

POSITION PAPER ON AMENDING THE AIR CARRIER ACCESS ACT TO ALLOW FOR PRIVATE RIGHT OF ACTION

July 8, 2004

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Introduction

The National Council on Disability (NCD) is an independent federal agency that advises the President and Congress on issues affecting more than 54 million Americans with physical and mental disabilities. NCD's fundamental purpose is to promote policies, programs, practices, and procedures that guarantee equal opportunity for all individuals with disabilities, regardless of the nature or severity of the disability, and to empower individuals with disabilities to achieve economic self-sufficiency, independent living, inclusion, and integration into all aspects of society.

For a number of years, NCD has been engaged in the effort to improve access to air travel for individuals with disabilities, and has monitored the efforts of the Department of Transportation to enforce the provisions of the Air Carrier Access Act.¹ The Air Carrier Access Act (ACAA) prohibits discrimination by air carriers against people with disabilities. NCD has addressed the issue of discrimination by air carriers against people with disabilities in a number of reports, including the following:

- *Achieving Independence: The Challenge for the 21st Century*. July 26, 1996 (noting the persistent problems with air travel faced by people with disabilities such as: untrained or poorly trained attendants and other airline personnel, lack of accessible public announcement systems for people who are deaf or hard-of-hearing and the lack of captioning of TV monitors and airport channels at airports).
- *Enforcing the Civil Rights of Air Travelers with Disabilities: Recommendations for The Department of Transportation and Congress*. February 26, 1999 (recommending, among

other things, that Congress amend the Air Carrier Access Act to establish an express statutory private right of action).

- *National Disability Policy: A Progress Report, December 2000 - December 2001*. July 26, 2002 (recommending improved collaboration between the Department of Justice and the Department of Transportation in the implementation and enforcement of civil rights laws bearing on transportation).
- *National Disability Policy: A Progress Report, December 2001 - December 2002*. July 26, 2003 (voicing concern regarding the impact of major airline personnel cutbacks on services and accommodations for passengers with disabilities).

For many years most courts recognized an implied private right of action to enforce the ACAA, but in the last few years the courts have moved to prohibit private rights of action to redress discrimination under the ACAA. This recent change in the interpretation of the law by the courts makes the need for Congressional action to amend the ACAA crucial if progress is to be made in improving access to air travel for people with disabilities. Congress must amend the ACAA to provide for a private right of action in order for the civil rights of persons with disabilities to be enforced effectively.

NCD's interest in amending the ACAA to provide for a private right of action stems partly from the fact that Title III of the Americans with Disabilities Act does not apply to air carriers, as well as the fact that the Department of Transportation (DOT), notwithstanding its more thorough investigation of complaints pursuant to the ACAA's 2000 amendments, does not have the authority to ensure that victims of discrimination under the ACAA are reimbursed for economic losses or are directly compensated for other injuries. Civil penalties levied against an airline do nothing for the individual who has suffered a loss, economic or otherwise, as a result of discrimination.

History of the Air Carrier Access Act

The Federal Aviation Act of 1958 created a limited legal obligation of nondiscrimination. Section 404(a) required air carriers to provide "safe and adequate" service.² Section 404(b), as originally written, prohibited "undue or unreasonable preference or advantage to any particular person, port, locality, or description of traffic."³ Gradually, the legal meaning of these two provisions was understood to prohibit any kind of unjustified discrimination toward air travelers. The Civil Aeronautics Board, which was the regulatory agency then responsible for the enforcement of these provisions, generally only invoked these provisions in connection with rate or fare issues. As a consequence, these provisions had little actual impact on improving access to air transportation for persons with disabilities. Airline and airport policies, as a rule, remained unresponsive to the needs of persons with disabilities, justifying their unresponsiveness on the basis of safety, economics, and the convenience of other passengers.⁴

In 1973, discrimination on the basis of disability was specifically prohibited by law with the passage of the Rehabilitation Act.⁵ Section 504, as amended, prohibits discrimination on the basis of disability in any federally assisted program;⁶ however, the anti-discrimination

proscription of the Rehabilitation Act applies only to carriers that receive direct federal subsidies.⁷

The Paralyzed Veterans of America (PVA) challenged the limited application of Section 504, arguing that all carriers benefit from federal assistance in the form of air traffic control services and federal grants for improving airport facilities.⁸ The PVA argued that since the airlines indirectly received federal assistance, the regulations promulgated pursuant to Section 504 should apply to all air carriers.⁹ The Supreme Court disagreed however, and held that unsubsidized carriers were not recipients of federal assistance and thus were outside the scope of Section 504.¹⁰ This decision of the court exempted most carriers from the duty to make specific accommodations in providing services to passengers with disabilities, and left the passenger with a disability little or no protection against discrimination by the airline industry.

