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DESPITE THE ACA A, TURBULENCE IS NOT JUST IN THE SKY FOR DISABLED TRAVELERS

Erin M. Kinahan

Despite the Air Carrier Access Act\(^1\) (ACAA), travel for people with disabilities is far from easy. Today's society has forgotten the purpose of the ACAA: to provide travel for people with disabilities without discrimination.\(^2\) As a result, those who are disabled are continually plagued with problems and complications while traveling. The first section of this article will explore the history and evolution of the ACAA. The second section will dissect the ACAA and its requirements. Finally, the analysis section will delineate five problem areas accountable for the difficulties people with disabilities encounter when they travel. Such obstacles include a lack of standards to determine a passenger's ability to travel; inadequate training of air carrier personnel about ACAA requirements; courts' hesitation to award punitive damages; air carriers' neglect of higher duty of care owed to passengers with disabilities; and passive enforcement of the ACAA by the Department of Transportation (DOT).

BACKGROUND

The ACAA was created to protect the rights of people with disabilities when they travel via air carriers.\(^3\) This act is a direct descendant of the

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\(^{3}\) Id.
Federal Aviation Act (FAA), Airline Deregulation Act (ADA), and § 504 of the Rehabilitation Act (§ 504). While each new legislation attempts to fine-tune the existing laws, loopholes, which often impede travel for people with disabilities, still linger. After we examine the history of the ACAA and the statute itself, those loopholes will become more apparent.

Evolution of the ACAA
The first legislation, which directly addressed airlines' anti-discrimination, was the Federal Aviation Act drafted in 1958. Section 404 of the FAA was the only section pertaining to discrimination. The FAA mandated the Civil Aeronautics Board (CAB) to monitor any discrimination by commercial airlines and adopted Section 404 to do so. Section 404 states, "all air carriers were required to provide safe and adequate service, equipment, and facilities." Subsection (b) of Section 404 continues: "[a]ir carriers were prohibited from subjecting any particular person...to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever." Section 404 also granted the CAB authority to regulate any deceptive trade practices and interstate airfares. Furthermore, the FAA was the first legislation to allow air carriers to use their own discretion to decide between ensuring safety to passengers and allowing disabled passengers access to air travel.

In 1973, Congress enacted the Rehabilitation Act. This legislation imparted further protection for travelers with disabilities via Section 504, which states:

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8 Shinault, 936 F.2d at 801.
9 See id.
11 Federal Aviation Act, 49 U.S.C § 1374(b).
13 Milani, supra note 7 at 395.
No otherwise qualified individual with handicaps in the United States, as defined in Section 706(8) of this Title, shall, solely by reason of her or his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance...

However, the scope of this provision is limited to airlines that received federal subsidies.

Following the incorporation of § 504, Congress also realized the importance of competition in the commercial airline market. The industry needed to decrease prices, and, as a safety measure, Congress enacted the Airline Deregulation Act of 1978. The purpose of the Act was to "encourage, develop, and attain air transportation system which relies on competitive market forces to determine the quality, variety, and price of air services." In response to problems that arose between state and federal regulations it encountered as a result of the FAA (as opposed to disability related issues), Congress included a clause which preempted any state law "relating to rates, routes, or services of any air carrier."

Courts have struggled with the interpretation of the phrase "relating to...services of any air carrier." This phrase has been interpreted in areas other than preemption. In fact, airlines often use this as a defense to a negligence claim, especially with regard to disability related issues, despite its original purpose to influence competitive markets. Congress real intention for the preemption provision was not to relieve air carriers of all liability under state law

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15 Shinault, 936 F.2d at 801.
16 Id.
18 Milani, supra note 7. See also Knopp, 938 S.W.2d at 358.
21 Milani, supra note 7, at 384.
but rather, to prevent state deregulation of airfares and fare advertising.\textsuperscript{22}

Controversy arose in 1986 when the Paralyzed Veterans of America (PVA) filed a complaint against the DOT.\textsuperscript{23} The plaintiffs disagreed with the CAB's interpretation of the Rehabilitation Act when it stated that § 504 only applied to airlines that received federal financial assistance.\textsuperscript{24} PVA argued that § 504 applied to all commercial airlines, since they all received federal financial assistance, whether via airport development programs or traffic control systems.\textsuperscript{25} By ruling that § 504 did not apply to commercial airlines, the United States Supreme Court rigorously restricted discrimination protection to people with disabilities.\textsuperscript{26}

