

**CURRENT ISSUES IN AIRLINE PASSENGER LITIGATION:
PASSENGERS OF SIZE AND AIR RAGE**

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I. INTRODUCTION

- A. Post 9-11 world means these claims are less significant, but still must be carefully defended.
- B. Often these cases involve a psychological overlay; the plaintiff can be difficult.
- C. Both types of cases involve “trigger” issues (crowded planes and inconvenience of travel) which may resonate with juries.

II PASSENGER OF SIZE (POS) CLAIMS - - DAMNED IF YOU DO

- A. Background
 - 1. Cases have arisen in response to comfort complaints, crowded planes, and seat size.
 - 2. Sample Airline Policies (See Attachment1)
 - (a) Policy “A” requires a complaint by smaller passenger, which triggers action by flight attendants.
 - (i) POS must find two adjacent seats, (at no extra charge,) or if two seats are not available, must take next flight.
 - (b) Policy “B” requires POS to test a seat in ticketing area or on aircraft. If POS intrudes into second seat, POS must pay for two seats.
- B. Statutory/Regulatory Scheme
 - 1. Air Carrier Access Act of 1986 (ACAA)
 - (a) 49 U.S.C. 41705 (previously 49 U.S.C.1374).

- (i) Regulates all matters involving disabled/impaired airline passengers.
- (b) Requires accommodation, and prohibits discrimination of or denial of services based on disability that causes a physical or mental impairment.
 - (i) Physical impairment arguably does not include obesity alone.
 - (ii) Physical impairment must substantially limit one or more major life activity.
- (c) Although the Americans with Disabilities Act of 1990, 42 U.S.C. §12131, specifically excludes interstate airline travel [42 U.S.C. §12141(2)], cases decided under it can be instructive.
- (d) Generally speaking, being overweight is not a disability. See *Tudyman v. United Airlines*, 608 F. Supp. 739, 746 (1984), U.S.D.C., C.D. Cal.
- (e) However, when an individual reaches levels of obesity or morbid obesity¹, there is some blurring of the line.
- (f) Generally speaking obesity by itself is not a disability. But if it is coupled with other conditions to create a physical or mental impairment that substantially limits a major life activity a disability finding is foreseeable. “Unless tethered to a substantially limiting physical impairment, obesity was simply a "physical characteristic" beyond the reach of the Americans with Disabilities Act. *Fredregill v. Nationwide Agribusiness Ins. Co.*, (1997 USDC SD Iowa), 992 F. Supp. 1082.
- (g) *See also*:
 - (i) *Johnson v. Baylor University*, 129 F. 3d. 607 (5th Circuit 1997)(affirming grant of Summary Judgment where Plaintiff claimed protection for chronic obesity under ADA);

¹ The EEOC maintains that a person is considered to be morbidly obese if they weigh either more than twice their optimal weight or more than 100 lbs. over optimal weight. *Cook v. State of Rhode Island Apartment*, 10 F. 3d. 17, 20 Note 1 (1st Circuit 1993).

- (ii) *Andrews v. Ohio*, 104 F. 3d. 803, 810 (6th Circuit 1997) (holding that obesity does not equal an impairment and to hold otherwise would debase the ADA's protection for those who are truly handicapped);
 - (iii) *Francis v. City of Meriden*, 129 F. 3d. 281 (2nd Circuit 1997)(holding Plaintiff's obesity claim does not fall within the meaning of the ADA);
 - (iv) *Torcasio v. Murray*, 57 F. 3d. 1340, 1354 (4th Circuit 1995)(reviewing case law finding obesity not covered by the ADA).
 - (v) As mentioned, chronically obese individuals also have a propensity to have or acquire additional health problems. These other health problems may well raise an individual to having a disability as covered under the Americans with Disability Act.
 - (vi) Another consideration is that 29 CFR Section 1630.2 (1) of the Americans Disability Act states that an individual may be "regarded as" having such an impairment (disability) if such an individual "is treated by a covered entity as having a substantially limiting impairment." Therefore, if a morbidly obese individual does not have a physical or mental impairment that substantially limits any major life activity, but that individual is treated by a "covered entity" as constituting such a limitation, a covered entity may find themselves subject to the ADA (or by extension the ACAA). While this "perceived as" disability has not met with considerable success in the courts outside of the workplace, it is nonetheless a concern that airlines should consider when developing any policies or procedures with regard to overweight passengers.
- (h) It is generally accepted that the ACAA provides a private cause of action.
- (i) No express cause of action is provided, but at least three Federal Circuit Courts and one District Court have held that an implied cause of action is created.