In response to this decision, Congress enacted and President Reagan signed into law, the Air Carrier Access Act of 1986.¹¹ Initially codified as Section 404(c) of the Federal Aviation Act (49 U.S.C. 1374(c)), the amendment prohibited discrimination on the basis of disability by all carriers, and authorized DOT to issue regulations “to ensure nondiscriminatory treatment of qualified handicapped individuals consistent with safe carriage of all passengers on air carriers.”¹² Subsequently, DOT has issued a series of regulations implementing the ACAA that are codified at Title 14 CFR Part 382. In 2000, Congress amended the ACAA to require foreign air carriers to comply with U.S. accessibility standards and strengthen enforcement by DOT.

THE NEED TO AMEND THE AIR CARRIER ACCESS ACT TO PROVIDE FOR A PRIVATE RIGHT OF ACTION

Changed Judicial Interpretation

For many years, the courts held that the Air Carrier Access Act provided an implied private right of action to enforce the statute. In *Tallarico v. Trans World Airlines, Inc.*,¹³ the United States Court of Appeals for the Eighth Circuit held that the ACAA impliedly provides for a private right of action to enforce the statute. In *Tallarico*, the court analyzed the ACAA using the four factors that were enumerated in the Supreme Court opinion, *Cort v. Ash*.¹⁴ In the *Cort* case, the Supreme Court established the four factors, hereinafter *Cort* factors, which a court should use in determining whether a statute provided an implied private right of action. These four factors are: (1) whether the plaintiff is one of the class of persons whom the statute was intended to benefit; (2) whether the legislature intended to create a private remedy; (3) whether a private remedy is consistent with the underlying statutory scheme; and (4) whether the contemplated remedy traditionally has been relegated to state law.

The United States Court of Appeals for the Fifth Circuit likewise concluded that the ACAA allowed for a private right of action. In the case of *Shinault v. American Airlines, Inc.*,¹⁵ the Court analyzed the ACAA by applying the four *Cort* factors and agreed with the Eighth Circuit that the ACAA satisfied all four of the *Cort* factors as applied in that case, and concluded that “Congress intended to allow private plaintiffs to recover all necessary and appropriate remedies.”¹⁶ Most courts around the country that had the opportunity to decide the issue either

agreed with the Eighth and Fifth Circuits that the ACAA provided for an implied private right of action, or assumed as much since the issue was not raised by the parties.¹⁷

In April of 2001 the United States Supreme Court decided the case of *Alexander v. Sandoval*.¹⁸ While the *Sandoval* case did not deal directly with the ACAA, the Court announced that private rights of action to enforce federal law, like federal substantive law itself, must be created by Congress, and that statutory intent is determinative in deciding whether a statute creates not just a right but also a private remedy.¹⁹ This opinion was the catalyst for the United States Court of Appeals for the Eleventh Circuit to decide that, contrary to the opinion of other courts around the country, the ACAA does not provide for a private right of action to enforce the statute.²⁰

The Effect of the *Sandoval* Opinion on the Air Carrier Access Act

In *Love v. Delta Air Lines*,²¹ the Eleventh Circuit held that the ACAA does not grant litigants a private right of action. Justice Marcus, writing for the court in *Love*, concluded that the ACAA contains no congressional intent to create a private right of action because it contains no “rights-creating language,” which focuses on the class to be protected rather than the persons to be regulated.²² The court stated that its analysis of the issue in the context of the ACAA is “informed and controlled” by the Supreme Court’s decision in *Alexander v. Sandoval*, which it said “distills and clarifies” the approach that the court is obliged to follow in such determinations.²³ In the *Love* case, the court also concluded that since the ACAA does contain some express provision for enforcement, Congress must have intended to preclude other forms of enforcement. In the *Love* case, the court ultimately found that, “our review of the text and structure of the ACAA yields no congressional intent to create a private right of action in a federal district court.”²⁴

