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Overview of the Air Carrier Access Act

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Summary

The Air Carrier Access Act, 49 U.S.C. §41705, prohibits discrimination by air carriers against individuals with disabilities. Recent public attention regarding an airplane passenger who traveled while infected with Extensively Drug Resistant Tuberculosis (XDR-TB) raises timely questions regarding the ACAA's requirements and guarantees. This report briefly discusses the ACAA's statutory provisions, accompanying regulations, and relevant judicial opinions.

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Overview of the Air Carrier Access Act

Background[1]

Congress passed the Air Carrier Access Act (ACAA) in 1986,[2] with several goals. First, Congress intended to address the "unique difficulties" faced by individuals with disabilities, who often had no way to predict the extent of a given airline or flight crew's accommodation.[3] Second, Congress intended the ACAA to overrule a Supreme Court case, *Department of Transportation v. Paralyzed Veterans of America (PVA),*[4] in which the Court held that certain nondiscrimination regulations then in effect[5] could not be enforced against commercial airlines.[6] Finally, Congress also intended to balance protecting individuals with disabilities from discrimination, on one hand, and the need to ensure general passenger safety, on the other.[7]

The inquiry regarding the extent of protections under the ACAA is timely given recent public concern about a man infected with XDR-TB who traveled on several passenger airplanes before he was placed in isolation. This report discusses ACAA requirements and regulations, including regulations regarding airplane passengers with communicable diseases.[8]

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[1] This report was prepared under the general supervision of Nancy Lee Jones, Legislative Attorney.

[2] Air Carrier Access Act of 1986, 100 Stat. 1080 (1986) (current version at 49 U.S.C. §41705).

[3] S. Rep. No. 99-400, at 2 (1986).

[4] 477 U.S. 597, 611 (1986).

[5] In 1982, the predecessor to the Federal Aviation Administration promulgated regulations prohibiting discrimination by air carriers against individuals with disabilities. 55 Fed. Reg. 8009. These regulations derived legal authority from §504 of the Rehabilitation Act of 1973, 29 U.S.C. §794, which the *PVA* Court interpreted as extending only to entities directly receiving federal financial assistance. 477 U.S. at 604.

[6] S. Rep. No. 99-400, at 1-2 (1986); see also 132 Cong. Rec. S11,784 (daily ed. Aug. 15, 1986) (statement of Sen. Dole) ("The legislation ... overturns the recent Supreme Court decision in the case of [*PVA*].").

[7] Id. ("[The ACAA] does not mandate any compromise of existing … safety regulations.")

[8] For more information on XDR-TB and related legal and public health issues, see CRS Report RS22672, *Extensively Drug-Resistant Tuberculosis (XDR-TB): Quarantine and Isolation*, by Kathleen S. Swendiman and Nancy Lee Jones.

The Nondiscrimination Requirement and Exceptions

The ACAA prohibits discrimination by air carriers against "otherwise qualified individual[s]" on the basis of disability.[9] The statutory language regarding the scope of "disability" is the same under the ACAA as under the Americans with Disabilities Act (ADA).[10] Specifically, a person is an "individual with a disability" under the ACAA if the individual (1) has a physical or mental impairment that substantially limits one or more major life activities, (2) has a record of such an impairment, or (3) is regarded as having such an impairment.[11] Under the regulations, such individuals are "qualified" individuals with disabilities if they (1) take steps to avail themselves of services offered by air carriers, (2) make good faith efforts to obtain tickets for air transportation, or (3) purchase or possess valid tickets for air transportation and meet reasonable contracts of carriage.[12] In practice, courts have typically found that individuals meet this "qualified" requirement if they also satisfy the "individual with a disability" requirement.[13]

The ACAA's statutory language is brief, leaving implementation to the Department of Transportation (DOT). The department originally promulgated regulations to implement the ACAA on March 6, 1990.[14] Under the regulatory framework, air carriers violate the ACAA's nondiscrimination provision if they discriminate against an individual with a disability, "by reason of such disability, in the provision of air transportation."[15]

Additionally, air carriers may not require passengers to accept special services.[16] DOT's goal for this provision was to ensure that individuals with disabilities "are not treated differently than other passengers."[17] In *Deterra v. America West Airlines*, a federal district court noted that asking a person utilizing a wheelchair to advance to

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[9] 49 U.S.C. §41705.