- (ii) See, *Tallarico v. Trans World Airlines, Inc.*, 881 F.2d 566, 570 (8th Cir. 1989), *Shinault v. American Airlines, Inc.*, 936 F.2d 796, 800 (5th Cir. 1991), *Waters v. Port Auth of N.Y & N.J.*, 158 F. Supp 2d 415, 430-32 (D.N.J. 2001) and *Love v. Delta Air Lines, Inc.*, 310 F.3d 1347, 1350 (11Cir. 2002).
 - (i) The ACAA allows for compensatory damages and may allow a cause of action for emotional distress.
 - (i) See, *Shinault, Id.* at 804 and *Tallarico, Id.* at 570.
 - (j) One Court refused to allow a cause of action for emotional distress.
 - (i) See, *ADAPT v. Sky West Airlines, Inc.*, 762 F.Supp. 320, 326-27 (D. Utah 1991).
 - (k) No Court has allowed for the recovery of punitive damages.
 - (l) No case has addressed the recovery of attorney fees.
2. 14 CFR § 382
- (a) Regulations promulgated under the ACAA.
 - (b) 14 CFR § 382.5 defines an individual with a disability as any individual who has a physical or mental impairment.
 - (c) Under 14 CFR §382.5, physical or mental impairment means any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory including speech organs, cardio-vascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin and endocrine.
 - (d) The term physical or mental impairment includes, but is not limited to, such diseases and conditions as orthopedic, visual, speech and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, drug addiction, and alcoholism.
 - (e) But, 14 CFR § 328.38(i) provides that “Carriers 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.”

- (f) In 2001 the Canadian Transportation Agency rule that, while obesity is not disability *per se*, it did find evidence that suggests there may be obese individuals who have a disability for the purposes of Part V of the CTA which can be attributed to their obesity. Such an instance would be reviewed on a case by case basis. Decision No. 646-AT-A-2001. (Information on the decision is contained in Attachment 2).
 - (i) This decision implies that Airlines operating out of Canadian airports may, in some instances be required to provide some obese passengers a second seat for free.

3. State Civil Rights Statutes

- (a) Plaintiff alleges that the carrier’s conduct discriminates on the basis of a disability, and that full enjoyment of accommodations is denied.
- (b) Is overweight/obesity a disability under State civil rights law?
- (c) Is such a claim preempted by Federal law? (See below)

C. Common Law Causes of Action

1. Breach of Contract.

- (a) Practitioners should examine the ticket for exculpatory language regarding means and methods of travel right to deny travel.
 - (i) Typical language: “Carrier will use its best efforts to carry passengers and baggage with reasonable dispatch.” “This ticket does not guarantee travel.”

2. Negligence

- (a) Plaintiff alleges that carrier’s POS policies are improper, incomplete, not enforced uniformly.
- (b) In-house operations customer care/customer advocacy personnel are important to the case.

- (c) To the extent possible they need to be qualified in POS training, the ACAA and 14 CFR § 382.
 - (d) Seat width issue - carriers are not manufacturers.
 - (e) Don't be afraid to mention low profit margins, need to maximize capacity to keep airfares low, discounted advanced purchase fares (you can't anticipate large passengers just showing up).
- 3. Negligent/Intentional Infliction of Emotional Distress
 - (a) Check State law - Is this a separate cause of action? Is physical injury required?
 - (b) Need to obtain pre and post injury psychological records, consider independent clinical psychologist examiner.
- 4. POS Advocacy Groups
 - (a) See Attachment 3.
- D. Damned If You Don't - What if the thin passenger sues?
 - 1. Causes of action: breach of contract, negligence, assault, battery, intentional and negligent infliction of emotional distress.
 - 2. Thin passenger claims that failing to eject the large passenger caused injury.
- E. Removal/Preemption Issues
 - 1. See Sample Notice of Removal, Attachment 4.
 - 2. Diversity, 28 U.S.C. § 1332.
 - (a) Pitfall: does a case like this meet the \$75,000.00 jurisdictional minimum?
 - 3. Federal Question, 28 U.S.C. §1331.
 - (a) Preemption is based on the Federal Aviation Act of 1958, 49 U.S.C. § 40101-49105, as amended by the Airline Deregulation Act of