The ACAA Statute

Congress recognized potential problems following the narrow holding of \textit{US Department of Transportation et. al. v. Paralyzed Veterans of America et. al. (DOT v. PVA)} decision.\textsuperscript{27} To rectify the situation, Congress adopted the Air Carrier Access Act\textsuperscript{28} to overturn \textit{DOT v. PVA}.\textsuperscript{29} The law which applies to all air carriers, states:

In providing air transportation, an air carrier may not discriminate against an otherwise qualified individual on the following grounds:

1. the individual has a physical or mental impairment that substantially limits one or more major life activities.
2. the individual has a record of such an impairment.
3. the individual is regarded as having such an impairment.\textsuperscript{30}

\[\text{References:}\]
\textsuperscript{22}Id. at 390. See Knopp, 938 S.W.2d at 358.
\textsuperscript{23}DOT v. PVA, 477 U.S. 597, 106 S. Ct. 2705, 91 L.Ed. 2d 494 (1986).
\textsuperscript{24}Shinault, 936 F.2d at 802.
\textsuperscript{25}See id.
\textsuperscript{26}See id.
\textsuperscript{27}DOT, 477 U.S. at 597.
\textsuperscript{28}49 U.S.C. § 41705.
\textsuperscript{29}See id. See also Milani, supra note 7, at 401.
The ACAA was intended to assist air travelers with disabilities regardless of the source of financial assistance.\textsuperscript{31} The ACAA tackles the ambiguity of the "otherwise qualified individual" definition.\textsuperscript{32} Furthermore, the ACAA dictates specific accessibility requirements to each aircraft to accommodate for people with various disabilities.\textsuperscript{33}

\textit{Legislative Intent}

In drafting this law, the legislature created a statute that assisted disabled travelers who use air carriers.\textsuperscript{34} Senator Bob Dole, a prominent author of the ACAA, stated: "Our intent... is that so long as the procedures of each airline are safe as determined by the FAA, there should be no restrictions placed upon air travel by handicapped persons."\textsuperscript{35} In addition to overturning the PVA case, Senator Dole indicated three other focal points of the ACAA: (1) to prevent potential undue financial burdens to airlines, (2) to provide consistency for travelers with disabilities, and (3) to address the struggle between non-discrimination and safety concerns for passengers.\textsuperscript{36} Compliance with this new legislation could potentially be financially taxing on the airlines. Airlines could incur greater costs by either changing existing planes to become accessible or by purchasing new planes that are accessible. To preserve the financial interests of the air carriers, Congress included an undue financial or administrative burden provision in the ACAA.\textsuperscript{37} The government also recognized potential burdens the air carriers may experience in modifying their air carriers to adapt to travelers with disabilities.\textsuperscript{38} Although there is no explicit definition of an "undue financial burden," the requirement is to achieve

\textsuperscript{31}14 C.F.R. § 382.1 (1990).
\textsuperscript{32}49 U.S.C. 41705 (1994).
\textsuperscript{33}14 C.F.R. § 382 (1990).
\textsuperscript{34}14 C.F.R. § 382.1 (1990).
\textsuperscript{35}Milani, \textit{supra} note 7, at 401. \textit{See also} 132 Cong. Rec. S11784, S11786 (1986).
\textsuperscript{36}14 C.F.R. § 382 (1990).
\textsuperscript{37}49 U.S.C. 41705 (1994).
\textsuperscript{38}\textit{Id.}
The equilibrium is not explicitly defined. Perhaps an objective standard would apply here. It is reasonable to expect an airline to provide an aisle chair to transport a passenger who is unable to walk to their seat, whereas it may be unreasonable for a passenger with a disability to expect a flight attendant to personally care for the passenger throughout the duration of the flight.

The second central issue of the legislative intent was to rectify predicaments where travelers with disabilities are "subject to the possibility of discriminatory, inconsistent, and unpredictable treatment" (emphasis added) provided by air carriers. Before the ACAA, the standard of providing accommodations for people with disabilities was a mere minimum standard mandated by the FAA. The ACAA successfully raised that standard beyond a minimum, while simultaneously providing consistency among air carriers for provisions for travelers with disabilities.

