conforming administrative procedures] because it reaffirms the intent of parity between people with disabilities and minorities and women under title VII[.]

House Comm. on Judiciary, H.R. Rep. No. 485(III), 101st Cong., 2d Sess., at 48, 49 (1990) (emphasis added); *see also id.* at 26 (“The Americans With Disabilities Act completes the circle begun in 1973 with respect to persons with disabilities by extending to them the same civil rights protections provided to women and minorities beginning in 1964.”); H.R. Rep. No. 101-485(II), at 82 (1990) (“An agreement was made that people with disabilities should have the same remedies available to all other minorities under Title VII of the Civil Rights Act of 1964.”).

Thus, Congress rejected the very theory offered by Appellants—that disability claims or protections are fundamentally different from, and less deserving of the broad remedies afforded to women, minorities or persons with religious claims under Title VII. But the legislative history went further and

explicitly confirmed that the pattern or practice provision of Title VII was incorporated in the ADA. The key committee reports explicitly reference the concept of “pattern or practice” litigation under the ADA:

Section 107(a) of the legislation specifies that the remedies and procedures set forth in [Title VII] shall be available with respect to the Commission, the Attorney General, or any individual who believes that he or she is being subjected to discrimination on the basis of disability in violation of any provisions of this legislation *As has been the case under title VII of the Civil Rights Act of 1964, the Attorney General will continue to have pattern or practice authority with respect to State and local governments.*

House Comm. on Education and Labor, H.R. Rep. No. 485(II), 101st Cong., 2d Sess., at 82 (emphasis added); *see also* Senate Comm. on Labor and Human Resources, S. Rep. No. 116, 101st Cong., 1st Sess., at 43 (1989) (containing virtually identical language).

These same reports confirm that the ADA’s language incorporating Title VII’s remedies and procedures incorporates Title VII case law including *Teamsters*, 431 U.S. at 365-67. H.R. Rep. No. 101-485(II), at 82; S. Rep. No. 101-116, at 43 (the case law under Title VII of the Civil Rights Act of 1964, including *Teamsters*, already provides protection against discrimination in those circumstances, and thus a specific provision in the ADA was unnecessary); *accord* S. Rep. No. 101-116, at 30 (noting that the Act “incorporate[s] a disparate impact standard to ensure that the legislative mandate to end discrimination does not ring hollow”); H.R. Rep. No. 101-485(II), at 61 (same).

II. The Pattern or Practice Framework Used in *Teamsters* is Appropriate When Plaintiffs are Challenging a System-Wide Practice of Discrimination

A. Class Injunctive Relief Does Not Turn on Class Member Specific Facts

UPS's asserts that an ADA case is not compatible with the pattern or practice theory because each class member must initially demonstrate a *prima facie* case including a showing that he or she is disabled. UPS mistakenly assumes, however, that the order and elements of proof in an individual case must be replicated in a class action. The *Teamsters* court rejected this very premise. *Teamsters*, 431 U.S. at 357-60.⁵ In a pattern or practice case, at the liability stage of the case, the plaintiff must prove “more than the mere occurrence of isolated or ‘accidental’ or sporadic discriminatory acts. It had to establish by a preponderance of the evidence that racial discrimination was the company’s standard operating procedure—the regular rather than the unusual practice.” *Id.* at 336.

At the liability stage of a pattern or practice case, the plaintiffs need not offer:

evidence that each person for whom it will ultimately seek relief was a victim of the employer’s discriminatory policy. Its burden is to show that such a policy existed. The burden then shifts to the employer to

⁵ In an individual Title VII case, the familiar requirements of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), apply. In such a case, the *prima facie* burden includes a showing that the plaintiff applied and was qualified for the position in question, but was nevertheless rejected and the position remained open. *Id.* at 802.

defeat a prima facie showing of a pattern or practice by demonstrating that the Government's proof is either inaccurate or insignificant.

Id. at 360.

The point is that at the liability stage of a pattern or practice trial, the focus often will not be on individual hiring decisions. While a pattern might be demonstrated by examining the discrete decisions of which it is composed, the Government's suits have more commonly involved proof of the expected result of a regularly followed discriminatory policy.

