Keep Calm and Fly On: Your Essential Guide to the Air Carrier Access Act

By

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TABLE OF CONTENTS

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By Tom Stilwell, BakerHosteter[1]

Experience tells us that we should celebrate our differences. To preserve equal treatment no matter our differences, Congress passed the Air Carrier Access Act ("ACAA") prohibiting discrimination against disabled individuals.[2] "In providing air transportation, an air carrier … may not discriminate against an … individual [that] has a physical or mental impairment."[3] Considered the American with Disabilities Act of the skies, the ACAA ensures "nondiscriminatory treatment of qualified handicapped individuals consistent with safe carriage of all passengers on air carriers."[4]

Yet, persons with disability do not necessarily possess common experiences with able-bodied passengers when they travel by air. Unlike able-bodied passengers, persons with a medical or physical impediment may require additional consideration, assistance, or time. Indeed, passengers using wheelchairs, possessing sight impediments, carrying infectious diseases, or traveling with service animals bring differences that must be addressed not only physically, but also functionally and procedurally. Their ticket buying experience may be different; their security screening may be different; their mode of communication may be

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[2] *Gilstrap v United Air Lines, Inc.*, 709 F.3d 995, 999 (9th Cir. 2013).

[3] 49 U.S.C. § 41705(a)(1); *National Federation of the Blind v. United Airlines, Inc.*, 2011 WL 1544524 *2 (N.D. Ca. April 25, 2011).

[4] *O'Brien v City of Phoenix*, 2012 WL 4762465 at *1 (D. Arizona Oct. 5, 2012).

different; their travel through the airport may be different; their boarding / deplaning procedure may be different; and their seat requirements may be different.

To give effect to the ACAA, the Department of Transportation ("DOT") enacted regulations that attempt to ensure these differences receive the care, attention and forethought that they deserve. But unraveling the specific requirements of the guidance provided by the regulations can be difficult on a case-by-case basis. Procedurally, litigation under the act has also resulted in material differences in approach by the various federal circuits. While the courts typically reject the argument that the Air Carrier Access Act creates a stand alone private right of action, this has not settled the debate regarding the scope of the act's preemptive force or the boundaries of the federal courts' jurisdiction.

This article evaluates the state of the law, combining the DOT regulations with court decisions to reach an understanding of the different approaches to passenger care under the Air Carrier Access Act.

I. DIFFERENCES ADDRESSED BY THE ACAA

The ACAA's origin stemmed from the difference between protection persons with disability received through federally funded programs, and the lack of protection afforded to them on a federally regulated airline. While the original version of the Federal Aviation Act contained language preventing an air carrier from subjecting any passenger to "…unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect…"[5], the

[5] 49 U.S.C.App. § 1374 (1982), *repealed by* Pub.L. No. 103-272, 108 Stat 745, 1141 (1994).

Airline Deregulation Act of 1978 repealed this provision.[6] In 1986, the United States Supreme Court issued its decision in *U.S. Department of Transportation v. Paralyzed Veterans of America* and held that regulations prohibiting discrimination by federally funded programs did not apply to airlines who did not receive direct federal subsidies.[7] The Court rejected the argument that the airlines must comply with the anti-discriminatory regulation because they benefitted from federal grants for airport construction and utilized a federally funded air traffic control system.[8] Recognizing the gap created by the decision, Congress reacted quickly, passing the Air Carrier Access Act as an amendment to the FAA in order to directly prevent discrimination against disabled passengers during air travel.[9]

"More than just prohibiting overtly discriminatory conduct, these regulations 'are aimed at ensuring that services, facilities, and other accommodations are provided to passengers with disabilities in a respectful and helpful manner.'"[10] But, isolated instances of distasteful, uncivil, or inappropriate demeanor by airline personnel interacting with disabled passengers do not constitute an act of discrimination under the ACAA or its regulations.[11]

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6 49 U.S.C.App. § 1301, *repealed by* Pub.L.No. 103-272, 108 Stat. 745, 1141 (1994).

7 477 U.S. 597 (1986).

8 *Id.* at 599.

9 49 U.S.C. § 41705.

10 *Elassaad v. Independence Air, Inc.,* 613 F.3d 119, 131 (3rd Cir. 2010)(*quoting* Nondiscrimination on the Basis of Disability in Air Travel, 70 Fed.Reg. 41,482, 41,504 (July 19, 2005)).

11 *Deterra v. America West Airlines, Inc.,* 226 F.Supp.2d 298, 306 (D. Mass. 2002)("None [of the DOT regulations] suggest that demeanor of an airline employee standing alone, uncivil as that demeanor may be, entitles the handicapped passenger to bring suit for damages under the ACAA.").

A. The ACAA Applies to US And Foreign Air Carriers

In April 2000, the ACAA was amended to include foreign air carriers.[12] The DOT first issued rules implementing the ACAA in March 1990. After Congress extended the ACAA to include foreign air carriers in April 2000, the DOT issued draft amendments to the rules that were finalized in March 2008. The DOT's final rules revising the regulations and including foreign air carriers went into effect May 13, 2009.[13]

Unless specifically stated, all DOT provisions enacting the ACAA apply to U.S. and foreign air carriers[14] that engage in air transportation.[15] The regulations define "air transportation" to include interstate or foreign air transportation, and "refers to transportation by aircraft within, to, or from the United States."[16]

For U.S. carriers, the ACAA applies to all of its operations and aircraft regardless of where its operations take place.[17] For a foreign carrier, the ACAA applies to flights that "begin or end at a U.S. airport and to aircraft used for these flights."[18]

U.S. carriers who possess code-sharing arrangements with foreign carriers must ensure that all legs of the flight, even those between two foreign points (non-U.S. airports), comply with

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12 *Id.*

13 14 C.F.R. § 382.5.

14 14 C.F.R. § 382.7(e).

15 14 C.F.R. § 382.3 defining "*Carrier*".

16 14 C.F.R. § 382.3 defining "*Air Transportation*".

17 14 C.F.R. § 382.7(a).

18 14 C.F.R. § 382.7(b).

the ACAA, even if operated by a foreign air carrier who would not otherwise be subject to the ACAA.[19]

B. DOT Regulations Provide Operational Rules

Under the authority given to the Secretary of Transportation to carry out the FAA's "Air Commerce and Safety Provisions," the DOT issues detailed regulations specifying the requirements that airlines must meet to comply with the ACAA.[20] The DOT regulations "impose four general duties on air carriers:

1. Not to discriminate against any qualified individual with a disability, by reason of such disability, in the provision of air transportation;

2. Not [to] require a qualified individual with a disability to accept special services … that the individual does not request;[21]

3. Not [to] exclude a qualified individual with a disability from or deny the person the benefit of any air transportation or related services that are available to other persons; and

4. Not [to] take any adverse action against an individual (e.g., refusing to provide transportation) because the individual asserts, on his or her own

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[19] 14 C.F.R. § 382.7(c).

[20] *See* 14 C.F.R. § 382; *cf. Gilstrap*, 709 F.3d at 1000.

[21] *See, e.g., Adiutori v. Sky Harbor Intern. Airport*, 880 F.Supp. 696, 701 (D. Az. 1995) *affirmed by* 103 F.3d 137 (9th Cir. 1996). "The regulations implementing the ACAA, when read as a whole, do not force air carriers to provide unrequested assistance to handicapped individuals." The Court in *Adiutori* went on to suggest that forcing handicapped individuals to accept services they do not request would constitute a violation of the ACAA. *Id.* at 702.

behalf or through or on behalf of others, rights protected' by the regulations or the ACAA.[22]

C. Airlines Remain Responsible for their Service Contractors

Where a carrier employs contractors or service providers to carry out the duties required by the ACAA (i.e. the provision of wheelchair assistance at airports), the carrier possesses a duty to make sure that the contractor provides the services required by the statute.[23] The DOT requires the written contract to contain an assurance that the requirements of the ACAA will be met.[24] The carrier "remains responsible for [the] contractor's compliance with [the DOT regulations] and for enforcing the assurances in [the] contracts with them."[25]

Given this, air carriers typically require strong indemnity provisions in their contracts with service providers, that are supported by insurance, and that add the carrier as an additional insured on the service contractor's liability policy.

D. Training Requirements

The DOT regulations also specify the training requirements for air carrier personnel. Employees must be trained, as appropriate given their functions and duties, on the ACAA's regulations, the airline's procedures regarding passengers with disabilities, appropriate boarding

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22 *Gilstrap*, 709 F.3d at 1000-01, *quoting and summarizing* 14 C.F.R. § 382.11(a).

23 14 C.F.R. § 382.15(a).

24 14 C.F.R. § 382.15(b).

25 14 C.F.R. § 382.15(d).

and deplaning procedures that protect the safety and dignity of passengers, and awareness of and appropriate responses to passengers with disabilities.[26]

This requirement results in many dual causes of action when a passenger files a lawsuit. Not only does the aggrieved passenger seek redress for the acts that breached the ACAA, but the passenger also invariably faults (and includes causes of action against) the airline for improperly training its personnel. For instance, in *Adler v WestJet Airlines, Ltd.,*[27] the court allowed just such a claim to survive a motion to dismiss. Ms. Adler suffered from medical conditions that required her to be "accompanied by a service animal," namely a four pound Yorkshire terrier.[28] After boarding and while waiting for takeoff a flight attendant told the Adlers that she was "uncomfortable" with the dog on the plane, resulting in their removal and the denial of transportation that day. Finding no preemption of their negligence claims (*see discussion infra*), the Court allowed the continued development of cause of action directed at the airline's "negligent failure to train its personnel regarding their legal obligation to accommodate service dogs."[29]

E. Enforcement of the ACAA

At each airport, the carrier must provide a complaint resolution official ("CRO") to address any passenger's concern about discrimination, accommodations, or services.[30] The carrier must advise the passenger of the ability to contact and discuss the issue with the CRO,

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26 *Gilstrap,* 709 F.3d at 1001, *quoting and summarizing* 14 C.F.R. § 382.141(a).

27 *Adler v WestJet Airlines, Ltd.,* 31 F.Supp.3d 1381 (S.D. Fla. 2014).

28 *Adler,* 31 F.Supp.3d at 1383.

29 *Adler,* 31 F.Supp.3d at 1388.

30 14 C.F.R. § 382.151(a) – (c).

and must make the means to meet or talk with the CRO available to the passenger. The CRO must possess the authority to make a dispositive resolution of all complaints.[31] Despite this broad mandate, the airline does not have to grant the CRO the authority to "countermand a decision of the pilot-in-command of an aircraft based upon safety."[32]

After an event, the carrier must respond to written complaints[33] received within forty-five (45) days of the incident.[34] The carrier must respond within thirty (30) days specifically admitting or denying that a violation occurred.[35] The response must include a summary of the facts and either (1) the steps taken in response to the admitted violation or (2) the reasons the carrier denies any violation occurred.[36] Additionally, the response must inform the complaining passenger of "his or her right to pursue DOT enforcement action…."[37]

To enforce the ACAA, the FAA permits a passenger to file a complaint with the Secretary of Transportation that reports regulatory violations.[38] The DOT will investigate, provide notice to the air carrier, conduct a hearing,[39] and, if a violation is found, "issue an order to compel

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31 14 C.F.R. § 382.151(e).

32 14 C.F.R. § 382.151(e).

33 14 C.F.R. § 382.155.

34 14 C.F.R. § 382.155(c).

35 14 C.F.R. § 382.155(d).

36 14 C.F.R. § 382.155(d)(1) – (2).

37 14 C.F.R. § 382.155(d)(3).

38 *Gilstrap,* 709 F.3d at 1001, *citing* 49 U.S.C. § 46101(a)(1).

39 49 U.S.C. § 46301(c)(1) grants the carrier the right to receive notice and an opportunity for hearing during the investigation by the Department of Transportation.

compliance."[40] The DOT may impose a civil penalty upon air carriers of up to $27,500 per violation.[41]

A person substantially interested in the DOT's resulting order may appeal the decision by filing a petition for review directly with the United States Court of Appeals for the District of Columbia, or in the United States Court of Appeals for the district in which the person lives.[42] The Court of Appeals possesses the authority to affirm, amend, modify or set aside any portion of the order, or alternatively, may order the DOT to conduct further proceedings.[43] Thereafter, a petition for review may be filed with the United States Supreme Court.[44]

Regardless of any formal investigation or enforcement action (or lack thereof) by the DOT, the carrier must keep records of all disability-related complaints, and, annually, make a report to the DOT summarizing the disability complaints received throughout the year.[45]

As might be imagined, the duty to investigate, respond in writing, and admit or deny fault possess broad implications if the passenger later files a civil action. This leads some courts to hold the opinion that civil lawsuits seeking remedies for violations of the ACAA conflict with the DOT enforcement scheme mandated under the ACAA. (*See discussion at II B. infra*). Indeed one court noted that the ability for a claimant to "whipsaw" the airlines with admissions made

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40 *Gilstrap*, 709 F.3d at 1001-02 *citing* 49 U.S.C. § 46101(a)(4).