1979, 49 U.S.C. § 41713 *et. seq.*

- (i) Query whether the ACAA should also be mentioned in the preemption argument. A lot of plaintiff's lawyers don't know about it.
- (b) The argument is that plaintiff's claims are related to the services provided by an air carrier which are expressly preempted by the act. [§41713(b)(1)].
 - (i) Most courts are hostile to the argument that this is a Federal question as opposed to an ordinary state tort or contract claim. Preemption is usually rejected.
 - (ii) There is authority that the ACAA preempts State law claims. See, *Williams v. Express Airlines I, Inc.*, 825 F.Supp. 831 (W.D. Tenn. 1993).

III. AIR RAGE

- A. Congress's purpose in enacting the Federal Aviation Act was "to promote safety in aviation and thereby protect the lives of persons who travel on board aircraft." *In re Mexico City Aircrash of October 31, 1979* (9th Cir. 1983), 708 F.2d 400, 406. *Accord, Rauch v. United Instruments, Inc.* (3rd Cir. 1976), 548 F.2d 452, 457.
- B. A pilot is specifically authorized under Federal law to refuse to provide transportation to any passenger on the basis of a threat to safety. 49 U.S.C. § 44902(b).
- C. FAA Regulations provide some guidance as to "threats to safety" and prohibits any person from "assaulting, threatening, intimidating, or interfering with a crewmember in the performance of the crewmember's duties aboard an aircraft being operated under this part." 14 C.F.R. § 121.580.
 - 1. Passengers are often charged by the FAA in Civil Penalty Actions under this regulation.
- D. The refusal to transport the passenger does not give rise to a claim for damages under either federal or state law unless the carrier's decision was arbitrary or capricious. *Norman v. Trans World Airlines, Inc.* (Oct. 5, 2000), Southern District of New York Case No.: 98 Civ. 7419, 2000 U.S. Dist. LEXIS 14618.

E. A pilot is vested with "wide discretion" to decide whether to transport a passenger in order to protect other passengers. *Zervigon v. Piedmont Aviation, Inc.* (S.D.N.Y. 1983), 558 F.Supp. 1305, 1306 aff'd (2d Cir. 1983) 742 F.2d 1443.

1. In determining whether the denial of passage to a ticketed passenger was reasonable, the following test was developed:

The test of whether or not the airline properly exercised its power under [§44902]² to refuse passage to an applicant or ticket-holder rests upon the facts and circumstances of the case as known to the airline at the time it formed its opinion and made its decision and whether or not the opinion and decision were rational and reasonable in the light of those facts and circumstances. They are not to be tested by other facts later disclosed by hindsight.

Williams v. Trans World Airlines (2d Cir. 1975) 509 F.2d 942, 948.

“Because [the captain's] decision was not arbitrary, capricious or unreasonable as a matter of law, §44902(b) forecloses any claims for recovery based on that decision. [The flight attendant] and TWA are accordingly entitled to summary judgment on [plaintiff's] tort claims arising from the decision to remove her from the flight.” *Norman v. Trans World Airlines, Inc.* (Oct. 5, 2000), Southern District of New York Case No.: 98 Civ. 7419, 2000 U.S. Dist. LEXIS 14618. at *11-12.

F. Common Law Claims

1. Negligence, assault and battery, false arrest, false imprisonment negligent/emotional inflection of emotional distress.

2. Privilege is an affirmative defense (at least in Ohio).

(a) A privileged act is one which ordinarily would be tortious but which, under the circumstances, does not subject the actor to liability. *Goldfuss v. Davidson* (1997), 79 Ohio St.3d 116, 124 citing 1 *Restatement of the Law* 2d (1965), Section 10(1); and Prosser & Keeton, *The Law of Torts* (5 Ed. 1984) 108-109, Section 16.

²*Williams* interpreted 49 U.S.C. § 1511, which has been renumbered 49 U.S.C. § 44902.

3. If police were called, obviously the complete police file should be obtained. Often plaintiff is allowed to enter a first offender program to avoid prosecution. He may have given a release in exchange. Your client may be a beneficiary of the release. (See Attachment 5).
- G. The same removal/preemption issues arise in air rage cases as in POS cases. Most courts do not believe tht 49 U.S.C. § 44902(b) preempts state court claims.

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