Id. at 360 n.46. In other words, the liability stage focuses on the defendant's policy as it applies to the entire class. *See also Cooper v. Fed. Reserve Bank of Richmond*, 467 U.S. 867, 876 (1984).

If the defendant fails to rebut the prima facie case, liability is established and the trial court determines the appropriate remedy. “*Without any further evidence from the Government, a court's finding of a pattern or practice justifies an award of prospective relief. Such relief might take the form of an injunctive order against continuation of the discriminatory practice . . .*” *Teamsters*, 431 U.S. at 361 (emphasis added); *see also Cooper*, 467 U.S. at 876 (“[A] finding of a pattern or practice of discrimination itself justifies an award of prospective relief to the class . . .”). Importantly, declaratory and injunctive relief may be issued without any requirement of assessing the claims of individual class members. If individual relief is sought, “a district court must usually conduct additional proceedings after the liability phase of the trial to determine the scope of individual relief.”

Teamsters, 431 U.S. at 361. In such additional proceedings, all class members are presumed entitled to relief, but a defendant can defeat individual relief by proving that an individual was denied an employment opportunity for a lawful reason. *Id.* at 431-32.

Courts have consistently held that class certification is *particularly* warranted where the focus of the case is systemic conduct and remedies. In such cases, stage one liability proceedings deal with the resolution of common issues. *See Califano v. Yamasaki*, 442 U.S. 682, 701 (1979) (noting that class certification is appropriate where “[i]t is unlikely that differences in the factual background of each claim will effect the outcome of the legal issue”); *Armstrong v. Davis*, 275 F.3d 849, 868 (9th Cir. 2001).

This Court has rejected the argument that individual inquiries preclude class treatment or are required before a court can provide injunctive relief, even in cases that are not explicitly based on the pattern or practice theory. *Baby Neal ex rel. Kanter v. Casey*, 43 F.3d 48 (3d Cir. 1994). Plaintiffs in *Baby Neal* consisted of sixteen children in the care of Philadelphia’s Department of Human Services. Plaintiffs brought a class action against the department, alleging that it failed to provide required child welfare services, and sought declaratory and injunctive relief. *Id.* at 53. The district court denied class certification because each plaintiff “had his or her own individual circumstances and needs, and that the class thus

could not complain about a single, common injury.” *Id.* at 54. On appeal, this Court held that the district court abused its discretion and acknowledged that individualized determinations are not necessary “where plaintiffs request declaratory and injunctive relief against a defendant engaging in a common course of conduct toward them.” *Id.* at 57. Furthermore, if individualized determinations became an issue, the Court recognized that the district court could bifurcate the proceedings. *Id.*

This Court has also extended the *Teamsters* pattern or practice approach to a non-Title VII case. *See Gavalik v. Cont'l Can Co.*, 812 F.2d 834, 860-66 (3d Cir. 1987). *Gavalik* involved a class action that alleged the employer operated a scheme to prevent employees from attaining eligibility for benefits in violation of the Employee Retirement Income Security Act (ERISA). *Id.* at 838. Trial was bifurcated into liability and damages phases. *Id.* After trial, the district court made several findings of fact as to defendant’s implementation of a program specifically intended to avoid future vesting of benefits, but concluded that Defendant did not violate ERISA. *Id.* at 842. In reaching this determination, the district court required plaintiffs to show at the *liability stage* that each individual was specifically affected by defendant’s system-wide program. *Id.* at 856. This Court reversed because defendant’s “maintenance of the program with the specific intent to interfere with class members’ pension eligibility was in itself a class-wide

violation of ERISA entitling them to injunctive relief.” *Id.* at 857. The Court then clarified what appropriate *Teamsters* presumption would apply to class members seeking individual relief. *Id.* at 865-66.⁶

As this Court recognized implicitly in *Baby Neal* and expressly in *Gavalik*, a pattern or practice framework is appropriate in cases challenging class-wide conduct. The district court in this case found that plaintiffs presented sufficient evidence to show the existence of three common practices at UPS that potentially violate the ADA: the 100% healed policy, the implementation of a formal ADA compliance policy, and the use of uniform pretextual job descriptions. *Hohider v. United Parcel Serv., Inc.*, 243 F.R.D. 147, 222-223 (W.D. Pa. 2007). As explained below, the district court properly applied a pattern or practice framework to these claims.