41 *Gilstrap,* 709 F.3d at 1002, *citing* 49 U.S.C. § 46301(a). 49 U.S.C. § 46301(a) gives the Department of Transportation authority to issue a fine up to $25,000 for each violation but 14 C.F.R. § 383.2(a) has increased this amount to $27,500 to account for inflation.

42 49 U.S.C. § 46110(a).

43 49 U.S.C. § 46110(c).

44 49 U.S.C. § 46110(e).

45 14 C.F.R. § 382.157.

under the DOT enforcement scheme created a significant impediment to voluntary compliance by the airlines.[46]

F. Safety Remains Paramount

When necessary, safety trumps the ACAA. Notwithstanding the detailed regulations that mandate action by, and govern the conduct of the airlines, the carrier "must comply with all FAA safety regulations, TSA security regulations, and foreign safety and security regulations having a legally mandatory effect" on the carrier.[47] A carrier "may refuse to provide transportation to any passenger on the basis of safety, as provided in 49 U.S.C. 44902 or 14 CFR 121.533, or to any passenger whose carriage would violate FAA or TSA requirements or applicable requirements of a foreign government."[48]

II. DIFFERENCES IN INTERPRETATION: DOES THE ACAA POSSESS PREEMPTIVE POWER?

The ACAA exists as a federal statute, but it does not contain a provision that creates a federal cause of action for an aggrieved passenger. Additionally, the ACAA does not contain an express preemption clause within the statute that overtly prevents the assertion of a state cause of action by an aggrieved passenger.[49] "Express preemption requires that Congress's intent to preempt be 'explicitly stated in the statute's language or implicitly contained in its structure and

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[46] *Compass Airlines LLC. v. Montana Dept. of Labor & Industry*, 2013 WL 4401045 *15 (D. Montana Aug. 12, 2013).

[47] 14 C.F.R. § 382.7(g).

[48] 14 C.F.R. § 382.19(c).

[49] *Gilstrap* 709 F.3d at 1003.

purpose.'"[50] If no federal cause of action exists, but the statute does not explicitly prevent state law claims, may an aggrieved passenger utilize common law or state law to seek remedies for conduct that otherwise violates the ACAA? Courts differ in opinion and approach.

The DOT, which was tasked with the implementation of the ACAA, describes the regulations as "a detailed, comprehensive, national regulation, based upon Federal statute, which substantially, if not completely, occupies the field of nondiscrimination on the basis of handicap in air travel."[51] The DOT forewarned, "interested parties should be on notice that there is a strong likelihood that state action on matters covered by this rule will be regarded as preempted."[52]

As might be expected, the courts do not uniformly agree with the DOT's broad guidance statements. While some courts believe that the absence of the creation of a cause of action indicates congressional intent to allow enforcement solely through the DOT, other courts analyze the ability of the state law claim to co-exist with the ACAA and its regulations.

A. The ACAA Does Not Create an Independent Private Right of Action

The ACAA does not, in its express terms, create a private cause of action for individuals to pursue. "There is no provision in the statute that provides for a violation to be enforced through an action in federal district court."[53] Because there is no express private right of action

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50 *Elassaad v Independence Air, Inc*., 613 F.3d 119, 126 (3rd Cir. 2010)(*quoting Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992)).

51 *Nondiscrimination on the Basis of Handicap in Air Travel*, 55 Fed.Reg. 8008, 8014 (Mar. 6, 1990); *Compass Airlines, LLC*., 2013 WL 4401045 *18.

52 *Nondiscrimination on the Basis of Handicap in Air Travel*, 55 Fed.Reg. 8008, 8014 (Mar. 6, 1990); *Compass Airlines, LLC*, 2013 WL 4401045 *18.

53 *Segalman v. Southwest Airlines*, 913 F.Supp.2d 941, 948 (E.D. Ca. 2012).

under the ACAA, a Court must find an implied private right of action in order to retain jurisdiction over a case,[54] or determine that any portion of the claim asserted by the plaintiff has been completed preempted by federal regulations.[55]

In 2001, the U.S. Supreme Court's decision in *Alexander v Sandoval* "strictly curtailed the authority of courts to recognize implied rights of action, requiring that a review of the text and structure of a statute evidence a clear manifestation of congressional intent to create a private cause of action before a court can find such a right to be implied."[56] Following the Supreme Court's decision and subsequent analysis of the administrative enforcement scheme established in the DOT, courts have generally concluded that the ACAA does not create an implied private

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54 *Lopez v. Jet Blue Airways,* 662 F.3d 593, 596 (2nd Cir. 2011); *Segalman,* 913 F.Supp.2d at 948.

55 *Brown v Alaska Air Group, Inc.,* 2011 WL 2746251 (E.D. Wa. July 14, 2011)("An exception to the well pleaded complaint rule is the field preemption doctrine. Under the doctrine 'Congress may so completely preempt a particular area that any civil complaint raising this select group of claims is necessarily federal in character.'" *Id.* at *2 (*quoting Metropolitan Life Ins. Co. v Taylor,* 481 U.S. 58, 63 (1987))).

56 *O'Brien,* 2012 WL 4762465 at *1 (Explaining *Alexander v Sandoval*, 532 U.S. 275 (2001)). *See also Lopez v Jet Blue Airways*, 662 F.3d 593, 596-598 (2nd Cir. 2011)("…the judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy."). In *Deterra v. America West Airlines, Inc.*, this concept was explained:

> As this court sees it, particularly in view of the holding in *Alexander v. Sandoval*, 532 U.S. 275, 121 S.Ct. 1511, 149 L.Ed.2d 517 (2001), it is not enough to ask whether DOT, in promulgating [regulations], intended to confer a substantive right in favor of the plaintiff. To the contrary, the second, and far more important, question is whether Congress intended, by the language of the enabling statute, that a handicapped person such as plaintiff (and those similarly situated) could resort to the federal courts for compensatory damages for the violation of that alleged right. This second question looms, since, although Congress may grant an agency of the executive branch authority to promulgate the minutia and interstices of what may, and may not, be done under a broadly worded statute, consistent with Congressional intent, and, to that extent, "create" substantive rights, only Congress, and Congress alone, because of Article III constraints, can confer jurisdiction in the federal courts." *Deterra v. America West Airlines, Inc.,* 226 F.Supp.2d at 309.

right of action to sue in Federal Court.[57] "[A]fter *Sandoval*, absent a showing of congressional intent, 'a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute.'"[58]

> Reviewing the ACAA, courts find that Congress provided the Department of Transportation ("DOT") with the power to issue regulations to insure the nondiscriminatory treatment of disabled passengers.[59] The statute establishes an administrative enforcement scheme requiring an individual to file a complaint with the DOT, and provides the United States Courts of Appeals with judicial review of the DOT decision.[60] "Like the administrative-enforcement scheme, this limited right of review of an administrative decision suggests that Congress did not intend to otherwise allow access to federal courts under the statute."[61]

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57 *Gilstrap*, 709 F.3d at 1002; *Lopez v Jet Blue Airways*, 662 F.3d 593, 596-97 (2nd Cir. 2011); *Boswell v Skywest Airlines, Inc.,* 361 F.3d 1263, 1269-71 (10th Cir. 2004); *Love v Delta Air Lines*, 310 F.3d 1347, 1354-59 (11th Cir. 2002); *Segalman*, 913 F.Supp.2d at 948; *Njoku v Northwest Airlines, Inc*., 806 F.Supp.2d 1022, 1027 (E.D. Mich. 2011)("Without the existence of a private right of action, Northwest cannot be held liable for negligence." *Id.* at 1027). *See also O'Brien*, 2012 WL 4762465 at *2; *Kerner v. Mendez*, 2009 WL 1226998 *3 (N.D. Ca. May 1, 2009) *affirmed by* 403 Fed.Appx 225 (9th Cir. 2010); *Jackson v. United Airlines, Inc.,* 2009 WL 1036068 *9-*10 (E.D. Va. April 17, 2009); *Shqeirat v. U.S. Airways Group, Inc.,* 515 F.Supp.2d 984, 1001-1002 (D. Minn. 2007); Ruta v. Delta Airlines, Inc., 322 F.Supp.2d 391, 402-403 (S.D. NY. 2004).

58 *Segalman,* 913 F.Supp.2d at 948 (*quoting Sandoval*, 532 U.S. at 286-87). *See also Lopez*, 662 F.3d at 596

59 *O'Brien,* 2012 WL 4762465 at *2.

60 *O'Brien,* 2012 WL 4762465 at *2.

61 *Lopez*, 662 F.3d at 597-98.

The effect of the *Sandoval* opinion was to cast into doubt pre-existing decisions in the 5th and 8th Circuits that had used an obsolete analytical test to conclude that an implied right of action might exist in the ACAA.[62]

The Second Circuit Court of Appeals summed up the new analysis post *Alexander:* "In sum, although the ACAA is intended to protect the passengers of air carriers against discrimination on the basis of disability, the text and structure of the statute show that Congress chose to accomplish this goal through means other than private enforcement actions in the district courts."[63] The Tenth Circuit has added, "the choice as to which remedies are appropriate is for Congress rather than the courts. We are simply not authorized to compare the remedies specifically provided by Congress with a private right of action and then to impose the latter remedy if we deem it a better means of enforcing the statute."[64] "There is no private right of action under the ACAA, rather plaintiffs can file complaints with the Department of Transportation which may be appealed directly to the Federal Court of Appeals."[65]

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62 *Love v. Delta Air Lines*, 310 F.3d 1347, 1349 (11th Cir. 2002)(disagreeing with and declining to follow *Shinault v. Am. Airlines*, 936 F.2d 796 (5th Cir. 1991) and *Tallarico v. Trans World Airlines, Inc.*, 881 F.2d 566 (8th Cir. 1989)); *Boswell v. Skywest Airlines, Inc.*, 361 F.3d 1263, 1269 (10th Cir. 2004)(agreeing with the 11th Circuit's reasoning and refusal to follow the *Shinault* and *Tallarico* decisions). *See also Lopez,* 662 F.3d at 597 (agreeing with the 11th and 10th circuit court's refusals to follow the earlier 5th and 8th circuit opinions.).

63 *Lopez*, 662 F.3d at 598 (affirming the district court's dismissal of the plaintiff's disability claims for failure to provide proper wheelchair assistance); *Boswell*, 361 F.3d at 1269 (the provision of administrative remedies suggests Congress intended to preclude others). *See also Hill v United Air Lines, Inc.,* 2011 WL 1113499 *2 (D. SC. March 24, 2011)("If Congress intended for the ACAA to also provide a private right of action, including the right to sue in federal district courts, it had many ways to provide such protection, but forwent these options."); *Seymour v. Continental Airlines, Inc.,* 2010 WL 3894023 *2 (D. RI. Oct. 4, 2010).

64 *Boswell*, 361 F.3d at 1270.

65 *Brown v Alaska Airlines, Inc.,* 2011 WL 2746251 *2 (E.D. Wa. July 14, 2011); *Russell v Skywest Airlines*, 2010 WL 2867123 *5 (N.D. Ca. July 20, 2010)("While the Court is sympathetic to the fact that there is no private right of action under the ACAA, it must find that Plaintiff belongs to the class of persons covered by the implementing regulations. Accordingly, the Court finds that Plaintiff's state law negligence claims are preempted. To pursue her claim, Plaintiff must file a complaint with the Secretary of Transportation. 49 U.S.C. § 46101(a). Only when she has exhausted her administrative remedies may she file a civil action. 49 U.S.C. § 46101(a)); *Johnson v. Northwest Airlines, Inc*., 2010 WL 5564629 *5 (N.D. Ca. May 5, 2010).

B. Conflict Preemption Doctrine

While courts will not let a plaintiff state a stand alone cause of action for breach of the ACAA, some courts have been willing to analyze whether a passenger may utilize some other body of law – whether common law or state statutory law – to seek remedies for conduct that otherwise violates the ACAA. First, the courts must determine if the two bodies of law conflict.

The lack of a express private right of action under the ACAA has led to a split of authority concerning whether the DOT enforcement scheme conflicts with, and thereby preempts, state law claims seeking to penalize an airline for breach of the anti-discriminatory regulations.[66] "Conflict preemption occurs when state law, 'actually conflicts with federal law,' such that 'it is impossible for a private party to comply with both state and federal requirements, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'"[67]

1. No Conflict: The ACAA Provides A Non-Exclusive Remedy

Departing from the view that only the DOT possesses enforcement authority, some courts have concluded that the ACAA's federal regulatory scheme does not conflict with, or prevent state law causes of action pursued by individual passenger claimants. For instance, the District Court in *Hodges v Delta Airlines, Inc.* rejected the argument that a plaintiff must exhaust the administrative remedies under the ACAA before seeking judicial review in the courts.[68] Finding

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66 See, e.g., *Gill v JetBlue Airways Corp.,* 836 F.Supp.2d 33, 47-48 (D. Mass. 2011)("The statute does not expressly provide a right to sue the air carrier, and that right should not be implied, where the statute provides and administrative enforcement scheme and state-law remedies are available to compensate victims of any noncompliance.").