The court in the *Love* case stated that the Supreme Court, at one time, implied a private right of action from a statute if it concluded that doing so would advance what it perceived to be Congress’ purpose in enacting the statute.²⁵ The *Love* court went on to state that while the Supreme Court’s decision in *Cort v. Ash*²⁶ gave more concrete guidance to such an inquiry by articulating four factors that must be considered before a private right of action may be implied, the Supreme Court, since the late 1970s, had receded from reliance on three of the four *Cort* factors, instead focusing solely on legislative intent to create a private right of action as the “touchstone” of its analysis, with this trend culminating in the Supreme Court’s decision in *Alexander v. Sandoval*.²⁷ The court in the *Love* case pointed out that the Supreme Court had stated in *Sandoval* that without statutory intent to create a private cause of action, the courts cannot create one, no matter how desirable as a policy matter or how compatible with the statute, because while creating causes of action may be a proper function for common-law courts, it is not a proper function for federal tribunals.²⁸

Deterrence and the Redress of Injuries

Even though the Department of Transportation is mandated by the ACAA to investigate complaints of discrimination reported to it by citizens, there is no provision that would allow DOT to order the offending party to make restitution to a person with a disability who has

suffered a physical or economic injury caused by discrimination on the basis of disability. The current practice of a number of airlines is to offer a complaining party a free ticket for air travel, presumably to encourage the complainant not to pursue the matter any further. Many complainants accept the tickets out of the belief, rightly or wrongly held, that it is their only chance at some sort of compensation for their injury.

Additionally, at least one court has determined that, while Congress required DOT to “investigate” every ACAA complaint that does not mean that DOT must “adjudicate” every ACAA complaint.²⁹ Thus, people with disabilities currently have no guarantee that a claim of discrimination against an air carrier will be resolved on the merits. By allowing for a private right of action to enforce the statute, Congress will be ensuring that meaningful redress is available to victims of discrimination.

One may ask, what types of injuries do victims of discrimination suffer? To list just a few examples, many times people will have scheduled an event such as a cruise, where they stand to lose thousands of dollars if they are not on board when the cruise departs. As in the case of *Shinault v. American Airlines*,³⁰ the complainant had just met with President George H.W. Bush at the White House and was attempting to return to Jackson, Mississippi where a press conference was scheduled, but missed his connecting flight because the airline had allegedly refused to let him deplane until all the other passengers had deplaned, and refused to board him on his flight to Jackson even though the plane had not yet left the gate.

In *Tallarico v. Transworld airlines*,³¹ a fourteen-year-old girl with cerebral palsy was prohibited by Transworld Airlines from traveling alone on the basis of her disability. As a result, her father had to fly to Houston, where she had attempted to board a flight to St. Louis for the Thanksgiving holidays, and fly with her, at a cost to him of \$1,350.

Paralyzed Veterans of America members report encountering broken or unavailable wheelchairs, poor boarding assistance, and lack of seating accommodations, making many think twice about future air travel.³²

The number and types of discrimination by air carriers against passengers with disabilities are also evident in DOT enforcement records. In September 2001, the Department of Transportation charged Northwest Airlines with several hundred violations of the Air Carrier Access Act, including instances of lengthy delays in obtaining wheelchairs, passengers being stranded aboard aircraft for extended periods, and passengers being left at the wrong gate, resulting sometimes in the passenger missing his or her flight.³³ People with disabilities should not have to experience hundreds of acts of discrimination before some action is taken against an air carrier.

A complaint to DOT may accomplish the goal of eventually having the airline fined, but it will not reimburse the complainant for his or her loss of income or opportunity, and many individuals may suffer discrimination before action is taken. In order for victims of discrimination to have a remedy for their losses, and for enforcement to have a deterrent effect, a private right of action is necessary. Civil penalties do nothing to address plaintiffs’ injuries, and excessive delay in enforcement actions invites repeated acts of discrimination.