Finally, the last goal of the ACAA was to recognize the struggle between non-discrimination and safety of all passengers. The FAA proscribes an airline’s authority to refuse transportation to a passenger:

\[\text{a}ny \text{ carrier is authorized to refuse transportation to a passenger or to refuse to transport property when, in the opinion of the air carrier, such transportation would or might be inimical to safety of flight.}\]
The legislative intent of monitoring the discretion of air carriers is prevalent throughout the ACAA case law. In *Williams v. Trans World Airlines*, the court developed a test to determine an airline's proper use of its discretion. Here, the plaintiff was denied transportation because of his criminal status. Plaintiff discovered the FBI issued a warrant for his arrest for a kidnapping charge. When plaintiff heard this news he fled to several different countries to avoid prosecution. As plaintiff and his family attempted to return to the United States, TWA denied plaintiff and his family transportation, fearing that this dangerous fugitive would compromise the safety of the flight.

As a result, the Second Circuit Court of Appeals developed a test to monitor the discretion of air carriers:

The test of whether or not the airline properly exercised its power under § 1511 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 and not capricious or arbitrary in light of those facts and circumstances.

In *Paralyzed Veterans of America v. Civil Aeronautics Board (PVA v. CAB)* the Court reaffirmed the *Williams* decision by stating that airline discretion must vary on a case-by-case basis due to the uniqueness of every individual and their disability. In fact the Court took the test one step further by deciding that the air carrier could rightfully exercise its discretion to deny a certain passenger

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46 509 F.2d at 948.
47 Id. at 94
48 Id.
49 Id.
50 Id.
51 Id. at 948.
52 *Paralyzed Veterans of America, 752 F.2d at 720, 243 U.S. App.D.C. at 263.*
transportation when the decision was made by the carrier’s designated personnel familiar with the carrier’s standards and procedures.\(^{53}\)

Thus, the legislative intent explains the ACAA. This act was intended to correct an apparently erroneous decision of \textit{PVA v. DOT}.\(^{54}\) Despite receipt of federal funds, air carriers are now obligated to conform to FAA requirements.\(^{55}\) Moreover, the drafters meant to provide consistency for air travelers with disability by raising the standard to provide accommodations to people with disabilities.\(^{56}\) Finally, an airline’s discretion is challenged by the ACAA, striking a balance between the rights of the passengers and the interests of the air carriers.\(^{57}\)

\textbf{Otherwise Qualified Individual}

When applying the ACAA, one must first decide to whom this legislation applies. The exact wording of the ACAA reads: "In providing air transportation, an air carrier may not discriminate against an \textit{otherwise qualified individual} on the following grounds...."\(^{58}\) (emphasis added). This ambiguous phrase was probably meant to apply to different groups of people with various disabilities. However, the ambiguity of this language has quite possibly confused the issue more than it has clarified it. After struggling with the meaning of the phrase, the shortcomings, and the standards, I shall unveil the ambiguities of the phrase "otherwise qualified individual."

In \textit{PVA v. CAB}, one is qualified to travel via air if the following requirements are present:

[t]he tender of payment for air transportation, the absence of any indication that air transportation of the passenger will jeopardize flight safety, and the absence of any indication that the passenger is unwilling or unable to comply with reasonable requests of airline personnel.\(^{59}\)

\(^{53}\)Id. at 721, 243 U.S. App.D.C. at 264.

\(^{54}\)14 C.F.R. § 382 (1990) (supplemental information).

\(^{55}\)Id.

\(^{56}\)Id.

\(^{57}\)Milani, \textit{supra} note 7, at 395.