67 *Elassaad,* 613 F.3d at 126 (*quoting English v. Gen. Elec. Co.,* 496 U.S. 72, 79 (1990)).

68 *Hodges v. Delta Airlines, Inc.,* 2010 WL 5463832 *4 (W.D. Wa. Dec. 29, 2010).

the Third Circuit Court of Appeals decision in *Elassaad* instructive for the fact that the ACAA does not prohibit state law claims through conflict or field preemption, the court held "Here, the ACAA does not independently preempt plaintiff's negligence claim, and she is not obliged to seek administrative remedies before she can have her day in court."[69]

Analyzing the ACAA and the underlying dismissal in *Gilstrap*, the Ninth Circuit Court of Appeals placed emphasis on the fact that the ACAA's remedies are non-exclusive.[70] In this manner, the Ninth Circuit determined that a state law claim seeking compensation for an injured passenger would not conflict with the DOT's enforcement of the ACAA and its implementing regulations.

For this analysis, the Ninth Circuit looked beyond the ACAA statute, and relied upon the Federal Aviation Act's non-exclusive remedy provision and requirement that airlines maintain liability insurance.[71] Relying on its prior decisions interpreting the FAA, the court determined that the ACAA inherently contemplated tort suits brought under state law, otherwise there would be no basis for the FAA requirement that airlines carry liability insurance.[72]

Additionally, the Ninth Circuit adopted the Third Circuit's formulation in *Abdullah* wherein the court determined that the FAA's field preemptive effect might preempt the state

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69 *Hodges*, 2010 WL 5463832 *4.

70 49 U.S.C. 401020(c) "…a remedy under this part is in addition to any other remedies provided by law."

71 *Gilstrap*, 709 F.3d at 1002, interpreting the FAA at 49 U.S.C. §40120(c) & §41112. "These remedies are not exclusive, however: The FAA provision cautions that '[a] remedy under this part is in addition to any other remedies provided by law,' *id*. § 40120(c), and requires DOT-certified air carriers to maintain liability insurance sufficient to pay for bodily injury, death, loss of property, or damage to property 'resulting from the operation or maintenance of the aircraft,' *id.* § 41112." *Id.* at 1002.

72 *Gilstrap*, 709 F.3d at 1004, *citing and relying upon Martin e. rel. Heckman v. Midwest Express Holdings, Inc.*, 555 F.3d 806, 808 (9th Cir. 2009).

standard of care but would not necessarily preempt state law remedies for breaches of the applicable (federal) standard of care.[73] The *Gilstrap* opinion explained "…the FAA sections expressly preserving state remedies and requiring insurance coverage support the conclusion that state law damages actions remain available even when state substantive standards are displaced."[74]

> The FAA's savings clause and its liability insurance requirement, both of which cover the ACAA, suggest that Congress did not intend any of the FAA administrative enforcement schemes to be exclusive of state-law *remedies.* While a savings clause is not a *per-se* bar to conflict preemption, the FAA's longstanding savings clause and its liability insurance requirement for air carriers, taken together, express a congressional intent not to preempt state tort remedies in fields of aviation operation covered by the statutory scheme.[75]

Similarly, with respect to conflict preemption, the Third Circuit concluded, "we are not persuaded that compliance with duties imposed by state law would require air carriers to act in a manner that would undermine the dignity of disabled passengers. Thus, there is no basis for us to find that it would have been 'impossible' for [the airline] to comply with both state law and

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[73] *Gilstrap*, 709 F.3d at 1006 adopting the analysis in *Abdullah v American Airlines, Inc.,* 181 F.3d 363 (3rd Cir. 1999).

[74] *Gilstrap*, 709 F.3d at 1006.

[75] *Gilstrap*, 709 F.3d at 1010 (italics in original; internal citation to *Geier v. Am. Honda Motor Co*., 529 U.S. 861 (2000) omitted).

the ACAA, or that state law would have been an 'obstacle to the accomplishment and execution of the full purposes and objectives of Congress.[76]"

Thus, both the Ninth Circuit Court of Appeals and the Third Circuit Court of Appeals find no conflict between the federal enforcement scheme set forth in the ACAA and a state law claim seeking a judicial remedy for conduct that violates the ACAA.

2. Preemption: The DOT Enforcement Scheme Conflicts with State Law Claims

But, not all courts agree. Analyzing the issue of conflict preemption, the District Court of Montana noted that the ultimate ability to comply with multiple regulatory schemes is not the test:

> Actual conflict preemption may arise 'when two separate remedies are brought to bear on the same activity.' *Crosby v Nat'l Foreign Trade Council*, 530 U.S. 363, 380, 120 S.Ct. 2288, 147 L.Ed.2d 352 (2000). Even if the regulated entity can comply with both state and federal sanctions, the mere fact of the inconsistent sanctions can undermine the federal choice of the degree of pressure to be employed, 'undermin[ing] the congressional calibration force.' *Id.* at 379-80. When a state law diminishes the value of the bargaining chip being offered federally (such as the value of the regulator's approval of the air carrier's operating certificate) by the very existence of a competing state sanction (such as substantial punitive damage judgments), the state law then 'stands as an obstacle

[76] *Elassaad*, 613 F.3d at 133.

> to the accomplishment and execution of the full purposes and objectives of Congress.' *Id.* at 377.[77]

Reviewing the ACAA enforcement scheme, the District Court of Montana took note of the fact that (1) the ACAA mandates that the DOT investigate every complaint presented to it or to an air carrier; (2) Air Carriers are required to investigate, respond to, and report all complaints to the DOT; (3) the DOT must make complaint statistics public and report annually to Congress on its review of ACAA complaints; (4) Civil penalties exist for each individual act of discrimination; (5) the DOT possesses the authority to pursue equitable remedies such as injunctive or declaratory relief; (6) the civil penalty requires notice and an opportunity for a hearing; and (7) civil penalties are subject to judicial review.[78] The Court concluded, "state law claims could present a substantial impediment to this federal enforcement scheme."[79]

> The air carrier is now answerable to the DOT for ACAA regulation violations, and it appears that Congress intended that this be the exclusive remedy in cases not involving breach of contract or bodily injury or death. To permit a state remedy under the facts and circumstances of this case would diminish the value of the federal bargaining chips and also block the achievement of the industry-wide objective of non-discrimination in air travel that Congress set for itself in enacting the ACAA.[80]

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77 *Compass Airlines*, 2013 WL 4401045 *13.

78 *Compass Airlines*, 2013 WL 4401045 *14.

79 *Compass Airlines,* 2013 WL 4401045 *14.

80 *Compass Airlines,* 2013 WL 4401045 *14.

Indeed in the case before it, the Montana court noted that airlines would be loathe to voluntarily investigate, disclose and remedy claims when it would be "whipsawed with its admissions made to the DOT" by a claimant intending "to use those admissions to obtain the state law remedy."[81]

C. Field Preemption Doctrine

If the courts find no conflict exists between the DOT's enforcement scheme and a lawsuit seeking civil remedies for the same air carrier conduct, then the courts must evaluate whether federal regulatory activity has precluded all state regulation. Known as "field preemption," this analysis of the preemptive force of the ACAA focuses upon the specific regulations governing the conduct of the carrier or its service provider that led to the complaint.

"Field preemption arises where the scheme of federal regulation is 'so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.'"[82] Those courts who have engaged in a field preemption analysis generally dismiss claims where the DOT has issued specific regulations addressing the very conduct at issue, but allow state law claims to survive when the regulations only tangentially address the cause of the underlying claim and/or injury.

1. One View: No Preemption Because the ACAA Ensures Non-Discrimination Only

Focusing on the history of the interpretation of the Federal Aviation Act, several court opinions evaluating the application of field preemption hinge upon the determination of (1) whether the ACAA itself serves a safety function that is traditionally exclusively reserved for the

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81 *Compass Airlines*, 2013 WL 4401045 *14-15.

82 *National Federation of the Blind*, 2011 WL 1544524 *3 (E.D. Ca. April 25, 2011)(*quoting Medtronic, Inc. v Lohr*, 518 U.S. 470, 508 (1996)). *See also, Elassaad*, 613 F.3d at 126 (*quoting Holk v. Snapple Beverage Corp.,* 575 F.3d 329, 336 (3rd Cir. 2009)).

FAA and DOT, or alternatively (2) whether the ACAA only provides the assurance of non-discrimination in the regular conduct of the airlines.

The Ninth Circuit Court of Appeals believes the ACAA prevents discriminatory conduct, but does not serve any safety function with respect to the operation of the airlines:

> The FAA governs not only aviation safety, but also aviation commerce. The breadth of the FAA is relevant in this case, because the ACAA – which is codified under the 'economic regulation,' not the 'safety,' subpart of the FAA; see 49 U.S.C. subt. VII, pt. A, subt. II – is an antidiscrimination imperative, not a safety regulation.[83]

Thus the Ninth Circuit Court of Appeals felt that the ACAA and the DOT regulations enforcing the statute possessed no field preemption capability.

Reaching the same conclusion, but through slightly different reasoning, the Third Circuit noted that the regulations enacting the ACAA did not displace the Federal Aviation Act's safety regulations.[84] Analyzing the airline's arguments that the ACAA completely preempted the field concerning an air carrier's interaction with disabled persons, the Third Circuit declined to assign such preemptive force to the ACAA. In *Elassaad,* the court explained, "the ACAA is clearly directed at nondiscrimination, and we are not persuaded that Congress intended the ACAA to

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83 *Gilstrap*, 709 F.3d at 1005.

84 *Elassaad,* 613 F.3d at 131 (relying on 14 C.F.R. § 382.3(d) "Nothing in this part shall authorize or require a carrier to fail to comply with any applicable FAA safety regulation.")

preempt *any* state regulation of the interaction between an air carrier and disabled passengers (or disabled persons in general)."[85] Thus the court could not conclude that field preemption applied.

In *Adler v WestJet Airlines, Ltd.,* the plaintiffs brought a negligence cause of action after being ejected from an aircraft due to the presence of their service animal (a Yorkshire terrier). The Court differentiated the prevention of discrimination at the heart of the ACAA, from the state law remedies for injuries sought by the plaintiffs. "[T]he ACAA, which prohibits disability discrimination, does not categorically result in express, conflict, or field preemption with regard to state common-law remedies for injuries, distinct from discrimination, which a plaintiff suffered as a result of an air carrier's failure to provide appropriate accommodations."[86]

2. Contra-View: Any Regulation Impacting Safety Is Preempted

Some courts place importance on the fact that the ACAA exists within the FAA, and thereby possesses the same ability as the FAA to preempt claims in the field of aviation safety.[87] These courts generally find that the ACAA will preempt claims in areas where the DOT has issued pervasive regulations and thereby precluded the ability of a separate claim to arise under a state statute or state common law cause of action.[88] Under this view, the ACAA necessarily

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85 *Elassaad*, 613 F.3d at 132.

86 *Adler v WestJet Airlines, Ltd.*, 31F.Supp.3d 1381, 1385-86 (S.D. Fla. 2014)..

87 *See, e.g., Gill v Jetblue Airways Corp.,* 836 F.Supp.2d at 47.

88 *See, e.g., Brown v Alaska Air Group*, 2011 WL 2746251 (E.D. Wa. July 14, 2011); *National Federation of the Blind*, 2011 WL 1544524 *4 (But noting "Absent 'pervasive' federal regulation, however, state laws apply.").

serves more than a mere anti-discriminatory purpose, rather the regulations promulgated by the statue address safety concerns as well as ensuring disabled passengers receive equal treatment.[89]

Taking issue with the Ninth and Third Circuit's assessment that the Air Carrier Access Act only protects against discrimination, the District Court of Montana in *Compass Airlines LLC v. Montana Dept. of Labor & Industry* evaluated the various safety related functions that the act's provisions serve.[90] The court determined that the safety-related nature of the regulations warranted preemption of state law claims to define, interpret, and enforce them:

> The ACAA and its implementing regulations at issue in this case are not fairly categorized as being solely non-discrimination regulations, because it is reasonably clear that they can be categorized also as safety regulations, in that they are intended to protect not just the rights, but also the safety of both disabled and non-disabled passengers. Because the state law claim in this case implicates an area pervasively regulated by the DOT (i.e., the medical certificate boarding requirement for a disabled passenger using a medical assistive device, and the provision of information relating thereto), the implied preemption in the area of

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[89] *Johnson*, 2010 WL 5564629 *6: "The regulations promulgated under the ACAA, which implicate both safety and non-discrimination mandates, establish with specificity an air carrier's obligations to provide disabled passengers with assistance "as needed" in deplaning and to ensure disabled passengers are provided with "transportation between gates to make a connection" as requested."