B. Injunctive Relief in Class Action ADA Cases Does Not Require Proof of Individual Class Member Claims

The class action mechanism and pattern or practice framework are appropriate in ADA cases, particularly where an employer refuses to base its

⁶ Several other circuit courts have approved of the use of the pattern or practice framework for a variety of legal claims beyond Title VII. *See generally Thiessen v. Gen. Elec. Capital Corp.*, 267 F.3d 1095, 1108 (10th Cir. 2001) (applying framework in Age Discrimination in Employment Act collective action case); *Davoll v. Webb*, 194 F.3d 1116, 1132-33 (10th Cir. 1999) (applying framework to Title I ADA claim); *United States v. DiMucci*, 879 F.2d 1488, 1497-98 (7th Cir. 1989) (applying framework in Fair Housing Act case).

determinations on individual factors. Because the ADA explicitly requires individual assessment of disability, *see Williams v. Pa. Hous. Auth. Police Dep't*, 30 F.3d 751, 761 (3d Cir. 2004), the presence of a blanket rule is almost by definition a violation of the statute and quintessentially positioned for class treatment. Indeed, several courts have certified employment disability class actions, recognizing that an employers' application of a blanket policy is not dependent on individualized issues. *See Bates v. United Parcel Serv.*, 204 F.R.D. 440, 445-46, 449 (N.D. Cal. 2001) (certifying class challenging policies and procedures excluding deaf workers from certain job assignments); *Hendricks-Robinson*, 164 F.R.D. at 669, 672; *Daggett v. Voeller*, 1996 U.S. Dist. LEXIS 22465, at *49-50, 68 (D. Or. Apr. 18, 1996) (certifying class of blind and partially blind employees alleging lower wages for the same work, and assignment to fewer hours and lower paying positions); *Wilson v. Pa. State Police Dep't*, 1995 WL 422750 (E.D. Pa. July 17, 1995) (certifying class of persons denied employment as state police officers because of correctable visual impairment); *Kimble v. Hayes*, 1990 WL 20208 (E.D. Pa. Mar. 1, 1990) (certifying class of persons denied employment as police officers because of correctable visual impairment); *Dyer-Neely v. City of Chicago*, 101 F.R.D. 83, 85, 87 (N.D. Ill. 1984) (certifying class of applicants excluded on the basis of disability).⁷

⁷ *See also EEOC v. Northwest Airlines*, 216 F. Supp. 2d 935, 937-38 (D. Minn.

The district court's order in this case certified plaintiffs' claims for injunctive relief as to the UPS's three class-wide policies. *Hohider*, 243 F.R.D. at 245 & n.106. To demonstrate the existence of a 100% healed policy and the implementation of UPS's formal ADA compliance policy, Plaintiffs offered testimony from UPS managers and employees about their knowledge of and experiences with the 100% healed rule, evidence from UPS's training materials, and evidence from various EEOC investigations. *Id.* at 215, 220. The court found that this was sufficient evidence of UPS's practice and policies to establish common factual issues and the illegality of its conduct. *Id.* at 214-15, 220-21. The Court correctly noted that, contrary to UPS's contention, individual inquiries are not required to establish the existence of these discriminatory policies and practices or to issue systemic injunctive relief. *Id.* at 231-32. Instead, at stage one liability proceedings, Plaintiffs will have the burden to prove UPS violates the ADA by utilizing a 100% healed policy, implementing a disingenuous ADA compliance policy, and using uniform pretextual job descriptions. *Id.* The district court specifically delayed its determination of the nature of stage two proceedings until

2002) (denying motion to dismiss class action challenging blanket policy prohibiting employees on certain treatments from holding positions as cleaners or equipment service employees); *Delise v. Fed. Express Corp.*, 2001 WL 321081, at *2-3 (N.D. Ill. Mar. 30, 2001) (denying defendant's motion to dismiss class action challenging leave of absence, return to work, job bidding, and job transfer policies).

both parties addressed the issue of bifurcation. *Id.* at 245 & n.106. Therefore, under a pattern or practice framework, the district court did not abuse its discretion.