CAB’s definition of an otherwise qualified individual is one that “lacks objective guidelines and criteria to ensure that airlines do not arbitrarily impose unnecessary conditions on disabled passengers, thus rendering the definition ‘vague and confusing’ for both airline personnel and disabled travelers.”60 The court then adds the condition that an otherwise qualified individual is one “who is willing to comply with reasonable requests of airline personnel, or, if not, is accompanied by a responsible adult passenger who can ensure that requests are complied with.”61

In *SE Community College v. Davis*, the court held an otherwise qualified individual is “one who is able to meet all of a program’s requirements in spite of his handicap.”62 The legislative history of the ACAA defines an otherwise qualified individual as one who has a valid ticket, one who will not violate the FAA by flying, and one who can and will adhere to the safety requirements (including those who are accompanied by someone else who can assist them.)63 With this standard in mind, airlines must also assume that each person with a disability is an otherwise qualified individual unless there is a reasonable, specific basis for doubting those qualifications.64

The court in *Tallarico v. Trans World Airlines* applied this standard to determine if the plaintiff, Polly Tallarico, a fourteen-year-old female whose cerebral palsy hindered her walking and talking abilities, was competent to fly.65 She met the requirements of being an otherwise qualified individual by acquiring a valid airline ticket and by adhering to the FAA regulations.66 Despite her disability, the plaintiff was an otherwise qualified individual because of her ability to move, to communicate via a portable computer with a voice attachment, and to comply with the safety requirements by crawling, fastening her own seatbelt and oxygen mask.67 Even though the plaintiff proved that she was an otherwise qualified individual, the airline would not allow her

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60 Id. at 703, 243 U.S. App.D.C. at 246.
61 Id. at 262.
64 *Paralyzed Veterans of America*, 752 F.2d at 721, 243 U.S. App.D.C. at 264.
65 881 F.2d 566 (8th Cir. 1989).
66 Id. at 569. Actually, she had flown by herself previously.
67 Id.
to fly by herself. The acting airline station manager was informed the plaintiff could not speak or walk, and subsequently concluded she could not take care of herself in an emergency. Plaintiff was forced to bring a companion to fly with her.

At times, the airlines seem to arbitrarily decide if a passenger is an otherwise qualified individual. A violation of the ACAA occurs if an airline denies a passenger merely because the disability involves unsightly appearances or involuntary behavior that may be uncommon and unfamiliar to people who have never seen or dealt with a disability. These occurrences often result in blatant discrimination, demonstrating one of the ACAA’s shortcomings.

In Jacobson v. Delta Airlines, the airline clearly violated the ACAA. The passenger, Mr. Jacobson, suffered from cerebral palsy that precluded him only from walking without assistance. When Mr. Jacobson arrived at the airport, he was presented with a medical waiver which allowed the airline the right to refuse him access if they deemed him incompetent to fly. Mr. Jacobson claimed this extra requirement was unreasonable and discriminatory, especially when the ACAA already addresses this situation. The court deemed an otherwise qualified individual as “one who is able to meet all of a program’s requirements in spite of the handicap.” Mr. Jacobson argued that he met all of the requirements. Furthermore, the court agreed with Mr. Jacobson and found that the waiver did not survive rigorous scrutiny

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68 Id. at 567.
69 Id. at 568.
70 Id.
71 14 C.F.R. § 382.12(a). See Price v. Delta Airlines, 5 F. Supp. 2d 226, 233 (Vt. 1998) (Traveler with AIDS had an odiferous lesion and as a result was denied the opportunity to fly. The odor was said to impede the flight attendants’ work.)
72 742 F.2d 1202 (9th Cir. 1984).
73 Id. at 1204.
74 Id. at 1205.
75 Id. at 1204.
76 Id.
77 Jacobson, 742 F.2d at 1204.
78 Id. Rigorous scrutiny must be applied to all challenges of the Rehabilitation Act.
because the policy did not achieve a legitimate purpose.79 Thus, Mr. Jacobson’s discrimination was entirely the airline’s fault.80

While the ACAA is a step in the right direction, it is far from perfect. The ACAA has imposed an additional burden on disabled travelers to prove their disabilities.81 The Tallarico case alludes to the notion that travelers with disabilities have an increased burden to prove their own capabilities.82 As the plaintiff in Tallarico demonstrated, she met all of the qualifications of an otherwise qualified individual, yet she was still denied the ability to travel alone.83 The results of these two cases are further proof that the ACAA is not as effective as it could be. Arguably, this legislation has not carried out its intention of assisting travelers with disabilities. While it is understandable that the airlines need to protect themselves from various liabilities, there needs to be some middle ground.