[90] *Compass Airlines*, 2013 WL 4401045 at *7 - *9.

> air transportation safety is appropriately applied here and precludes state law claims for violation of these particular ACAA regulations. [91]

Determining that the ACAA impacts safety, the court applied the FAA's preemptive force to the ACAA:

> Therefore it seems to the Court that, given that the ACCA is an amendment to the Federal Aviation Act of 1958 ("FAA"), and given that the Part 382 regulations at issue in this case are clearly safety-oriented, these regulations should and do preempt state laws for aviation safety regulations.[92]

Utilizing the field preemption analysis, the Court found no room for the state law claim to exist in light of the DOT's enforcement action taken against the airline. While the Courts in *Gilstrap* and *Abdullah* found that the federal regulations merely defined the duty involved, the breach of which allowed recovery of damages, the District Court of Montana believed that the state law claims and federal regulations were so intertwined that a trial would essentially re-try the violations that the DOT determined to exist in its investigation. As such, the Court felt this required preemption of the state law claim for infliction of emotional distress.[93]

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[91] *Compass Airlines*, 2013 WL 4401045 at *9. The court evaluated regulations pertaining to (a) when a passenger must present a medical certificate in order to travel; (b) training of personnel in the proper and safe operation of equipment used to accommodate passengers with a disability; (c) use of portable electronic medical devices; and (d) information concerning the configuration of and physical accommodations possessed by a particular aircraft.

[92] *Compass Airlines*, 2013 WL 4401045 @*9.

[93] *Compass Airlines*, 2013 WL 4401045 at *11. "To sum up, in at least one crucial respect, the instant case is distinguishable from either *Abdullah*, *Elassaad*, or *Gilstrap*; in this case there is no claim of bodily injury and therefore the Insurance Clause does not justify making that exception to complete field preemption."

Other courts have reached the same conclusion. In *Edick v. Allegiant Air*, the court held, "An air carrier's obligations to provide wheelchair assistance are regulated under the ACAA, and an expansion of these obligations would undermine the 'single, uniform system of aviation safety'"[94] established by the "purpose, history and language of the FAA".[95]

The Court in *Foley v. JetBlue Airways Corp.* similarly found that the ACAA regulations for website and ticketing kiosk accessibility were field preempted by the regulations enacted by the DOT.[96]

> "The Court finds that website and kiosk accessibility is pervasively regulated so as to justify the inference that Congress intended to exclude state law discrimination claims relating to these amenities. Access to airline websites and kiosks is a narrow field, and the DOT has issued regulations specifically addressing this field."[97]

Finally, the court in *Brown v Alaska Air Group, Inc*. determined that a plaintiff's claim for unfair practices under Washington's state anti-discrimination statute was "preempted by the ACAA through field preemption."[98] "Looking at the pervasiveness of federal regulations in the

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94 *Edick v Allegiant Air, LLC*., 2012 WL 1463580 *3 (D. Nevada April 27, 2012) (*quoting Montalvo v. Spirit Airlines*, 508 F.3d 464, 471 (9th Cir. 2007)..

95 *Edick*, 2012 WL 1463580 *2 (*quoting Montalvo*, 508 F.3d 464, 471 (9th Cir. 2007)).

96 *Foley v. JetBlue Airways Corp.,* 2011 WL 3359730 *13 (N.D. Ca. Aug. 3, 2011). *See also National Federation of the Blind,* 2011 WL 1544524 *4 (reaching the same conclusion).

97 *Foley*, 2011 WL 3359730 *13.

98 *Brown*, 2011 WL 2746251 *5.

specific area covered by the claim … this Court finds pervasive regulations on the subject of failure to provide transport services between planes."[99]

3. Hybrid View: Analysis of the Intersection of the Regulations and the Claim

Many courts have been loath to make an absolute determination at either end of the spectrum: complete field preemption or no field preemption at all. Rather, several courts have looked at the specific regulations impacted in the case, the activity giving rise to the claim, and the causes of action pleaded by the plaintiff. Where the Court finds that the DOT has issued "pervasive regulations" dictating the specific conduct of the carrier, the Court generally finds field preemption precludes the assertion of the Plaintiff's state law claim. But where the Court finds that the regulations are silent or provide no direct guidance as to the conduct at issue in Plaintiff's claim, then the Courts tend to allow the claim.[100] As to this point, the reasoning in *Summers* is instructive:

> Thus, Plaintiff appears to allege that the gap or step presented a danger independent of any need for assistance or accommodation specific to Plaintiff or her physical disabilities. The Ninth Circuit has already held that the FAA does not preempt personal injury claims based on the defective or dangerous condition of aircraft stairs. *See Martin*, 555 F.3d at 812.[101] Thus, a non-disabled passenger would face no obstacles to bringing a suit for injuries caused by a dangerously large gap between the plane and the stair platform. The Court agrees with

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[99] *Brown*, 2011 WL 2746251 *5.

[100] *See, e.g., Hodges v Delta Air Lines, Inc.,* 2010 WL 5463832 *3 (W.D. Wa. Dec. 29, 2010)("In areas without pervasive regulations or other grounds for preemption, the state standard of care remains applicable.").

[101] *Martin ex rel. Heckman v. Midwest Exp. Holdings, Inc.*, 555 F.3d 806 (9th Cir. 2009).

> Plaintiff that unless the ACAA specifically regulates such hazards, it would be inequitable and legally insupportable to bar Plaintiff from bringing such a claim simply because she is disabled.[102]

Finding that the ACAA's instruction to provide assistance disembarking from an aircraft was silent as to the carrier's duty to ensure that an exit path is well maintained and free from hazards, the Court found no preemption of the plaintiff's claims that the carrier negligently failed to cure a dangerous condition (large step or gap from the aircraft to stairs rolled up to the aircraft) and failed to warn of the condition.[103]

In 2012, prior to the 9th Circuit's decision in *Gilstrap*, the District Court of Massachusetts decided *Gill v. JetBlue Airways Corp*. and established a distinction between the utter failure to provide the assistance required by the ACAA, and the negligent provision of that assistance.[104] In *Gill*, the plaintiff brought a claim arising from injuries sustained when he fell out of an aisle-boarding chair while being assisted by airline personnel. The court noted that several district court decisions had found state law tort claims preempted by the ACAA where the plaintiff alleged "failure to provide access or disability assistance requested by customers."[105] But evaluating the plaintiff's claim for the "negligent provision of boarding assistance" in the case before it, the court determined that the "ACAA regulations establish no specific requirements as to the manner in which such services must be provided" and thus provided "no

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102 *Summers v. Delta Airlines Inc.,* 805 F.Supp.2d 874, 885 (N.D. Ca. 2011).

103 *Summers*, 805 F.Supp.2d at 885.

104 *Gill v JetBlue Airways Corp*., 836 F.Supp.2d 33, 45-46 (D. Mass. 2011). *See discussion in Summers*, 805 F.Supp.2d at 882.

105 *Gill*, 836 F.Supp.2d at 44.

alternative standard of care to that contained in the state tort law."[106] On this basis, the court determined that the ACAA would not preempt the negligent provision of assistance claim.

Other courts have reached a similar conclusion, separating the duty to provide assistance from the duty to provide such assistance safely. In *Brown v Alaska Air Group, Inc.*, the Court evaluated whether FAA field preemption would apply to any of plaintiff's claims.[107] Evaluating the trends in the case law, the Court noted (at that time) an "emerging consensus" that the ACAA preempted state-law claims based upon a failure to provide assistance to a disabled passenger, and an "emerging consensus" "that claims based upon the negligent provision of assistance are not preempted under the ACAA."[108]

> The ACAA regulations say nothing about how to move a disabled passenger from a plane seat to a wheelchair, how many people must assist the passenger, whether the passenger must be buckled in to the wheelchair, and the like. See 14 C.F.R. § § 382.1 et. seq. Because the regulations leave such issues open, federal law cannot possibly preempt all state tort claims in this area.[109]

4. <u>*Preemption of Only the State Law Standard of Care?*</u>

Foreshadowing the Ninth Circuit's later ruling and reasoning in *Gilstrap*, the District Court in *Summers v Delta Airlines* applied field preemption to claims arising from the failure to provide wheelchair assistance but let the Plaintiff continue to pursue her negligence and

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106 *Gill*, 836 F.Supp.2d at 45.

107 *Brown v Alaska Air Group, Inc*., 2011 WL 2746251 (E.D. Wa. July 14, 2011).

108 *Brown*, 2011 WL 2746251 *4.

109 *Hodges,* 2010 WL 5463832 *4.

negligent infliction of emotional distress claims with the caveat that the plaintiff must apply the federal standard of care prescribed by the ACAA to the claim.[110] The court found that the DOT had issued "comprehensive regulations regarding carriers' obligations to provide boarding and deplaning assistance" and had imposed "specific requirements regarding the training carriers must provide for personnel involved in providing boarding and deplaning assistance."[111] Thus for causes of action "premised on a breach of the duty to provide deplaning assistance or to properly train employees regarding deplaning procedures for disabled passengers" the Court held the claims subject to field preemption by the ACAA.[112] But, that did not end the analysis because the Court determined that the *Montalvo v. Spirit Airlines*[113] decision limited the scope of preemption to the state law standard of care.[114] "As to Plaintiff's common law negligence and negligent infliction of emotional distress claims, however, it would seem that Plaintiff may maintain these claims as long as they are premised on breach of a federal standard of care as set forth in the ACAA and its implementing regulations."[115]

Later, in *Gilstrap v United*, the Ninth Circuit Court of Appeals confirmed the approach utilized by the District Court in *Summers*. In *Gilstrap*, a plaintiff who possessed difficulty walking due to preexisting back and knee problems brought suit alleging that United failed to

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110 *Summers v. Delta Airlines, Inc.,* 805 F.Supp.2d 874, 883-885 (N.D. Ca. 2011).

111 *Summers v. Delta Airlines, Inc.*, 805 F.Supp.2d 874, 883 (N.D. Ca. 2011).

112 *Summers*, 805 F.Supp.2d at 883.

113 508 F.3d 464 (9th Cir. 2007).

114 *Summers*, 805 F.Supp.2d at 883-884.

115 *Summers*, 805 F.Supp.2d at 884.

provide the proper wheelchair assistance on two separate flights.[116] The plaintiff did not allege a specific cause of action under the ACAA, but instead relied on California's state tort law causes of action for negligence, negligent misrepresentation, negligent and intentional infliction of emotional distress, and breach of the duty of a common carrier.[117] The trial court granted United's motion to dismiss, finding the state tort claims were both conflict- and field-preempted by the ACAA, but the Ninth Circuit Court of Appeals reversed the dismissal.[118]

On appeal, the Ninth Circuit analyzed Gilstrap's claims for failure to provide wheelchair assistance during her travels, and found that the ACAA pervasively regulated both when (upon request by a passenger to move through the terminal or between gates) and where (between gates and to and from the terminal entrance, including key functional areas of the terminal) assistance must be provided. Thus the Ninth Circuit concluded that "[t]he ACAA and its implementing regulations established the standard of care – or duty – that United owed to Gilstrap regarding that activity, and so preempt any different or higher standard of care that may exist under California tort law."[119] In keeping with its holding that the preemption of the standard of care would not eliminate state law remedies, the Court explained that Gilstrap could still rely on California law to prove "other elements of her claims – breach, causation, damages, and remedies."[120]

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116 *Gilstrap v United Air Lines, Inc*., 709 F.3d 995, 998 (9th Cir. 2013).

117 *Id.*

118 *Gilstrap,* 709 F.3d at 999.

119 *Gilstrap*, 709 F.3d at 1007.

120 *Gilstrap*, 709 F.3d at 1007.

Explaining the effect of its holding, the Ninth Circuit concluded that the ACAA and its regulations preempt state standards of care with respect to the circumstances under which airlines must provide assistance to passengers with disabilities, but would not preempt any state remedies that might be available if an airline violated those standards. "For instance – but only insofar as state law allows it – tort plaintiffs may incorporate the ACAA regulations as describing the duty element of negligence, and rely on state law for 'the other negligence elements (breach, causation, and damages), as well as the choice and availability of remedies."[121]

The court in *Gill v JetBlue Airways Corp*. reached the same outcome. Examining the ACAA's regulatory effect under field preemption analysis applied to the Federal Aviation Act, the Court held that the ACAA would preempt portions of the plaintiff's negligent training claim.[122] "The regulations describe the training required with sufficient detail to supplant the common-law negligence standard in this area."[123] "Thus the ACAA preempts state law that would hold airlines to training obligations different from those explicitly set forth in the ACAA regulations."[124] Nonetheless, the Court left open the ability of the plaintiff to seek damages if they proved that the federal standard of care defined by the ACAA was violated.[125]

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121 *Gilstrap*, 709 F.3d at 1010, *citing Elassaad v. Independence Air, Inc.*, 613 F.3d 119, 125 (3rd Cir. 2010).