C. Stage Two Individual Relief Issues in ADA Cases Are Not Necessarily More Complex than in Title VII or Other Cases

UPS argues that entitlement issues in ADA cases are so individualized and complex that the pattern or practice theory may not apply. As an initial matter, as noted above, class member specific facts, no matter how complex and individualized, do not preclude class-wide injunctive relief. Even where individual relief is sought, however, complex individualized determinations are no bar to the use of the pattern or practice theory in Title VII or other cases.

When individual relief is sought for class members in a pattern or practice case, it may be necessary to consider facts specific to individual class members. That is why “additional proceedings” may be necessary after the class liability stage when such individual relief is sought. *Teamsters*, 431 U.S. at 361. Such proceedings in Title VII cases may involve complex individual determinations. As *Teamsters* confirmed, at stage two “[t]he task remaining for the District Court . . . will not be a simple one. Initially, the court will have to make a substantial number of individual determinations in deciding which of the minority employees were actual victims of the company’s discriminatory practices.” *Id.* at 371-72.

In *Teamsters*, class members seeking to establish claims after the liability trial needed to prove they applied for a position or would have applied in the

absence of discrimination. A class member making the latter claim must “show that he was a potential victim of unlawful discrimination. . . . [H]is is the not always easy burden of proving he would have applied for the job had it not been for those practices.” *Id.* at 367-68.

This court has approved individual relief in a class case for class members who must meet a substantial burden. In its order remanding the *Gavalik* case to the district court for individual relief, this Court explained that “individual class members must . . . establish that they were (1) non-vested employees eligible for 70/75 and Rule of 65 benefits, (2) available for work, (3) labeled as permanently laid off by Continental, and (4) laid off or continued on layoff status prior to attaining eligibility for those benefits.” *Gavalik*, 812 F.2d at 865-66.

Appellant’s rejection of the pattern or practice theory ignores the fact that entitlement to relief under the ADA does not always require the same types of proof or individualized facts. Thus, there are three ways to establish disability under the ADA, including, as in this case, where a person is regarded as disabled by the employer. *See* 42 U.S.C. § 12102(2)(A)-(C). If a “regarded as” claim is made, the focus of entitlement is not the individual facts pertaining to a plaintiff or class member’s disability but on the defendant’s state of mind and conduct. *Buskirk v. Apollo Metals*, 307 F.3d 160, 167 (3d Cir. 2002). In such cases, such as this one, proof that an employer regarded a class as disabled would streamline any

individual remedy stage. Thus ADA cases may present entitlement issues that are comparable to or even less complex than in some Title VII cases.

UPS claims that if this case is allowed to proceed under a pattern or practice framework, plaintiffs and class members will be relieved of the burden to show that they are disabled and otherwise qualified. Opening Brief for Appellant 23. This is not the case. The district court certified the class for injunctive and declaratory relief only and has not decided the nature of any stage two proceedings or whether class members may seek back pay or other individual equitable relief. *Hohider*, 243 F.R.D. at 245 & n.106. Nor has the court addressed what burden will be placed on individual class members if such relief is permitted. Nothing in the court's opinion suggests that class members pursuing individual relief will be relieved from meeting a stage two burden of demonstrating entitlement to relief. Any such burden would take into account the ADA disability entitlement theory advanced in this case. It would also turn on the findings of the liability stage, since the "force of that proof does not dissipate at the remedial stage of the trial." *Teamsters*, 431 U.S. at 361-62.

D. Precluding Class Treatment in this Case Would Undermine the ADA and Compromise Judicial Efficiency

If the pattern or practice theory and class certification were unavailable in ADA cases, then Congress' goal of strong enforcement would be severely undermined. Where an employer engages in a blanket policy of discrimination,

individual cases simply are no substitute for class relief.

As stated above, Plaintiffs commonality evidence included testimony from UPS managers and employees about their knowledge of and experiences with the 100% healed rule, evidence from UPS's training materials, and evidence from various EEOC investigations. *Hohider*, 243 F.R.D. at 215, 220. This is powerful evidence that UPS engaged in a pattern or practice of discrimination with regard to its 100% healed policy and the implementation of UPS's formal ADA compliance policy. The cost and difficulty of proving a broad policy or practice, however, may be out of the reach of an individual pursuing a single claim. The cost of extensive discovery, statistical and expert evidence to prove a pattern or practice of discrimination, in many cases, will exceed any possible recovery by an individual. *Cf.* 42 U.S.C. § 1981a(b)(3) (providing limits on the total amount of compensatory and punitive damages that are recoverable in intentional discrimination cases under the ADA and Title VII).