[10] 42 U.S.C. §§12101 *et seq*. At least one court has used the same analysis for "disability" under the ACAA as the ADA case law provides. Curtis Edmonds, When Pigs Fly: Litigation Under the [ACAA], 78 N.D. L. Rev. 687, 698 (2002) (citing *McIntyre v. City & County of S.F.*, No. C-01-1244-CRB, 2001 WL 1679154 at 3 (N.D. Cal. Oct. 9, 2001)). Note, however, that unlike under the ADA, the regulatory definition of "disability" under the ACAA includes individuals with merely temporary impairments. 14 CFR §382.5.

[11] 49 U.S.C. §41705(a).

[12] 14 CFR §382.5.

[13] See Curtis Edmonds, When Pigs Fly: Litigation Under the [ACAA], 78 N.D. L.Rev. 687, 698 (2002).

[14] 55 Fed. Reg. 8008.

[15] 14 CFR §382.7(a)(2). In the context of refusing service, note that carriers violate the ACAA if they deny access "solely because the person's disability results in appearance or involuntary behavior that may offend, annoy, or inconvenience" others (14 CFR §382.31(b)) or if they limit the number of individuals with disabilities allowed on any given flight (14 CFR §382.31(c)).

[16] 14 CFR §382.7(a)(2).

[17] 55 Fed. Reg. 12337.

the front of a ticket line when he had not requested special service could constitute discriminatory conduct under the regulations.[18]

Exceptions. The regulations provide two major exceptions to the general nondiscrimination requirement. First, carriers may refuse to serve individuals with disabilities "on the basis of safety."[19] Second, carriers may refuse to serve individuals with disabilities when doing so would violate federal aviation regulations.[20] If a carrier denies service to an individual with a disability under either of these exceptions, it must specify its reason in writing.[21]

Impacted Air Carriers. The ACAA impacts nearly all air carriers, or people who "undertak[e], whether directly or indirectly ... to engage in air transportation,"[22] that transport passengers. It is clear from the ACAA's legislative history,[23] and from the text of its accompanying regulations,[24] that the ACAA applies to both government and commercial air carriers. Additionally, in *Bower v. FedEx*, the Sixth Circuit held that the ACAA applied to a company that routinely allowed employees to ride as passengers in its cargo planes.[25]

Except for a minor reporting provision,[26] ACAA regulations exempt foreign air carriers.[27] However, in 2000, Congress passed a law amending the ACAA such that it now applies to foreign air carriers.[28] Although it has not yet amended its regulations

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[18] 226 F.Supp.2d 298, 299 n.6 (D. Mass. 2002).

[19] 14 CFR §382.31(d).

[20] Id.

[21] 14 CFR §382.31(e).

[22] 14 CFR §382.5.

[23] See, e.g., S. Rep. No. 99-400, at 1-2 (1986) (referring to the ACAA's purpose as extending to air carriers as a whole, distinct from the small subset of carriers that receive direct federal financial assistance).

[24] 14 CFR §382.3(a) (providing that the regulations apply to "all air carriers providing air transportation").

[25] 96 F.3d 200, 204 (6th Cir. 1996) (interpreting the definition of "air carrier" to include carriers who transport property by aircraft across state lines).

[26] 14 CFR §382.70 mandates complaint reporting. It applies to foreign air carriers "with respect to disability-related complaints associated with any flight segment originating or terminating in" the U. S.

[27] 14 CFR §382.3(c).

[28] Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, P.L. 106-181, §707(a)(2), 114 Stat. 61 (2000).

to reflect this change,[29] DOT issued a notice in 2000 indicating its intent to use existing regulations as a guide for enforcing complaints against foreign air carriers.[30]

Application in the Context of Communicable Diseases

The ACAA contains no statutory reference to communicable diseases. However, the regulatory text generally treats individuals with communicable diseases as falling within the definition of "individual with a disability."[31] Similarly, courts generally accept communicable diseases as falling within the scope of "disability" under the ADA if the diseases meet the same parameters that other physical or mental impairments must satisfy.[32] Although no federal court has reached the issue, it follows that courts would likely reach similar conclusions under the ACAA.