Who is to blame for the increased burden placed upon travelers with disabilities? The ACAA drafters? The airline personnel? Most likely the burden stems from the ambiguous language of the Act. The ambiguity influences the interpretation on the part of the passengers, airlines, and enforcers of the ACAA. Perhaps the airlines are not making a true good faith effort to accurately assess or determine if a passenger is an otherwise qualified individual. Whether the otherwise qualified individual problems can be attributed to the ACAA itself or the airline, there is a sizeable ambiguity creating problems for travelers with disabilities. Regardless as to whether the blame should be placed on the airline or the legislation, there needs to be more change to accommodate travelers with disabilities (as discussed in the Analysis section).

Requirements of ACAA

The ACAA addresses many different aspects of traveling with a disability: aircraft accessibility requirements,84 advanced notice to airlines regarding disability,85 and additional safety precautions.86

79 Id. Furthermore, Delta did not even “demonstrate that its policy is reasonable to achieving [sic] a legitimate purpose.”
80 Id.
82 Id.
83 Id.
84 Namely, armrests, lavatories, on-board wheelchairs, storage/stowage space.
Aircraft Requirements

ACAA's regulations apply to any aircraft that was delivered more than two years after the rule has been implicated and that has more than thirty seats. There are no retrofitting requirements of existing carriers. However, if features are updated or remodeled, those particular features must comply with the accessibility requirements.

The first effort to make aircrafts more accessible was to make half of the armrests movable to facilitate transferring people with disabilities to their seats. The main goal was to provide more integrated seating possibilities for people with disabilities. This change would further eliminate the need to require priority seating for passengers with disabilities. Moreover, movable armrests would reduce the risk of injury to passengers and air carrier personnel when carrying or lifting a passenger. Movable armrests may also promote independence by allowing some passengers with disabilities to transfer themselves as opposed to relying on air carrier personnel to transfer them to their seats.

After much debate, the ACAA also mandates that accessible lavatories are required on all planes with more than one aisle, regardless of the loss revenue sacrificed from potential seat removal to accommodate the accessible lavatories. Even if there are no accessible lavatories, a passenger may request an on-board wheelchair (in advance) to assist them to use the lavatory, despite its inaccessibility. On-board wheelchairs are required when an aircraft contains accessible lavatories to allow people with disabilities to travel

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85 14 C.F.R. § 382 (Supplementary Information).
86 Id.
87 14 C.F.R. § 382.21.
88 Id.
89 Id.
90 Id. at § 382.21(1).
91 14 C.F.R. § 382.21(1).
92 14 C.F.R. § 382.21.
93 Id.
94 14 C.F.R. § 382.21(2).
95 Id. at § 382.21(3).
from their seats to the lavatory. A passenger may request an on-board wheelchair within forty-eight hours prior to the flight.

Finally, the ACAA contains provisions regarding storage/stowage space. The airlines are required to retain priority space for in-cabin stowage of a folding wheelchair in a new aircraft, to expedite an exit for the travelers with disabilities.

Advanced Notice Requirements
Airlines require advanced notice of a traveler with disabilities in situations when an attendant will be accompanying a traveler, or when there are special needs for seating assignments. Other special circumstances requiring advanced notice include: packing or storing a battery for an electric wheelchair; using an electric wheelchair on a plane with less than sixty seats; requesting an on-board wheelchair on an aircraft without accessible lavatories; using medical oxygen, stretcher, incubator, or respirator; or traveling with large groups of travelers with disabilities.

Additional Safety Precautions
An airline can mandate an attendant to accompany a traveler with disabilities only when it is necessary for safety reasons. Again, these situations include: passengers traveling in an incubator or stretcher; passengers who are unable to understand or respond to the safety instructions; passengers who have severe mobility impairments whereby a passenger is incapable of assisting in their own evacuation; and passengers who have extreme vision and hearing impairments, unless the passenger is able to effectively communicate by other means. The airlines have the choice to either allow the passenger to

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96 Id.
97 Id.
98 Id. at § 382.21(4).
99 Id.
100 14 C.F.R. § 382.33.
101 Id.
102 Two definitions of safety are "perform its services with the highest possible degree of safety in the public interest." Williams, 509 F.2d at 946. There seems to be an objective standard.
103 14 C.F.R. § 382.35. Other means may include by other communicative devices/computers, sign language, an interpreter, writing.
select an attendant who would travel free of charge or the airline may appoint an off-duty employee who is already scheduled for that same flight to be the passenger's attendant.\textsuperscript{104}