In order for the private right of action to be of benefit to ACAA claimants, it must be accompanied by the same statutory right to attorneys' fees and damages as plaintiffs under Title VII and the Americans with Disabilities Act. Such statutory rights have a common goal: to minimize the cost of litigation to plaintiffs and maximize the incentive of potential defendants to stop discriminatory policies and practices.

The legal and financial resources of people with disabilities are no match for the legal and financial resources of air carriers. Individuals with disabilities will not be able to pursue ACAA discrimination claims without the ability to recover attorneys' fees.

THE CURRENT STATUS OF THE AIR CARRIER ACCESS ACT

The Actions of the Judiciary

More recent ACAA decisions have held that there is no private right of action under the ACAA. As explained above, currently there is no private right of action to enforce the ACAA in the Eleventh Circuit due to the decision handed down by the court in *Love*.³⁴ In 2004, the United States Court of Appeals for the Tenth Circuit, in the case of *Boswell v. Skywest Airlines*,³⁵ sided with the Eleventh Circuit and also held that there is no private right of action under the ACAA. In doing so the court held that the ACAA contained "no rights-creating language," and that under the "newer standard" it cannot add a right where none exists.

In another court opinion decided in March of 2003,³⁶ the United States District Court for the District of Minnesota noted that in April 2000 Congress added a subsection to the ACAA that established specific administrative procedures for investigating complaints of discrimination against persons with disabilities. The alarming aspect of the court's dicta was that the court opined that this amendment rendered an implied right of action under the ACAA "inconsistent with the structure of the statute."³⁷ While this is the opinion of a trial court, it is remarkable that this trial court is part of the Eighth Circuit Court of Appeals that previously held, in the *Tallarico* case, that there was an implied private right of action under the ACAA.

The question of what type of relief is available under the ACAA is also unclear.³⁸ Few, if any, courts have explicitly held that punitive damages are available under the ACAA. Only by allowing for punitive damages, as well as a private right of action under the ACAA, can the Act be sufficiently enforced. Proving the amount of compensatory damages in such cases can be very difficult,³⁹ and if this is the only risk to which an airline may be exposed for violating the Act, the airlines may determine that it is worth the risk to continue their discriminatory practices.

The Actions of Congress

While Congress did not expressly provide for a private right of action under the ACAA when it was passed in 1986, nor in 2000 when the law was amended, it can be argued that Congress intended for there to be an implied private right of action to enforce the ACAA. At the time of its original enactment in 1986, the standard for determining whether a statute provided for an implied private right of action was enumerated in *Transamerica Mortgage Advisors, Inc. v. Lewis*.⁴⁰ Given the holdings of *Transamerica*, Congress had every reason to assume that an

implied private right of action would be available.⁴¹ When Congress amended the ACAA in 2000, nearly every court that had the opportunity to address the issue had either held that there was an implied private right of action under the ACAA, or presumed as much since the issue was not raised by the parties. Given the case law at the time, if Congress had intended to limit enforcement of the ACAA to the regulatory agencies only, it would likely have done so expressly. To add a limitation to the ACAA, which Congress did not add, constitutes the very same form of unauthorized judicial “federal substantive lawmaking” that the court disapproved of in the *Sandoval* case. Rather than concluding that because Congress did not explicitly provide a private right of action and therefore it must have intended for there not to be such a right, the more logical interpretation of the ACAA, given the history of the Act, is to conclude that Congress intended for there to be a private right of action as the courts had so held for more than a decade before Congress amended the Act in 2000.

The Supreme Court in its *Sandoval* opinion concluded that, since Congress expressed a form of remedy, it must have meant to exclude others. This is an example of the maxim that to express one thing is to exclude the other by implication. However, as Justice Souter stated in the case of *Chevron v. Echazabal*,⁴² “[t]he rule is fine when it applies, but this case joins some others in showing when it does not.” As Lord Justice Lopes said of the maxim in *Colquhoun v. Brooks*:⁴³:

“It is often a valuable servant, but a dangerous master to follow in the construction of statutes or documents. The *exclusio* is often the result of inadvertence or accident, and the maxim ought not to be applied, when its application, having regard to the subject-matter to which it is applied, *leads to inconsistency or injustice*.” (Emphasis added.)