The regulations prohibit various actions by carriers against individuals with communicable diseases. Namely, a carrier may not "(1) refuse to provide transportation to the person, (2) require the person to provide a medical certificate, or (3) impose on the person any condition, restriction, or requirement not imposed on other passengers."[33] However, an exception applies when an individual "poses a direct threat to the health or safety of others."[34] The regulations define "direct threat" as "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."[35]

Carriers have discretion in determining whether a given passenger poses a "direct threat." The carrier must make an "individualized assessment, based on reasonable judgment ... to ascertain: the nature, duration, and severity of the risk; that the potential harm to the health and safety of others will actually occur; and whether

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[29] DOT has proposed such an amendment (See 69 Fed. Reg. 64363-95) but has not yet adopted it as a final rule.

[30] Department of Transportation, Applicability of the Air Carrier Access Act (49 U.S.C. §41705) to Foreign Air Carriers Under a Recent Statutory Revision (2000), [http://airconsumer.ost.dot.gov/rules/foreign.pdf].

[31] See, e.g., 14 CFR §382.51(c) (referring to "qualified individual with a disability with a communicable disease").

[32] See *Bragdon v. Abbott*, 524 U.S. 624, 631-42 (1998) (analyzing the plaintiff's HIV infection under the same framework as applies to other physical and mental conditions; holding that the plaintiff's HIV infection constituted a disability under the ADA because it is a physical impairment affecting a major life activity). For more information regarding judicial treatment of communicable diseases under the ADA, see CRS Report RS22219, *The Americans with Disabilities Act (ADA) Coverage of Contagious Diseases*, by Nancy Lee Jones.

[33] 14 CFR §382.51(a).

[34] 14 CFR §382.51(b)(1).

[35] 14 CFR §382.51(b)(2).

reasonable modifications of policies, practices, or procedures will mitigate the risk."[36] However, note that within the scope of their discretion, carriers must choose the "least restrictive alternative" from the qualified individual's point of view.[37] For example, a carrier should not refuse to serve an individual if requiring a medical certificate certifying that the individual's particular communicable disease could not infect other passengers during the flight would sufficiently mitigate the safety threat.[38]

Accessibility Requirements for Qualified Individuals

The Department of Transportation regulations require most air carriers[39] to take specific actions in order to fulfill the ACAA's broad nondiscrimination requirement. Note that these requirements are minimum standards only.

Aircraft Accessibility. Aircraft must conform to multiple accessibility requirements under the regulations. First, on "aircraft with 30 or more passenger seats on which passenger aisle seats have armrests," at least half of the aisle armrests must be "movable."[40] Second, each aircraft with 100 or more passenger seats must offer priority space in its cabin for storing at least one folding wheelchair.[41] Third, aircraft with "more than one aisle in which lavatories are provided" must provide at least one accessible lavatory.[42] Finally, aircraft with 60 or more passenger seats providing one or more accessible lavatories must provide an "operable on-board wheelchair" for passengers' use.[43]

Attendants, Equipment, and Service Animals. Generally, air carriers may not require that an individual with a disability travel with an attendant.[44] However, a carrier may require that an individual travel with an attendant if one of the following applies and the carrier determines that an attendant's assistance is "essential for safety": (1) the passenger will travel in a stretcher or incubator, (2) the passenger is unable to comprehend or respond appropriately to safety instructions, (3) the passenger has a "mobility impairment so severe that the person is unable to assist in his or her own evacuation of the aircraft," or (4) the passenger has severe

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[36] 14 CFR §382.51(b)(3).

[37] 14 CFR §382.51(b)(4).

[38] *Id.*

[39] The requirements in this section do not apply to "indirect" air carriers, 14 CFR §382.3(b), where an "indirect" carrier is a "person not directly involved in the operation of an aircraft who sells air transportation services to the general public other than as an authorized agent of an air carrier" (14 CFR §382.5).

[40] 14 CFR §382.21(a)(1).

[41] 14 CFR §382.21(a)(2).

[42] 14 CFR §382.21(a)(3).

[43] 14 CFR §382.21(a)(4).