122 *Gill*, 836 F.Supp.2d at 46.

123 *Gill*, 836 F.Supp.2d at 46.

124 *Gill,* 836 F.Supp.2d at 47.

125 *Gill,* 836 F.Supp.2d at 47 (*citing Abdullah*, 181 F.3d at 375).

D. Use of the Airline Deregulation Act as an Alternate Preemption Mechanism?

In 1978, the Federal Aviation Act of 1958 was amended by the Airline Deregulation Act's ("ADA") removal of government control over fare, routes, and market entry.[126] The ADA contains an express preemption clause prohibiting a state from "enacting or enforcing any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier …."[127] The courts have broadly interpreted the provision to preempt all state laws having "a connection with or reference to airline rates, routes, or services."[128]

Reviewing the broad preemptive scope of the ADA in connection with the "services" required by the ACAA, the District Court of Montana concluded that preemption would exist. Noting that *Gilstrap's* reasoning characterized the ACAA as merely an economic statute, the *Compass Airlines* decision reasoned, "To the extent that the ACAA regulations ought to be viewed as economic as opposed to safety regulations, the explicit preemption provided by the Airline Deregulation Act of 1978 ("ADA"), codified at 49 U.S.C. § 41713, is implicated."[129] "The Court concludes that allowing state law tort claims and remedies in non-bodily injury cases, and allowing them to vary state by state, would significantly, if indirectly, affect rates, routes, and services. Therefore the ADA's express preemption could be applied to Hankinson's complaints of denial of air transportation service and hostile environment."[130] Reviewing the

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126 49 U.S.C. § 41713; *National Federation of the Blind*, 2011 WL 1544524 *4.

127 49 U.S.C. § 41713(b)(1).

128 *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992).

129 *Compass Airlines,* 2013 WL 4401045 at *12.

130 *Compass Airlines*, 2013 WL 4401045 at *13.

cross summary judgment motions filed by the passenger and the airline, the Montana court held "in light of the fact that [the passenger] describes his hostile environment claim as a denial of service (described as 'the creation of an environment so hostile that the passenger could not have reasonably been expected to board'), the ADA preempts state laws relating to the services of an air carrier."[131]

In *National Federation of the Blind v. United Airlines, Inc.,* the court also applied the ADA after finding that ticketing kiosks "plainly facilitate a number of different services that relate to air transportation …"[132] Rejecting arguments that the FAA savings clause would preserve their claims, that discrimination claims do not impact the deregulation protected by the ADA, and that a general presumption exists in favor of state rights and exercise of power, the court determined the area of discrimination in air transportation is a field long reserved for federal regulation.[133] Holding that the California Unruh Civil Rights Act and Disabled Persons Act both possessed "connection[s] with service, plaintiffs' claims are expressly preempted by the Airline Deregulation Act."[134]

E. Ensuring Uniformity in Treatment on International Flights: Do Treaties Trump the ACAA?

With the extension of the ACAA to foreign air carriers in 2000, the courts were faced with a new jurisdictional difference to accommodate: the intersection of the Warsaw Convention

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131 *Compass Airlines*, 2013 WL 4401045 at *17.

132 *National Federation of the Blind*, 2011 WL 1544524 *5.

133 *National Federation of the Blind,* 2011 WL 1544524 *7.

134 *National Federation of the Blind*, 2011 WL 1544524 *7.

and Montreal Protocol[135] ("Warsaw Convention") and the ACAA. Giving preference to the effort of the signatory countries to create a uniform set of laws governing international air carriage, most courts find that the Warsaw Convention, where it applies, trumps or preempts separate claims under the ACAA.[136] But, not all courts agree.

Most courts give deference to the intention of the Warsaw Convention to achieve uniformity of rules governing claims arising from international air transportation.[137] In doing so, these decisions find the treaty preempts separate discrimination claims that invoke or arise under the ACAA:

> Allowing air carrier exposure to discrimination claims which do not conform to the requirements of the Convention would undercut the signatory nations' desire for uniformity and 'the Convention's comprehensive scheme of liability,' subjecting them to 'unlimited liability under diverse legal regimes.'[138]

In *Waters*, a wheelchair bound passenger with multiple sclerosis who was traveling from New York to Rome brought claims arising from the failure to provide wheelchair assistance,

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[135] CONVENTION FOR THE UNIFICATION OF CERTAIN RULES FOR INTERNATIONAL CARRIAGE BY AIR, MAY 28, 1999, S. Treaty Doc. No. 106-45, 2242 U.N.T.S. 309.

[136] *Turturro v Continental Airlines, Inc.,* 128 F.Supp.2d 170, 180 (S.D.N.Y. 2001)(finding the preemptive effect of the Warsaw Convention / Montreal Protocol on "local law" included the ACAA. "'Local' law certainly includes federal statutes such as plaintiff's discrimination claim under the Air Carrier Access Act.").

[137] *King v. American Airlines, Inc.*, 284 F.3d 352, 361 (2nd Cir. 2002)(Finding separate discrimination claims preempted by the Warsaw Convention: "The aim of the Warsaw Convention is to provide a single rule of carrier liability for all injuries suffered in the course of international carriage of passengers and baggage."); *Waters v Port Authority of New York & New Jersey*, 158 F.Supp.2d 415, 429 (D. NJ. 2001)(Courts finding preemption of federal discrimination claims "focus on the Convention's goal of providing [a] comprehensive scheme of liability to ensure predictability to signatories, and the goal of generally restricting the types of actions for damages which may be brought to ensure uniformity.").

[138] *Brandt v. American Airlines*, 2000 WL 288393 *4 (N.D. Ca. 2000)(*quoting El Al Israel Airlines v. Tsui Yuan Tseng*, 525 U.S. 155, 168, 119 S.Ct. 662, 672 (1999)). *See also Mikerina v Delta Air Lines, Inc*., 834 F.Supp.2d 54 (D. Mass. 2011).

failure to provide an accommodation in the form of a bulkhead seat, and failure to provide boarding and deplaning assistance.[139] "Although his cause of action is grounded in discrimination statutes, the thrust of his claim is one of personal injury. Undoubtedly, this falls within the scope of the Convention and the goal of providing a uniform scheme of liability."[140] Because "the purposes of the Convention would be undercut by allowing plaintiff to pursue a cause of action that falls within the scope of the Convention, the Court finds that plaintiff's ACAA and FAA claims are preempted."[141]

Contrary to all other decisions at that time, the Court in *Adler v WestJet Airlines* allowed separate state law claims to continue.[142] In that case, the plaintiffs alleged that the flight crew "unexpectedly and unreasonably reacted to [the plaintiff's] need to travel with a service animal, ejecting the [plaintiffs] from the airplane and causing them injury."[143] As the flight was bound for Toronto Canada, the Court agreed that these events constituted an 'accident' under the Warsaw Convention.[144] However, rather than finding the separate causes of action pleaded by the plaintiffs to be preempted by the treaty, the Court took the view that Warsaw Convention permits "a plaintiff to proceed on state-law claims alleging personal injury harms within the scope of the Convention, subject to the Convention's limitations on liability."[145] Thus the court

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139 *Waters*, 158 F.Supp.2d at 417-18.

140 *Waters*, 158 F.Supp.2d at 429.

141 *Waters*, 158 F.Supp.2d at 430.

142 *Adler*, 31 F.Supp.3d at 1381.

143 *Adler*, 31 F.Supp.3d at 1389.

144 *Id.*

145 *Id.* at 1390.

permitted the plaintiffs' discrimination claims pleaded under state law causes of action to continue.

In situations involving international flights, the Warsaw convention aims to not only to provide a limitation of monetary exposure, but also a restriction on the type of actions which might be brought in order to ensure uniformity.[146] Hence the decisions reached by the courts in *Brandt*, *Turturro*, *Waters*, *King*, and *Mikerina* to preempt separate state law claims. But, if courts begin following the reasoning in *Adler* for international flights, then it would appear that the preemption debate fostered by the ACAA will be moot. There will be no need to determine the preemptive effect of the ACAA, if the Warsaw Convention is seen to allow separate state law claims for discriminatory conduct subject only to the treaty's limitations on the duty owed and damages.

III. DIFFERENCES IN SERVICE: ACCOMMODATIONS REQUIRED BY THE ACAA

Setting aside jurisdictional differences, the airlines must still determine how to accommodate the differences in capabilities, capacity and requirements presented by passengers with disabilities. The DOT regulations, and the lawsuits interpreting the carrier/passenger interaction, provide guidance.

A. Refusal of Carriage

As noted previously, the ACAA gives deference to the safety regulations enacted by Congress, the FAA, and the DOT for the protection of the airlines and their passengers.[147] Thus

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[146] *Waters*, 158 F.Supp.2d at 429.

[147] *See, e.g.,* 14 C.F.R. § 382.7(g) and 14 C.F.R. § 382.19.

a carrier may refuse to provide transportation to a disabled or handicapped passenger for safety purposes including a disability-related safety reason.[148]

Before refusing to transport a passenger on the basis of a disability, the carrier must determine that the passenger poses a "direct threat" meaning a "significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures, or by the provision of auxiliary aids or services."[149] This assessment must be "individualized" to the particular passenger and based on "reasonable judgment that relies on current medical knowledge or the best available objective evidence…."[150] The decision must consider three factors:

1. The nature, duration, and severity of the risk;

2. The probability that potential harm to the health and safety of others will actually occur; and

3. The ability to mitigate the risk through reasonable modifications of policies, practices, or procedures.[151]

After making this determination, the carrier must select "the least restrictive response from the point of view of the passenger…."[152] If the carrier can protect the health or safety of

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148 14 C.F.R. § 382.19(c).

149 14 C.F.R. § 382.19(c) & 14 C.F.R. § 382.3 defining "*Direct Threat*".

150 14 C.F.R. § 382.19(c)(1).

151 14 C.F.R. § 382.19(c)(1)(i)-(iii).

152 14 C.F.R. § 382.19(c)(2)(underlining added).

others through means that will allow travel, then the carrier "must not refuse transportation to the passenger."[153]

B. Advance Notice Requirements

In general, an airline may not require a person with a disability to provide advance notice of their intention to travel with the carrier on a flight.[154] But, a passenger requiring specific assistance in the airport or onboard a flight would be wise to provide notice by requesting the assistance. A qualified passenger cannot expect a carrier to intuit, guess, or predict that he/she will require any particular type of assistance or equipment.

Notably, an airline does not have to predict the needs of a passenger or offer services that have not been requested.[155] As one court explained, "[U]nder the ACAA, the plaintiff had the right to have a wheelchair and a handicapped accessible shuttle bus available for his use upon his request, but he also had the right not to use the wheelchair or the handicap shuttle bus if he [chose] not to do so. The plaintiff simply has not established that there is anything in the ACAA that provides that air carriers must guess what special services, or the extent of those services, a handicapped passenger requires."[156]

But medical equipment needs may, in some instances, be beyond a carrier's ability to accommodate without notice. Thus, if medical equipment will be needed for the safe carriage of the passenger, then the airline may request some advance notice. For instance, if the passenger

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153 14 C.F.R. § 382.19(c)(2).

154 14 C.F.R. § 382.25.

155 *Adiutori*, 880 F.Supp. at 701-702.

156 *Adiutori*, 880 F.Supp. at 703.

expects to use carrier supplied in-flight medical oxygen, or if the passenger expects to use his or her ventilator, respirator, CPAP machine, or portable oxygen concentrator during the flight, the airline may request up to forty-eight hours advance notice and check-in one hour before the check-in time for the general public.[157]

Additionally, a carrier may require up to forty-eight hours advance notice and advanced check-in for:

1. Carriage of an incubator (if possible on the flight);

2. Hook up for a respirator, ventilator, CPAP machine or positive oxygen concentrator (if available on the flight);

3. Carriage of a passenger in a stretcher (if possible on the flight);

4. Transportation of an electric wheelchair (on flights with fewer than 60 seats);

5. Provision of hazardous materials packaging for assistive devices with batteries required to possess such packaging;

6. Accommodation of groups of 10 or more qualified individuals with a disability who book travel as a group;

[157] 14 C.F.R. §382.27(b). Note that for international flights, a carrier may request up to 72 hours advance notice if the passenger expects to use in-flight carrier-supplied medical oxygen.