Faced with such expense, an individual would either forego the litigation or abandon any effort to demonstrate a broad policy or practice. Instead, an individual who decided to sue would likely focus on individual disparate treatment or failure to accommodate theories. Even if an individual prevailed in such a case, the relief and proof obtained would only apply to that individual.

If the individual nevertheless undertook the task of proving a general

discriminatory policy, absent a certified class, no other individual would be permitted relief, even if the policy was explicit. In such a case, only named plaintiffs would be eligible to recover damages or other individual relief. It is also doubtful that broad injunctive relief benefiting others would be permitted. *See, e.g., Davis v. Coca-Cola Bottling Co. Consol.*, 516 F.3d 955, 967-969 (11th Cir. 2008) (determining that individuals may not prosecute a pattern or practice claim seeking injunctive relief outside of a class action context); *cf. Lowery v. Circuit City Stores, Inc.*, 158 F.3d 742, 761 (4th Cir. 1998) (determining that individual plaintiffs may not pursue a discrimination claim under a pattern or practice framework), *vacated on other grounds*, 527 U.S. 1031 (1999).

If class pattern or practice cases were not permitted under the ADA, the result, at best, would be fragmentary and potentially inconsistent litigations placing an enormous burden on the courts and plaintiffs. Such individual litigation will be ineffective whenever an employer discriminates in gross.

CONCLUSION

Congress was adamant that there be “comprehensive”, “strong” and “enforceable” standards to eliminate discrimination against individuals with disabilities of the same quality as those afforded under Title VII. 42 U.S.C. § 12101(b). Class actions based on the pattern or practice theory are an essential part of the arsenal of enforcement. Therefore, to effectuate Congress’ intent to provide

individuals with disabilities the same protections as those provided women and people of color, this Court should affirm and hold that Plaintiffs' ADA claims may proceed under a pattern or practice framework.

For the foregoing reasons, Amici respectfully request that this Court affirm the district court's order granting Rule 23(b)(2) class certification.

Respectfully submitted,

Dated: May 1, 2008

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LAR 28.3 CERTIFICATION

Pursuant to LAR 46.1(e), *Amici Curiae* certify that at least one attorney, Brad Seligman, counsel of record, is a member of the bar of this court.

DATED: May 1, 2008

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CERTIFICATE OF COMPLIANCE

Amici curiae certify that this brief meets the type-volume limitations of Fed. R. App. P. 29(d) and 32(a)(7)(A)-(B), which limit the amicus brief to no more than one-half the maximum length authorized by the rules for the principal brief. This brief is allowed no more than 7,000 words of proportional spaced type. This brief contains 5,885 words, excluding the table of contents, table of authorities, and certifications of counsel.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the original was electronically filed with the clerk and true and correct copies of **BRIEF OF AMICI CURIAE THE PUBLIC INTEREST LAW CENTER OF PHILADELPHIA, DISABILITY RIGHTS NETWORK OF PENNSYLVANIA, DISABILITY RIGHTS EDUCATION AND DEFENSE FUND, DISABILITY RIGHTS LEGAL CENTER, THE IMPACT FUND, LEGAL AID SOCIETY – EMPLOYMENT LAW CENTER, THE NATIONAL DISABILITY RIGHTS NETWORK, AND NEW JERSEY PROTECTION AND ADVOCACY, INC. IN SUPPORT OF PLAINTIFF-APPELLEES’ BRIEF SUPPORTING AFFIRMANCE OF CLASS CERTIFICATION** have been duly sent to the Clerk via Federal Express and served on opposing counsel via U.S. Mail to:

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CERTIFICATE OF IDENTICAL COMPLIANCE

Amici Curiae certify that the electronic form of the Brief of *Amici Curiae* filed with the Clerk is in all ways identical to the hard copies of the Brief of *Amici Curiae* sent to the Clerk on the same day as filing.

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