[44] 14 CFR §382.35.

hearing and vision impairments and "cannot establish some means of communication with carrier personnel."[45]

Air carriers must allow individuals with disabilities to travel with service animals.[46] In addition, carriers must "permit a service animal to accompany a qualified individual with a disability in any seat in which the person sits, unless the animal obstructs an area that must remain unobstructed."[47] Also, carriers must accept service animal identification cards, tags, and even "credible verbal assurances" from qualified individuals, as proof that a given animal is a "service animal."[48]

Similarly, airlines must allow qualified individuals with disabilities to bring ventilator or respirator equipment into the airplane cabin and use those devices during flights.[49] Additionally, if a sufficiently large space exists, each aircraft must reserve space in an overhead compartment for a collapsible wheelchair.[50]

Seat Assignments, Boarding and Deplaning Assistance, and Advance Notice. The regulations require all carriers to assist individuals with disabilities with boarding and deplaning if either the individual has requested such service or the carrier has offered such service and the individual agreed to receive it.[51] Also, carriers may not require individuals with disabilities to sit in particular seats or refuse to seat them in exit or other rows on the basis of disability.[52] However, a narrow exception applies when refusing to accommodate a passenger in a particular seat is necessary in order for the carrier to comply with federal aviation regulations.[53]

Carriers generally may not require individuals with disabilities to provide advance notice of their disability as a condition for flying.[54] However, various exceptions apply. Specifically, a carrier may require up to 48 hours of advance notice of a passenger's disability if that passenger plans to carry or utilize certain equipment on the flight or seeks certain accommodations enumerated in the regulations.[55]

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[45] Id.

[46] 14 CFR §382.55(a).

[47] 14 CFR §382.55(a)(2).

[48] 14 CFR §382.55(a)(1).

[49] 14 CFR §382.41(b).

[50] *Id.*

[51] 14 CFR §382.39(a).

[52] 14 CFR §382.37.

[53] *Id.*

[54] 14 CFR §382.33(a).

[55] Specific equipment includes medical oxygen, incubators, electrical respirator hook-ups, stretchers, electric wheelchairs (if the aircraft has fewer than 60 seats) and hazardous materials packaging for a battery to be used in an assistive device. 14 CFR §382.33(b). Specific accommodations include seating for 10 or more individuals with disabilities who travel as a group or provision of an on-board wheelchair in an aircraft that lacks an

(continued...)

Security Screening. The regulations require that individuals with disabilities be required to undergo no more security screening procedures than individuals without disabilities.[56] Likewise, security personnel must conduct screening of individuals with disabilities in the same manner in which they conduct screening of individuals without disabilities.[57] However, they may examine an assistive device that might, "in their judgment," conceal a weapon or other prohibited item.[58]

Enforcement

In the most recent cases, two federal circuits have held that private individuals have no ability to sue airlines for discrimination under the ACAA.[59] Instead, those courts have suggested that the ACAA merely gives individuals the ability to complain to the Department of Transportation and then to file petitions for review with federal circuit courts if DOT fails to investigate individual complaints.[60] These holdings limit individuals' ability to enforce the ACAA through the federal courts. Instead, individuals often must rely on DOT to enforce complaints against air carriers. Furthermore, some experts have argued that DOT's enforcement ability is relatively weak, in part because it handles enforcement through its enforcement office rather than through its office of civil rights.[61] DOT has indicated that it has investigated numerous ACAA complaints, sometimes seeking millions of dollars in civil penalties as a result of ACAA violations.[62]

(...continued)
accessible lavatory. *Id.*

[56] 14 CFR §382.49.

[57] *Id.*

[58] *Id.*

[59] See *Love v. Delta Airlines*, 310 F.3d 1347, 1359 (11th Cir. 2002) (holding that "Congress did not intend to create a private right of action in a federal district court to vindicate the ACAA's prohibition against disability-based discrimination on the part of air carriers") and *Boswell v. Skywest Airlines, Inc.*, 361 F.3d 1263 (10th Cir. 2004) ("We conclude that ACAA establishes certain administrative remedies but not a private right of action"). Although prior cases, see, e.g., *Tallarico v. Trans World Airlines, Inc.*, 881 F.2d 566 (8th Cir. 1989), had held that the ACAA creates a private right of action, cases since the Supreme Court decision in *Alexander v. Sandoval*, 532 U.S. 275, have reached the opposite conclusion.

[60] See, e.g., *Love*, 310 F.3d at 1356.

[61] See, e.g., National Council on Disability, Enforcing the Civil Rights of Air Travelers with Disabilities: Recommendations for the Department of Transportation and Congress (1999), [http://www.ncd.gov/newsroom/publications/1999/acaa.htm].

[62] See, e.g., News Release, Department of Transportation, DOT Enforcement Office Charges Northwest Airlines With Discrimination Against Passengers With Disabilities (2001), [http://www.dot.gov/affairs/dot9001.htm].