CONCLUSION

Despite improved enforcement of the Air Carrier Access Act by the Department of Transportation since the 2000 ACAA amendments, people with disabilities continue to experience widespread discrimination by air carriers. While earlier court decisions recognized an implied private right of action under the ACAA, since the Supreme Court’s decision in *Sandoval*, which changed the test for determining whether a private right of action exists, two circuit courts have ruled that the ACAA does not allow private suits. Under *Sandoval*, Congress must expressly provide for a private right of action in the statute. Thus, only by expressly allowing for a private right of action under the ACAA will victims of discrimination based on disability be able to seek redress for their injuries, and disability-based discrimination by air carriers be deterred. Currently, there is legislation pending before Congress to amend the ACAA to explicitly provide for a private right of action under the ACAA.⁴⁴ NCD again calls on Congress to amend the ACAA to establish a private right of action for the recovery of compensatory and punitive damages for violations of the ACAA and for the recovery of attorneys’ fees.

The National Council on Disability wishes to acknowledge Dwayne Burns for his work in the preparation of this document.

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1. 49 U.S.C. § 41705.
 2. Federal Aviation Act, 49 U.S.C. § 1374(a).
 3. *See supra* note 2, § 1374(b).
 4. *See* Nondiscrimination on the Basis of Disability in Air Travel, 14 CFR Pt. 382 including November 1996 amendments, at 13-14, U.S. Department of Transportation (1996).
 5. Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (codified as amended at 29 U.S.C. § 701 et seq.).
 6. 29 U.S.C. § 794.
 7. *Id.* *See also* *Boswell v. Skywest Airlines, Inc.*, 217 F. Supp. 2d 1212, for a discussion of this requirement.
 8. *See PVA v. CAB*, 752 F.2d 694 (D.C. Cir. 1985).
 9. *Id.*, at p.701.
 10. *See DOT v. PVA*, 477 U.S. 597 (1986).
 11. 49 U.S.C. § 41705.
 12. Air Carrier Access Act, Pub. L. No. 99-435, 100 Stat. 1080 (then codified at 49 U.S.C. § 1374 (c)(1986)).
 13. 881 F.2d 566 (8th Cir. 1989).
 14. 422 U.S. 66 (1975).
 15. 936 F.2d 796 (1991).
 16. *Id.*, at 804.
 17. *See Tunison v. Continental Airlines Corp., Inc.*, 162 F.3d 1187,1189.
 18. 532 U.S. 275 (2001).
 19. *Id.*, at 286.
 20. *See Love v. Delta Air Lines*, 310 F.3d 1347 (11th Cir. 2002).
 21. *Id.*
 22. *See supra* note 20, at 1352-53.

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23. *See supra* note 20, at 1351.
 24. *See supra* note 20, at 1360.
 25. *See supra* note 20, at 1351.
 26. *See supra* note 14.
 27. *See supra* note 20, at 1351-52.
 28. *See supra* note 20, at 1352.
 29. 51 Fed.Appx. 320, 2002 WL 31545973 (D.C.Cir.)
 30. *See supra* note 15.
 31. Tallarico v. Trans World Airlines, Inc., 881 F.2d 566 (8th Cir. 1989).
 32. http://www.pva.org/aboutPVA/lifestorie/fight_rights.htm
 33. www.dot.gov/affairs/dot9001.htm
 34. *See supra* note 20.
 35. 2004 WL 502193 (10th Cir. 2004).
 36. *See Alasady v. Northwest Airlines Corp.*, 2003 WL 1565944 (D. Minn.)
 37. *Id.*, at 10, fn 13
 38. *See supra* note 32, at 311.
 39. *See eg.*, *Tunison*, *supra* at note 17.
 40. 444 U.S. 11 (1979).
 41. *See Nancy Eisenhower, Implied Causes of Action Under Federal Statutes: The Air Carrier Access Act of 1986*, 59 U. Chi. L. Rev. 1183 (1992).
 42. 536 U.S. 73 (2002).
 43. L.R. 21 Q.B.D. 52 (1888).
 44. Section 301 of Senate Bill 2088 cited as the “Fairness and Individual Rights Necessary to Ensure a Stronger Society: Civil Rights Act of 2004” would amend the ACAA to provide for a private right of action.