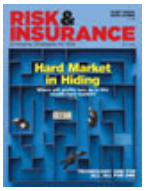

Current R&I Issue
Issue Archive
Subscribe
Advertise

Magazine Content
Home
Features
Columnists
Industry Risk Reports
In-Depth Series
Special Reports
Resources and Tools
Power Broker ™ Directory
Risk Innovators
Case Studies
Industry Events
WORKERSCOMP Forum ™
Award Nominations
Vendor Directories
RSS
R&I Information
Subscription Center
Advertiser Information
About Us
Contact Us

Commentary: The Flight to Access

As if they didn't have enough to worry about, airlines also fend off discrimination suits from disabled passengers. Here's how they should fight them.

By CHRISTOPHER B. KENDE, an aviation attorney and member of law firm Cozen O'Connor, and JENNIFER B. JACOBSON, an associate, who have represented airlines in passenger-disability and personal-injury litigation

One of the most difficult challenges facing the commercial aviation industry is accommodating the needs of disabled passengers without compromising safety or going awry of legislation protecting the rights of the physically and mentally challenged.

With more and more frequency, possibly due to personnel cutbacks and more attention focused on legitimate security concerns, courts are seeing actions brought by disabled passengers alleging discrimination, exacerbation of a physical injury, mental anguish and distress, and even punitive damages as a result of what has been perceived as either the inability or unwillingness to deal with the specific needs of disabled passengers. Cases have gone so far as to include passenger claims alleging mental and physical injuries as a result of panic attacks onboard the aircraft.

Web Extras
- The Montreal Convention (01/19/09)
- The Good, Better and Best Defense (04/01/09)

Related Coverage
- Flying Through Squabbles of the Turbulent (01/01/09)
- Shouldering the Burden (03/03/09)
- Squabbling Over the ADA (10/01/07)

Whatever the situation, the flight crew must ensure that disabled passengers have the ability or appropriate assistance to put on an oxygen mask and fasten their seat belt, visit the restroom or to eat during the flight, without unreasonably interfering with the overall safety of other passengers or distracting the crew from their significant and numerous other duties.

Here's a look at two legislative schemes governing most issues arising in these cases, examples of how litigation has played out and tips airlines can follow before problems take off.

The Air Carrier Access Act of 1986 provides that no air carrier may discriminate against otherwise qualified, handicapped individuals. The ACAA, which can be enforced by the Department of Justice following a request from the Department of Transportation, allows revocation of an air carrier's certificate and can provide for up to $10,000 in fines for each violation.

As of September 30, 1999, foreign air carriers are included within the ambit of the ACAA, and the regulations have been updated most recently to include passengers who use oxygen or other respiratory assisted devices, or who are deaf or hard of hearing.

The other legislative scheme is the well-known Montreal/Warsaw Convention, governing air-carrier liability for injury and death when passengers are embarking, transiting or disembarking from the aircraft. The convention provides

for a strict liability scheme in the event of an accident, defined as an "unexpected or unusual event or happening that is external to the passenger."

Conversely, a passenger's abnormal reaction to the normal or usual operation of an aircraft will not create liability. A passenger's contributory fault can also eliminate or reduce airline liability for an accident. Because the convention has limited liability provisions unless negligence is shown, it is clearly better for an airline to be under the convention's scheme rather than the ACAA.

The first issue raised in numerous cases involving claims for discrimination or injury by disabled passengers is whether the Warsaw Convention pre-empts the ACAA. A number of cases favor the convention, and, therefore, such plaintiffs run the risk that their ACAA claims will be dismissed.

See for example Searcy v. American Airlines, where a quadriplegic passenger allegedly suffered damages due to the negligence of American Airline employees who assisted him onto a plane. In that case, the court held the ACAA claims were pre-empted by the Warsaw Convention because the claims related to operations of embarking and disembarking. The plaintiff's claims against American Airlines brought under the ACAA were then dismissed, but the plaintiff was allowed to proceed with his state law discrimination claims. Following this decision, the parties settled the matter for an undisclosed sum.

A similar result was obtained in the Continental case involving a passenger panic attack due to the alleged theft of the passenger's anxiety medication. There, the court held that the supposed damages, incurred by the passenger who claimed emotional distress because the pilot refused to divert and allow her to disembark, were governed exclusively by the Montreal Convention and dismissed the ACAA claim.

Interestingly, the court did allow the plaintiff to pursue Continental outside of the convention for defamation, intentional infliction of emotional distress, or conspiracy to commit false imprisonment as a result of Continental's alleged comments to officials in a public area, leading to the plaintiff's involuntary commitment. However, following a later motion for summary judgment, the court dismissed the plaintiff's remaining claims and found in favor of Continental.

Likewise, two other ACAA claims were dismissed on the grounds that the convention pre-empted causes of action in personal injury occurring aboard an aircraft. In *Waters v. Port Authority* of New York and New Jersey, for instance, a passenger, wheelchair-bound because of multiple sclerosis, claimed discriminatory conduct in the airline's failure to: provide him with proper "meet and assist" services when he boarded the flight in question, assign him a bulkhead seat aboard the flight and transfer him from his seat to a transfer chair upon his arrival in New York. In Brandt v. American Airlines, the plaintiff's ACAA claim arose out of the alleged conduct of an air steward in denying plaintiff food with which to take his medication

To defeat an ACAA claim, airlines have also claimed that there is no private right of action under the statute. Courts are severely split on this issue, though, and the First, Second, Third, Fourth, Sixth and Seventh Circuits have yet to rule definitively on the question.

In their arguments, airlines maintain that, because the right of action under the statute is expressly delegated to the Secretary of Transportation and the Department of Justice, private parties have no implicit right of action under the statute and, therefore, no disability claim under the ACAA can stand. Some courts have rejected this argument, recognizing the possibility of a private claim for discrimination by a disabled passenger under certain conditions. See, for example, Shinault v. American Airlines.

Airlines have also used the approach that an air carrier may validly refuse transportation for safety. In Newman v. American Airlines Inc., the court observed that airlines may require a medical certificate for qualified individuals with a disability whose medical condition raises reasonable doubt whether that person can complete the flight safely, without extraordinary medical assistance.

Finally, there may be some basis for limiting claims to compensatory damages rather than punitive damages even if there is a private right of action. In fact, no

court has ever awarded punitive damages to a plaintiff in an ACAA claim.

Moreover, some courts have held that nonpecuniary claims for emotional distress and the like are not recoverable at all. In one case, *American Disabled for Accessible Public Transport Salt Lake City Chapter v. Sky West Airlines Inc.*, the district court denied all damages for emotional distress under the ACAA to a disabled person confined to a wheelchair. The airline refused permission for the passenger to board the aircraft, arguing that persons confined to wheelchairs are required to travel with an attendant capable of offering assistance during the flight.

In order to successfully defend claims brought under the ACAA (depending on the jurisdiction where the claim is brought), airlines should argue that: passengers cannot sustain a private right of action; the claim is pre-empted under the Warsaw Convention; passengers lacked a required medical certificate to board an aircraft; and if applicable, damages for purely emotional injuries and punitive damages are not compensable under the ACAA.

April 1, 2009

Back to top