Finally, the airline can only restrict the seating assignments when flight safety is in danger.\textsuperscript{105} Furthermore, the airline must accommodate a service animal to remain with the passenger if such a situation presents itself.\textsuperscript{106}

In order to better enforce the ACAA, we must dissect the act itself. The legislative intent fosters guidance of applicability of the ACAA conceived by the drafters. Knowing the purpose of the ACAA facilitates the enforcement. Only when the intended protected parties have been identified (albeit a murky definition of otherwise qualified individuals) can the ACAA be adequately enforced. Ultimately, an exploration of the exact requirements of the ACAA facilitates enforcement.

ANALYSIS

The ACAA has not sufficiently eliminated difficulties encountered by travelers with disabilities. Five particular problems interfere with the implementation of the ACAA: (1) inadequate standards to assess the ability of travelers with disabilities, (2) insufficient airline sensitivity/training, (3) lack of punitive damages granted to passengers who experience discrimination, (4) misunderstanding of the airline's role, and (5) futile enforcement on behalf of the Department of Transportation.

Standards

After determining a passenger is a qualified individual deemed able to fly, the ACAA requires standards to evaluate whether or not the airline can refuse the passenger's entry on the plane.\textsuperscript{107} Historically, implementation seems to have been favorable to the airlines.\textsuperscript{108} The

\begin{footnotes}
\item[104]Id.
\item[105]14 C.F.R. § 382.37. See also Williams, 509 F.2d at 944.
\item[106]Id.
\item[107]Id. at §382.2
\item[108]David M. Capozzi, The Disabled Fly in Unfriendly Skies, 71 BUS. & SOC. REV. 22 (Fall 1989).
\end{footnotes}
airlines must find a balance between the safety interests of all passengers, the interests of the travelers with disabilities, and the interests of the airline.\textsuperscript{109}

The standard used to evaluate a potential discrimination case is whether the decision was "arbitrary, capricious, or irrational" with respect to the information available to the airline at the time.\textsuperscript{110} However, such a standard typically has not favored travelers with disabilities.\textsuperscript{111} This standard merely mandates that the airline makes a minimal effort to assess the situation.\textsuperscript{112}

As the law currently dictates, the airline captain is the person who decides what is best for the safety of the entire plane.\textsuperscript{113} However, the captain may not be in the best position to ascertain whether or not anyone's safety is at risk, because the captain's knowledge of or training with regard to people with disabilities is likely to be minimal. Often it appears as though the airlines do not make a good faith effort to determine a passenger's true ability to fly. For example, ignorance regarding certain disabilities may sway airline personnel to unnecessarily deny a person with a disability the opportunity to fly.

It must be acknowledged that creating a standard that can accurately assess all disabilities is extremely difficult. One alternative would be to individually assess each disability, or possibly even each passenger's condition.\textsuperscript{114} However, this may not be a very realistic expectation, since flight attendants are not required to have any medical expertise beyond basic first aid. Nevertheless, some type of standard must be incorporated.

\textbf{Training}

Passengers with disabilities face another problem when traveling via air carriers: air carrier personnel so often are not appropriately trained as to the requirements of the ACAA.\textsuperscript{115} Not only are they unaware of the

\textsuperscript{109}Milani, \textit{supra} note 7, at 407.


\textsuperscript{111}Milani, \textit{supra} note 7, at 407.

\textsuperscript{112}\textit{Id.}

\textsuperscript{113}\textit{Id.}

\textsuperscript{114}\textit{Id.}

\textsuperscript{115}Tallarico, 881 F.2d at 566.
requirements, but flight attendants have been perceived as insensitive to the needs of passengers with disabilities.116

The most blatant example of flight crew devoid of training or sensitivity occurred when Jim117 flew on an American Trans Air flight.118 Jim is not ambulatory, and therefore depends on a wheelchair.119 When Jim makes a plane reservation, he always alerts the airline of his situation, and reminds the airline that he will need an aisle chair to board the aircraft and another aisle chair that transports the passenger throughout the air craft.120 If the flight exceeds three hours, he also inquires as to the availability of a portable aisle chair stowed on board to assist him from his seat to the lavatory.121