7. Provision of an on-board wheelchair (on aircraft with more than 60 seats and that does not have a handicap accessible lavatory);

8. Transportation of an emotional support or psychiatric support animal in the cabin;

9. Transportation of a service animal on flights with a scheduled duration of eight (8) hours or more;

10. Accommodation of a passenger with both severe vision and hearing impairments.[158]

Understanding that the passengers do not always follow these rules, the DOT still requires the carrier to provide the transportation, service, or accommodation if the carrier can do so through reasonable efforts without delaying the flight.[159]

C. Seating Accommodations

While a passenger possessing a qualifying disability cannot be required to pre-board the aircraft,[160] a carrier must offer preboarding to those passengers with a disability "who self-identify at the gate as needing additional time or assistance to board, stow accessibility equipment, or be seated."[161]

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158 14 C.F.R. § 382.27(c).

159 14 C.F.R. § 382.27(g).

160 14 C.F.R. § 382.11(2).

161 14 C.F.R. § 382.93.

Onboard the aircraft, the carrier must make some seating accommodations for persons with disabilities. These accommodations must be made if requested by the passenger and if the particular aircraft possesses the accommodation.[162] However, the carrier "must never deny transportation to any passenger in order to provide accommodations required" by the DOT regulations.[163]

In terms of accommodations, the ACAA specifies that if a passenger possesses mobility impairments and cannot readily transfer over a fixed armrest, the carrier must provide the passenger seating in a row with moveable armrests.[164] Adjoining seats must be provided to (a) passengers who require a personal care attendant to perform services during the flight (medical, eating, or lavatory assistance); (b) visually impaired passengers traveling with a reader/assistant; and (c) hearing impaired passengers traveling with an interpreter.[165] Persons with service animals may request to be seated at a bulkhead where greater room exists, and persons with fused or immobilized legs may request to sit in bulkhead seats or other seats with greater legroom.[166]

If a passenger's size or physical condition (i.e. use of stretcher or incubator) causes him or her to occupy the space or more than one seat, the airline may charge for more than one seat.[167] "Federal regulations regarding seating for passengers with a disability provide that

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162 14 C.F.R. § 382.81 preamble.

163 14 C.F.R. § 382.87(e).

164 14 C.F.R. § 382.81(a).

165 14 C.F.R. § 382.81(b).

166 14 C.F.R. § 382.81(c) & (d).

167 14 C.F.R. § 382.31(b).

airlines 'are not required to furnish more than one seat per ticket or to provide a seat in a class of service other than the one the passenger has purchased in order to provide an accommodation…."[168]

Seating of passengers with disabilities must comply with the FAA and applicable foreign government safety regulations, including regulations pertaining to exit row seating.[169] Thus an immobile passenger may not be seated in an exit row even though the exit row may provide the best space for the accommodation of the passenger's condition.

D. Assistance During Flight

On the aircraft, flight personnel must provide the following assistance to passengers with a disability:

1. Assistance moving to and from seats as part of the boarding or deplaning process;

2. Assistance in the preparation to eat, such as opening packages and identifying food;

3. Assistance with the use of an onboard wheelchair (if present) to move to and from the lavatories;

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[168] *Dogbe v Delta Air Lines, Inc.,* 969 F.Supp.2d 261, 278 n.5 (E.D. New York 2013)(Passenger ejected from a flight after complaining that a flight attendant would not move him into a different class of seats with more leg room). 14 C.F.R. § 382.87(f).

[169] 14 C.F.R. § 382.87(b).

4. Assistance with a semi-ambulatory person moving to and from the lavatories, but not involving lifting or carrying the passenger;

5. Assistance stowing and retrieving carry-on items or mobility aids; and

6. Effective communication of information with passengers who possess visual or auditory impairments.[170]

Neither the ACAA nor the DOT require the flight crew to provide "extensive assistance" such as (a) assistance in actual eating, (b) assistance in the restroom, or assistance at the seat with elimination functions, or (c) provision of medical services.[171]

E. Passenger Use of Personal Medical Equipment

A passenger with a disability must be allowed to bring "the following kinds of items" provided they can be properly and safely stowed in compliance with FAA, PHMSA, TSA, and/or foreign government requirements:

1. Manual wheelchairs including folding or collapsible models;

2. Canes, crutches, walkers, and other mobility aids;

3. Assistive medical devices such as medical prescriptions, vision enhancing devices, FAA-approved portable oxygen concentrators, ventilators, and respirators.[172]

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[170] 14 C.F.R. § 382.111.

[171] 14 C.F.R. § 382.113.

[172] 14 C.F.R. § 382.121.

IV. DIFFERENCES IN ASSISTANCE: PASSENGERS WITH SPECIFIC NEEDS

Air carriers know that passengers of all ages, and all abilities, travel on airlines. Passengers who need wheelchair assistance, who possess visual or auditory deficits, who possess communicable diseases or complex medical issues, or who need assistance from service animals present some of the most challenging circumstances for an airline to accommodate on a case-by-case basis.

A. Passengers Requesting Wheelchair Assistance

Far and away, the ACAA's requirement to provide wheelchair service creates the most liability and operational problems for the airlines. First, multiple opportunities exist for missed connections between the requesting passenger and the wheelchair. Between the time tickets are purchased and travel ensues, passengers may change their schedules. Even if their schedules remain the same, the time they arrive prior to their flight can be highly variable. During travel, aircraft can arrive at gates early, or late, or may change arrival gates altogether. Even when the timing is right and the passenger and the wheelchair are brought together, the manner in which the passenger is assisted into, and moved about in, a portable wheel chair or aisle chair presents more opportunities for issues to arise. Thankfully for the airlines, "the ACAA is not a strict liability statute …."[173]

1. Assistance In the Airport

In terms of assistance to persons who may possess difficulty moving throughout the airport, the ACAA requires airlines to either provide assistance or ensure the provision of

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[173] *Glatfelter v. Delta Air Lines, Inc.,* 253 Ga.App. 251, 558 S.E.2d 793, 796 (Ga.App. 2002). *See also Adiutori v. Sky Harbor Intern. Airport*, 880 F.Supp. 696, 701 (D. Arizona 1995).

assistance for the passenger.[174] Specifically, the airlines must ensure that a passenger can move between gates in order to make a connection,[175] move from a terminal entrance through the airport to the departure gate, or from an arrival gate through the airport to the terminal entrance.[176] For assistance between gates for connecting flights, the carrier who delivers the passenger to the airport possesses the duty to ensure that assistance is provided to the passenger so that he/she can make her connection.[177]

The assistance provided must include helping the passenger with his/her gate checked or carry on luggage, if requested, and help with accessing key functional areas of the terminal such as ticketing counters and baggage claim areas.[178]

Unless explicitly waived by the passenger, carrier personnel or agents may not leave a passenger who is not independently mobile unattended for more than thirty-minutes.[179] This obligation exists even if family members or a personal care attendant accompanies the passenger.

2. Assistance Does Not Extend to Associated Areas Beyond the Carrier's Control

The requirement to provide assistance has been limited by some courts to the areas controlled by the airlines: "Pursuant to the ACAA, an air carrier's obligations to provide

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174 14 C.F.R. § 382.91; *See Gilstrap*, 709 F.3d at 1001.

175 The carrier that operated the arriving flight bears the responsibility to ensure that the passenger receives assistance moving through the airport, or between gates, to reach the connecting flight. 14 C.F.R. § 382.91(a).

176 14 C.F.R. § 382.91 (a) & (b); *See Gilstrap*, 709 F.3d at 1001.

177 14 C.F.R. § 382.91 (a).

178 14 C.F.R. § 382.91 (a)-(b) & (d); *See Gilstrap*, 709 F.3d at 1001.

179 14 C.F.R. § 382.103.

wheelchair assistance do not extend beyond the areas of the terminal which it controls."[180] While the regulations address wheelchair assistance from the terminal entrance to the gate, neither the ACAA nor the DOT regulations require this assistance in the parking areas.[181] Finding that the ACAA preempted claims for failure to provide wheelchair assistance when a passenger with a pre-existing brain tumor fell when walking from the parking garage to the terminal, the Court noted: "Plaintiff correctly observes that the federal regulations do not address wheelchair assistance from parking structures to check-in counters, but it does not follow from this observation that the area of wheelchair assistance is not regulated pervasively."[182] "An air carrier's obligations to provide wheelchair assistance are regulated under the ACAA, and an expansion of these obligations would undermine the 'single, uniform system of aviation safety."[183]

3. Assistance Boarding & Deplaning

For aircraft with a capacity of at least nineteen passengers,[184] the carrier must also provide assistance boarding and deplaning if requested by or on behalf of a passenger with a disability.[185] This assistance may include use of ground wheelchairs, accessible motorized carts, boarding wheelchairs, on-board wheelchairs, ramps, and lifts.[186] At U.S. airports with ten thousand or more enplanements per year, the carrier must provide boarding and deplaning

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180 *Edick v. Allegiant Air, LLC*. 2012 WL 1463580 *3 (D. Nev. April 27, 2012).

181 *Edick v. Allegiant Air, LLC*., 2012 WL 1463580 *3 (D. Nev. April 27, 2012).

182 *Edick*, 2012 WL 1463580 *3.

183 *Edick*, 2012 WL 1463580 *3.

184 14 C.F.R. § 382.97.

185 14 C.F.R. § 382.95.

186 14 C.F.R. § 382.95(a).

assistance through ramps and lifts if a level-entry loading bridge is not accessible for entrance to and exit from the aircraft.[187]

4. *Response Time Should be Prompt (Less than 30 minutes?)*

Though the ACAA does not specify any particular response time to a customer's request, the statute does provide that assistance must be "promptly" provided.[188] Evaluating the time to provide wheelchair assistance in *Glass v Northwest Airlines, Inc.*, the Court determined that a "minimal delay" did not constitute a violation of the ACAA.[189] In *Glass*, an eighty-four year old man left the gate area before a wheelchair was provided, attempted to ascend an escalator while using his walker, and fell suffering injuries that allegedly led to his death.[190] Wheelchair assistance was requested at the time the tickets were purchased, and a gate agent called the wheel chair service provider as the plane arrived at the airport gate. Evaluating the evidence before it, the Court rejected the time elapsed between the purchase of the ticket and the aircraft's arrival at the gate as irrelevant, and instead focused on the passenger's wait period in the gate area.[191] The passenger left the gate area approximately twenty-four minutes after the gate agent's call to request the wheelchair as the plane arrived, and no more than ten minutes after disembarking and entering the gate area.[192] On those facts, the Court could not find that the ACAA had been violated.

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187 14 C.F.R. § 382.95(b).

188 14 C.F.R. § 382.95(a).

189 *Glass v. Northwest Airlines, Inc.,* 798 F.Supp.2d 902, 914-915 (W.D. Tenn. 2011).

190 *Glass,* 798 F.Supp.2d at 905.

191 *Glass*, 798 F.Supp.2d at 915. The Court also rejected the time period between when Pinnacle Airlines, Inc. learned it would operate the flight for Northwest and the arrival of the aircraft at the gate as irrelevant. *Id.* at 916.

192 *Glass,* 798 F.Supp.2d at 915.

In *Johnson v. Northwest Airlines*, the Court reached the same result on similar reasoning. In that case, the plaintiff, an elderly woman, fell while getting off of a moving walkway as she walked to a connecting flight. Just prior, at her arrival gate two separate agents had indicated that they would try to locate a wheelchair for the plaintiff, but the plaintiff left the gate area on her own. Evidence indicated that the passenger left the gate area no more than twelve minutes after her flight had arrived at the airport. On these facts, the Court found no breach of duty. "While an extended delay in bringing a wheelchair may amount to a failure to provide assistance, the short delay here – of no more than twelve minutes, if that long and no doubt still less – does not."[193]

In *Glatfelter v. Delta Air Lines*,[194] the Georgia Court of Appeals reached the same decision. The Glatfelter's originating flight was delayed by weather and they arrived in Atlanta later than scheduled. A wheelchair was not waiting in the gate area for Mr. Glatfelter, an elderly, obese gentleman with osteoarthritis in his knee. Mrs. Glatfelter requested a wheelchair and the gate agent called for one. After a fifteen to twenty minute wait, the Glatfelters decided to walk to the next fight, and Mr. Glatfelter fell on an escalator suffering injuries.[195] Reviewing the facts, the Court dismissed the notion that fact issues existed. "The ACAA and the regulations applicable here do not specify how quickly requested assistance must be provided, but this does not mean that evidence of a delay of any length is sufficient to raise a jury issue."[196] The Court

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193 *Johnson,* 2010 WL 5564629 *8.

194 *Glatfelter*, 558 S.E.2d at 796.

195 *Glatfelter*, 558 S.E.2d at 796.

196 *Glatfelter*, 558 S.E.2d at 796.

concluded as a matter of law that a fifteen to twenty minute delay under these circumstances did not constitute a violation of the ACAA.[197]

But, in *Jackson v United Airlines, Inc*., the court believed a thirty-minute wait created a fact issue for the jury to decide. There, an elderly passenger fell while trying to walk from the arrival gate to the baggage claim area. Wheelchair assistance had been requested at the time the ticket was purchased and the passenger asked for wheelchair assistance from a flight attendant while en route. At the arrival gate, a wheel chair was not brought down to meet the passenger, and the passenger eventually moved from the aircraft to the gate area. After airline personnel had left the area, the passenger decided to attempt to go to the baggage claim area on her own. Denying summary judgment that argued that the plaintiff's decision to attempt walk to the baggage claim on her own was an intervening cause and the proximate cause of her own injuries, the Court noted, "a question remains, if Plaintiff was indeed left at a gate where no airline personnel were available, how long a person must wait for necessary assistance before it becomes reasonable and foreseeable for them to initiate their own action to attempt to walk away on their own."[198] Noting that the Plaintiff alleged she had waited at least thirty minutes, the Court refused to grant summary judgment, leaving the issue to the jury to decide.

B. Passengers With Visual and Hearing Disabilities

In addition to the issues encountered by passengers with visual and auditory impairments in airports and on aircraft, the reservations and ticketing systems present challenges. The DOT

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197 *Glatfelter*, 558 S.E.2d at 796.

198 Jackson, 2009 WL 1036068 *15.

regulations seek to ensure accessibility within the technology constraints presented at the locations serviced by airlines.

For instance, airlines must make text telephone (TTY) systems available for reservation and information services supplied to the general public.[199] Similarly, websites that market air transportation in the United States must meet specific "Success Criteria" and "Conformance Requirements" from the "World Wide Web Consortium (W3C) Recommendation 11 December 2008, Website Content Accessibility Guidelines (WCAG) 2.0 for Level AA" by December 12, 2015.[200]

In the airport, the ACAA charges carriers with the responsibility to ensure passengers with visual or hearing impairments have "prompt access to the same information provided to other passengers at each gate, ticketing area, and customer service desk" that the carrier "owns, leases or controls."[201] If these areas remain under the effective control of the airport where the carrier operates, the ACAA makes the carrier and the airport "jointly responsible for compliance."[202]

The ACAA contains specific guidelines for the provision of accessible, automated kiosks provided at U.S. airports.[203] At airports with at least ten thousand (10,000) enplanements per year, any automated kiosk installed after December 12, 2016 must meet the DOT's design and

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[199] 14 C.F.R. § 382.43(a).

[200] 14 C.F.R. § 382.43(c)(1).

[201] 14 C.F.R. § 382.53(a)(1).

[202] 14 C.F.R. § 382.53(a)(3).

[203] 14 C.F.R. § 382.57.

accessibility criteria[204] until at least twenty-five percent (25%) of all kiosks at each location in the airport meet the requirements.[205] Regardless of the rate at which new kiosks are installed after this date, the airlines must ensure at least twenty-five percent (25%) of the kiosks at each location in the airports meet the design criteria by December 12, 2022.[206] These deadlines apply whether the kiosk is solely owned, leased, used, or controlled by the airline, or are shared with the airport or any other entity.[207]

Reviewing the kiosk standard promulgated by the DOT, the United States District Court for the District of Nevada dismissed a lawsuit seeking monetary and injunctive relief for airport ticketing kiosks that were inaccessible to the blind after the DOT promulgated its final rule in November 13, 2013.[208] In doing so, the Court found that the regulation gave the McCarran International Airport until 2016 to comply, and that no claim could exist for inaccessible common use self-service kiosks until after the December 12, 2016 final implementation date in the regulation.[209]

Evaluating the regulations to date, the Courts have determined that "as long as disabled passengers are accorded *equivalent* service, they need not be given *identical* access to ticketing kiosks."[210]

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204 See 14 C.F.R. § 382.57(c).

205 14 C.F.R. § 382.57(a)(1).

206 14 C.F.R. § 382.57(a)(2).

207 14 C.F.R. § 382.57(a) & (b).

208 *National Federation of the Blind v. Clark County, Nev*., 2014 WL 4206695 (D. Nev., Aug. 25, 2014).

209 *Id.* at *3.

210 *National Federation of the Blind*, 2011 WL 1544524 *3.

C. Passengers with Disease and Medical Issues

In 2014, the outbreak of the Ebola virus became a concern in the United States as several people who had unknowingly contracted the virus returned from their foreign travels and work. The widespread outbreak in other countries, coupled with the apparent ease of communicating the disease, caused concerns for the US public in communities, hospitals, and airlines where the afflicted persons lived, sought treatment, and traveled. Indeed in one publicly reported (and disputed instance) a passenger who was vomiting in the cabin of the aircraft was thereafter transported in the lavatory for the duration of the flight.

The ACAA addresses passengers with contagious diseases, and other medical issues. Passengers with diseases and who require the use of medical equipment during flight can qualify as a person possessing a disability that the ACAA protects from discrimination. The Air Carrier Access Act treats a passenger as possessing a disability if he/she possesses a "physical or mental impairment that, on a permanent or temporary basis, substantially limits one or more major life activities …."[211] Physical or mental impairment includes "any physiological disorder or condition"[212] while impeded major life activities include "functions such as caring for one's self, performing manual tasks, walking … and working."[213] Thus, a passenger may qualify as a person with a disability under the Air Carrier Access Act if the passenger possesses a medical issue or disease, whether permanent or temporary, that impedes some of the physical activities necessary to independently travel through airports and on aircraft.

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211 14 C.F.R. § 382.5

212 14 C.F.R. § 382.5(a)(1).

213 14 C.F.R. § 382.5(b).

The regulations enacting the ACAA prohibit a carrier from refusing to provide transportation to a qualified individual with a disability "solely because the person's disability results in appearance or involuntary behavior that may offend, annoy, or inconvenience crewmembers or other passengers."[214] Unless the passenger's condition poses a "direct threat"[215] the carrier may not (a) refuse to transport the passenger, (b) delay the transportation of the passenger (i.e. require the passenger to take a different flight), (c) impose a condition or restriction on the passenger that is not imposed on all passengers, or (d) require the passenger to present a medical certificate.[216]

In the case of a communicable disease, the carrier may rely upon directives issued by public health authorities such as the U.S. Centers for Disease Control, the World Health Organization, or comparable agencies in other countries.[217] The evaluation of the ease of transmission from casual contact in an aircraft cabin environment lies at the heart of the determination, not the severity of the consequences of contracting the disease.[218] As an example, the DOT notes that "AIDS has very severe health consequences but is not readily transmissible in an aircraft cabin environment" and therefore a prospective passenger "would not pose a direct because he or she is HIV-positive or possesses AIDS."[219] Meanwhile, SARS possesses severe

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214 14 C.F.R. § 382.31(b).

215 *See §IV Refusal of Carriage Supra*.

216 14 C.F.R. § 382.21(a).

217 14 C.F.R. § 382.21(b)(1).

218 14 C.F.R. § 382.21(b)(2).

219 14 C.F.R. § 382.21(b)(2) *Example 2*.

health consequences and may be readily transmitted in an aircraft cabin environment, and thus a passenger presenting with SARS would pose a "direct threat" allowing transport to be refused.[220]

Generally, a carrier may not demand that a disabled passenger present a medical certificate as a condition of travel. But the regulations allow this request when

1. The passenger is traveling in a stretcher or incubator;

2. The passenger needs medical oxygen during the flight; or

3. The condition of the passenger is such that reasonable doubt exists as to whether the passenger can complete the flight safely, without requiring extraordinary medical assistance during the flight.[221]

Additionally, a carrier may require medical certificate as a condition of travel if a person with a communicable disease poses a "direct threat" to the health and safety of others on the flight.[222] But if a passenger possessing a communicable disease presents a medical certificate outlining the measures for preventing the transmission of the disease in-flight, the carrier must provide transportation to the passenger unless it is unable to carry out the specified measures.[223]

The issues decided in *Price v Delta Airlines, Inc*. centered around the treatment of a passenger who possessed HIV and who had contracted Kaposi's sarcoma resulting in ulcerous

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220 14 C.F.R. § 382.21(b)(2) *Example 3*.

221 14 C.F.R. § 382.23 (a) & (b).

222 14 C.F.R. § 382.23(c)(1).

223 14 C.F.R. § 382.21(c).

lesions on his legs.[224] The cancer had caused his legs to swell, the lesions had become "ulcerated and infected, with fluid draining from them and a foul smell emanating from them that required periodic cleansing to control."[225] During a layover on a flight from Vermont to Florida, Mr. Price was removed from the flight. The stated reasons for the removal differed, with the defendants arguing that the pilot directed Mr. Price's removal out of a concern for flight safety, while the plaintiffs alleged the airline removed him out of their concerns about other passengers' comfort and convenience.[226] Reviewing the facts presented, the Court denied the carriers' summary judgment motion, noting that if Mr. Price was removed due to his appearance or involuntary behavior that offended, annoyed, or inconvenienced the passengers or crew, then the carrier violated the Air Carrier Access Act.[227]

Requiring a medical certificate to be presented by an individual with obvious or disclosed medical conditions can be a tricky situation. The regulations allow a carrier to require a medical certificate if there is "reasonable doubt" as to whether the passenger can complete the flight safely. But in doing so the airline had best base its decision on more than just the presence of the condition itself. In *Newman v. American Airlines, Inc.,* the plaintiff, a blind woman with cancer and heart conditions, was removed from a flight when she could not provide a medical certificate demonstrating her fitness to fly.[228] In a pre-*Sandoval* decision, the Court assumed that the plaintiff's claims for violations of the ACAA were actionable. The court disagreed with the

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224 *Price v. Delta Airlines*, 5 F.Supp.2d 226, 228 (D. Vermont 1998).

225 *Price*, 5 F.Supp.2d at 228.

226 *Price*, 5 F.Supp.2d at 233.

227 *Price*, 5 F.Supp.2d at 233-234.

228 *Newman v. American Airlines, Inc.,* 176 F.3d 1128, 1130 (9th Cir. 1999).

carrier's argument that the passenger was removed for safety reasons – namely a question of whether the passenger herself could safely complete the flight. The passenger had disclosed the conditions at the time of the purchase of her ticket and had not been asked to bring a medical certificate; the passenger had flown the first half of her trip without incident; and at the time of boarding the passenger did not present with any discernable distress, pain, or anxiety.[229] The Court opined instead that the carrier's "refusal to transport Newman may constitute exactly the type of discrimination prohibited by the ACAA."[230]

With the evaluation of medical equipment, it appears the Courts may be a bit more sympathetic to the airline's requests for a medical certificate or other assurance of safe use. In *Compass Airlines, LLC v. Montana Department of Labor & Industry*, the underlying issue involved the initial refusal to transport a passenger who possessed a medical device – a ventilator that had been mistaken to be a portable oxygen concentrator[231] by a flight attendant. Evaluating the requirement for a passenger to present a medical certificate, a court classified the ACAA regulation "as a safety regulation because it addresses when a medical certificate may be required of a passenger for safety reasons (ensuring both the safety of the disabled passenger and the safety of other passengers and aircraft crew)."[232] Thus the court envisioned instances where it would be permissible to deny boarding to a passenger who did not possess the proper medical documentation. "In other words, it is permissible for an air carrier to deny boarding to a disabled

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229 *Newman*, 176 F.3d at 1132.

230 *Newman*, 176 F.3d at 1131.

231 A medical certificate may be required by the carrier in order to use a portable oxygen concentrator on-board the aircraft during flight. 14 C.F.R. § 382.133(c)(6) & 14 C.F.R. § 382.23(b)(1)(ii).

232 *Compass Airlines, LLC. v Montana Dept. of Labor & Industry*, 2013 WL 4401045 @ *7.

passenger bringing an unapproved assistive device onto the aircraft because there are important safety issues involved with these devices."[233]

"Both portable oxygen concentrators and ventilators are portable electronic devices that must be tested and labeled by manufacturers for acceptable levels of emissions of radio frequency interference. Both devices are governed by FAA regulation. The use of ventilators and portable oxygen concentrators aboard aircraft is both an issue of rights and at the same time a safety issue; regulation § 382.141 likewise addresses the training of air carrier personnel for the purpose promoting equal rights of disabled passengers while at the same time maintaining aircraft safety."[234]

D. Passengers Traveling With Service Animals

The ACAA requires accommodation of service animals, but makes a distinction between "service animals" and "emotional support animals" for purposes of the statute. Contrary to urban myth, a passenger may not travel with their pet and insist – without a medical certificate – that the pet be carried in the cabin because it provides emotional support to the passenger.

1. What is a Service Animal?

The ACAA recognizes the importance of service animals and provide regulations for the accommodation of service animals accompanying disabled passengers in flight.[235] However, the ACAA does not provide a clear definition of a "service animal" and instead instructs carriers to accept as "evidence that an animal is a service animal" "identification cards, other written

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233 *Compass Airlines, LLC.,* 2013 WL 4401045 @ *9.

234 *Compass Airlines*, 2013 WL 4401045 @*7

235 *See e.g.* 14 C.F.R. § 382.117.

documentation, presence of harnesses, tags, or other credible verbal assurances of a qualified individual with a disability using the animal."[236] As might be imagined, this leaves the carriers in the position of making a subjective interpretation as to whether an animal is merely a pet, or provides a service necessary to the accommodation of an individual with a disability.

In the regulations implementing the Americans with Disabilities Act, a "service animal" is defined with reference to the work or tasks that the animal performs in order to assist the person with a disability. "Service animal means any guide dog, signal dog, or other animal individually trained to work or perform tasks for an individual with a disability, including, but not limited to, guiding individuals with impaired vision, alerting individuals with impaired hearing to intruders or sounds, providing minimal protection or rescue work, pulling a wheelchair, or fetching dropped items."[237] The ADA definition's focus on the work provided or task performed by the service animal comports with the usage implied by the ACAA, because the ACAA distinguishes service animals from non-working "emotional support and psychiatric service animals."

2. Emotional Support Animals Are A Different Animal

A carrier need not accommodate an animal used as an emotional support or psychiatric service animal unless the passenger provides medical documentation for the use of the animal.[238] The passenger need not have a medical prescription for the animal, but must present a letter, from a licensed mental health professional, on the professional's letterhead, stating that:

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[236] 14 C.F.R. § 382.117(d).

[237] 49 C.F.R. § 37.3 Definitions.

[238] 14 C.F.R. § 382.117(e).

1. The passenger possesses a mental or emotional disability recognized in the Diagnostic and Statistical Manual of Mental Disorders – Fourth Edition;

2. The passenger needs the animal as an accommodation for air travel or for activity at the passenger's destination;

3. The passenger is under the professional care of the author, and certifying that the author is a licensed mental health professional; and

4. The date and type of professional licensed held by the author, and the identification of the state, jurisdiction, or entity that issued it.[239]

The ACAA does not require advance notice to be given for use of a service animal on a flight of up to eight hours in duration, whereas the ACAA permits the airlines to require advance notice and advance check-in requirements for emotional support and psychiatric support animals.[240]

3. *Non-Standard or Unusual Service Animals*

Not every animal can qualify as a service animal for purposes of public flight. A carrier is "never required to accommodate certain unusual service animals (e.g., snakes, other reptiles, ferrets, rodents, and spiders) as service animals in the cabin."[241] The ACAA and DOT leave the determination of whether or not to accommodate "unusual or exotic animals" such as miniature

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[239] 14 C.F.R. § 382.117(e)(1)-(4).

[240] *See* 14 C.F.R. § 382.27(c).

[241] 14 C.F.R. § 382.117(f).

horses, pigs, and monkeys to the discretion of the carrier.[242] Factors for the carrier to consider include the weight and size of the animal; whether it poses a threat to the health or safety of others; whether it would cause a significant disruption in cabin service; and whether it would be prohibited from entering a foreign country being serviced by the flight.[243] However, "if no such factors preclude the animal from traveling in the cabin, you must permit it to do so."[244]

Foreign carriers need only accommodate dogs and have no duty to accommodate other service animals.[245]

4. Accommodations for Service Animals

A carrier "must permit a service animal to accompany a passenger with a disability"[246] and the animal may not be excluded on the basis that it may "offend or annoy carrier personnel or persons traveling on the aircraft."[247] The animal must be allowed to accompany the passenger "at any seat in which the passenger sits, unless the animal obstructs an aisle or other area that must remain unobstructed to facilitate an emergency evacuation."[248] If the service animal cannot be accommodated at the passenger's seat, the carrier must offer the passenger the opportunity to

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242 14 C.F.R. § 382.117(f).

243 14 C.F.R. § 382.117(f).

244 14 C.F.R. § 382.117(f).

245 14 C.F.R. § 382.117(f).

246 14 C.F.R. § 382.117(a).

247 14 C.F.R. § 382.117(a)(1). *See Adler*, 31 F.Supp.3d at 1381 (Removal of passengers using a Yorkshire terrier as a service animal may have violated the ACAA if the carrier removed them due to the flight attendant's discomfort with the dog in the cabin.).

248 14 C.F.R. § 382.117(b).

move with the animal to another seat location (if present on the aircraft) where the service animal can be accommodated.[249]

Contrary to urban myth, the ability to bring a service animal on a flight does not entitle the passenger to a second seat for free. "Federal regulations regarding seating for passengers with a disability provide that airlines 'are not required to furnish more than one seat per ticket or to provide a seat in a class of service other than the one the passenger has purchased in order to provide an accommodation required by this Part.'"[250]

V. DIFFERENCES AT THE AIRPORT: WHERE DOES THE AMERICANS WITH DISABILITIES ACT APPLY?

The ACAA may apply to portions of an airport in addition to air carriers. Typically, the Americans with Disabilities Act (*in this section,* the "ADA") provides the overall governance of the accessibility requirements for places of public accommodation. But, the Department of Justice ("DOJ"), which implements the ADA, has interpreted the ADA to exclude "'[t]he operations of any portion of any airport that are under the control of an air carrier,'" and has specified that the ACAA covers such areas not the ADA.[251] Consequently, the DOT, not the DOJ, regulates the portions of the airport controlled by air carriers.[252]

Consistent with this view, the DOT has implemented regulations requiring carriers to ensure that all facilities owned, leased, or controlled at a U.S. airport are readily accessible to and

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249 14 C.F.R. § 382.117(c).

250 *Dogbe v Delta Air Lines, Inc.,* 969 F.Supp.2d 261, 278 n.5 (E.D. New York 2013)(Passenger ejected from a flight after complaining that a flight attendant would not move him into a different class of seats with more leg room). 14 C.F.R. § 382.87(f).

251 *Gilstrap*, 709 F.3d at 1003. *See also* 28 C.F.R. pt. 36 app. C.

252 *Id.*

useable by individuals with disabilities.[253] This includes providing level-entry loading bridges and passenger lounges to and from aircraft, or ensuring an accessible route between the gate area and the location to board the aircraft.[254] Similarly, inter- and intra-terminal transportation via moving sidewalks, shuttle services, and/or people movers must comply with the DOT's rules under the Americans with Disabilities Act.[255]

But, references to, and guidance obtained from, the Americans with Disabilities Act do not provide passengers with the ability to make separate claims under that statute. Courts examining the overlay of the ADA and ACAA have extended the ACAA's specific requirements to portions of airports in those situations where the DOT regulations exhibit the intent to encompass the airport facilities, such as ticketing kiosks, within the scope of its regulations.[256] The federal regulations implementing the ACAA state that the purview of the statute extends beyond the activities on an aircraft. The federal regulations prohibit "both U.S. and foreign carriers from discriminating against passengers on the basis of disability; requires carriers to make aircraft, other facilities, and services accessible; and requires carriers to take steps to accommodate passengers with a disability."[257] The regulations define facility to extend to "any portion of an airport that a carrier owns, leases, or controls (e.g., structures, roads, walks, parking

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253 14 C.F.R. § 382.51(a)(1).

254 14 C.F.R. § 382.51(a)(2).

255 14 C.F.R. § 382.51(a)(3).

256 *Seymour*, 2010 WL 3894023 *2 (Finding that the plaintiff's claims related to the late check-in boarding policy of the airline and therefore fell within the aircraft exclusion of the Americans with Disabilities Act.).

257 14 C.F.R. § 382.1 (underlining added); *See, Segalman v Southwest Airlines*, 913 F.Supp.2d 941, 946 (E.D. Cal. 2012).

lots, ticketing areas, baggage drop-off and retrieval sites, gates, other boarding locations, loading bridges) normally used by passengers or other members of the public."[258]

In *Gilstrap*, the Ninth Circuit upheld the trial court's dismissal of the plaintiffs' ADA claims on the basis of preemption by the ACAA.[259] Ms. Gilstrap possessed difficulty walking and requested wheelchair assistance during separate trips on United Airlines. Complaining that she did not receive the proper treatment during either trip, Ms. Gilstrap brought claims that included allegations for violations of Title III of the ADA.[260] Both the trial court and the 9th Circuit Court of Appeals found that Title III prohibits discrimination on the basis of disability in public accommodations, but that the statute specifically excluded terminals servicing aircraft.[261] "The DOJ's ADA-implementing regulations state that '[t]he operations of any portion of any airport that are under the control of an air carrier are covered by the Air Carrier Access Act,' not the ADA."[262] Reviewing the implementation of the ACAA, the court noted that the DOT incorporated Title III's obligations to ensure that air terminals would be made accessible on the same basis as other public accommodations. "There would be no need for the DOT to incorporate the DOJ's Title III regulations by reference here if Title III already applied to air terminals directly."[263] Thus, the plaintiff's separate ADA claims were preempted by the ACAA and properly dismissed.

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258 14 C.F.R. § 382.3; *Seagalman*, 913 F.Supp.2d at 946-47.

259 *Gilstrap v United Air Lines Inc.,* 709 F.3d 995, 1011-1012 (9th Cir. 2013).

260 Gilstrap, 709 F.3d at 998.

261 Gilstrap, 709 F.3d at 1011.

262 *Gilstrap,* 709 F.3d at 1011, quoting 28 C.F.R. § 36 app. C.

263 *Gilstrap*, 709 F.3d at 1011-12.

The Second Circuit Court of Appeals reached this same conclusion using almost the exact same reasoning in *Lopez v Jet Blue Airways*.[264] In doing so, the Second Circuit Court of Appeals found that the plaintiff could not state a separate claim under the ADA where the ACAA applied.[265]

Other courts have found that the ADA will apply to portions of an airport terminal. For instance, the Department of Transportation's regulations concerning kiosks apply to airports insomuch as the kiosks are shared with, or jointly owned with, air carriers. The DOT kiosk regulation found at 49 C.F.R. § 27.71(j)(1) specifically extended the regulation to airport owners and operators so that differing standards would not be applied to airports than to carriers.[266]

It remains clear that public accommodations at airports that are not operated or controlled by air carriers, such as restaurants, shops, lounges, or conference centers, remain within the ambit of Title III of the ADA.[267]

VI. THE ACAA WILL EVOLVE WITH OUR DIFFERENCES

Unlike the FAA, the ACAA remains relatively new to the aviation industry and consequently continues to evolve. Air carriers must stay abreast of these changes so that their procedures and training will remain current in their compliance with the ACAA.

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264 *Lopez*, 662 F.3d at 599.

265 *Id. See also, Segalman,* 913 F.Supp.2d at 947(dismissing the Plaintiff's separate ADA claim upon finding that the ACAA controlled).

266 49 C.F.R. § 27.71(j)(1).

267 *Gilstrap,* 709 F.3d at 1003 *citing* 28 C.F.R. pt. 36 app. C.

The courts' differing approaches to the jurisdictional and preemptive scope questions surrounding the act will also continue to evolve, until resolved by the United States Supreme Court. Indeed, the airlines currently face the potential for inconsistent regulation; multiple different approaches amongst the circuits will lead to different results for similar factual patterns with the only variable being the happenstance of venue. Nothing in the legislative history of the ACAA suggests that Congress envisioned allowing each state, or even each federal circuit, to come up with its own approach to the enforcement of the ACAA.

Practically speaking, the DOT regulations that enact and enforce the ACAA will continue to evolve as medicine and medical equipment evolve. In some instances, prosthetic devices have placed persons with amputated limbs on the same track, in the same race, as able bodied competitors.[268] The advances of medicine, the ability for passengers to travel at older ages, and the increasing evolution of devices that extend mobility and independence, will continue to push the evolution of the accommodations required by the ACAA.

Similarly, technological changes will force evolution. As airlines continue evolve from barely modified bombers to luxury cruise liners, the change in airline equipment may change the accommodations required by the ACAA. Similarly, renovation of aging airports with new screening devices, people movers, walkways, and lifts may mandate evolution of the assistance required for impaired passengers. The new kiosk and web accessibility regulations underscore this potential future change. Tickets that once had to be purchased in person, through an agent, or on the phone, may now be purchased through a variety of internet capable mobile devices.

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[268] Oscar Pistorius, double amputee below the knees, ran in the 2012 Summer Olympic Games in the 400 meter race and the 4 x 400 meter relay.

Once inaccessible to the sight impaired or paralyzed passenger, technology has recently evolved to aid both types of passengers. These advances in technology, in addition to advances in airport capabilities, will continue to drive the evolution of DOT's regulations.

The reality is that as we continue to travel through life, the ACAA will eventually become relevant to each of us. "At some point in every person's life, you will need an assisted medical device - whether it's your glasses, your contacts, or as you age and you have a hip replacement or a knee replacement or a pacemaker. The prosthetic generation is all around us."[269] Just as surely, at some point in our traveling lives, we all may possess conditions that place us within the ambit of the Air Carrier Access Act. In that place and time, we may finally come to appreciate the celebration of our differences through the equality in treatment that the ACAA ensures for differently-abled passengers.

[269] Attributed to Aimee Mullins, athlete, fashion model, actress, and speaker.