This particular flight was an international flight, which required the portable aisle chair to assist him to the lavatory over the course of a nine hour flight.122 Jim is usually one of the first passengers on board, which enables him to double check with a flight attendant that there is a portable aisle chair on board, as he did on this flight.123 After posing the question to the flight attendant, she shook her head and said that they did not have one on this aircraft.124 Jim responded that he would have to deplane, for he could not last nine hours without using the lavatory.125 The flight attendant then stated that she would ask around to verify.126

The flight attendant returned with the news that yes, there was a portable aisle chair, but it was stored on the lower level of the aircraft, which was very hard to access.127 She then pointed to the lavatory,

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116 Id.
117 "Jim" allowed me to tell his story only if I agreed to strict anonymity. I feel it is essential to tell his story to better illustrate the frustration so often encountered by people with disabilities. Thus, I have elected to refer to this person as Jim, even though this is not his name.
118 Interview with Jim, Chicago, Illinois (Nov. 4, 1999).
119 Id.
120 Id.
121 Id.
122 Id.
123 Id.
124 Interview with Jim, Chicago, Illinois (Nov. 4, 1999).
125 Id.
126 Id.
127 Id.
approximately ten feet from Jim’s seat, stating that the lavatory was not far away, and asked if Jim could walk just a little to the lavatory. Jim indicated that he was not able to walk at all, even short distances. The flight attendant then returned with what she thought to be the perfect solution: one of the male flight attendants could wrap his arm’s around Jim’s waist and carry him to the lavatory. Of course this solution was unacceptable to Jim, and he asked to see the head flight attendant of this flight. Only after relaying this whole episode to the head flight attendant was he able to elicit the portable aisle chair that was stowed in the lower level. However, when Jim needed the chair, the first flight attendant was the one who brought the chair to Jim, but left it in a folded position and told Jim that she did not know how “those things” worked, and that he would have to figure it out himself. Luckily Jim had used these aisle chairs before and knew how to operate them.

Jim’s experience is clearly a result of ignorance, insensitivity, or discrimination. Either the flight attendant was unaware of the treatment of a passenger with a disability, or was blatantly discriminating against the passenger. According to Jim, this treatment is quite common. Jim was only trying to exercise his rights, the same rights entitled to people without disabilities. Conceivably, improved training policies could help avoid these types of situations.

Punitive Damages
Perhaps situations such as Jim’s could further be avoided by granting punitive damages. However, in the past, courts have not awarded punitive damages in an ACAA lawsuit. The availability of punitive

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125 Interview with Jim, Chicago, Illinois (Nov. 4, 1999).
129 Id.
130 Id.
131 Id.
132 Id.
133 Interview with Jim, Chicago (Nov. 4, 1999).
134 Id.
135 Id.
136 Punitive damages are available when the plaintiff shows that “defendant exhibits oppression, malice, gross negligence, willful or wanton misconduct, or reckless disregard for plaintiff’s rights.” Milani, supra note 7, at 411.
damages is uncertain,\textsuperscript{137} since the ACAA does not address applicable remedies.\textsuperscript{138} Courts rarely deny the possibility of punitive damages;\textsuperscript{139} rather, the courts do not address the issue if the plaintiff has failed to present a prima facie case deeming punitive damages.\textsuperscript{140} If, however, punitive damages were awarded, the damages may have a regulatory effect on airlines as air carriers would realize the seriousness of any infractions of the ACAA, and the necessity to strictly adhere to the law.\textsuperscript{141}

The issue of punitive damages is never explicitly addressed in the ACAA.\textsuperscript{142} As stated in Shinault v. American Airlines: "The touchstone for deciding whether a statute provides a particular remedy is congressional intent. Congress often manifests its intent to provide certain remedies through the express language of the statute."\textsuperscript{143} Yet the legislative history of the ACAA does not address this issue, nor are there any surrounding similar circumstances.\textsuperscript{144} There is no congressional design to limit remedies.\textsuperscript{145} Because the ACAA was drafted to rectify the decision made in PVA v. DOT and to extend the Rehabilitation Act § 504, it has been argued that the ACAA should follow § 504.\textsuperscript{146} Therefore, since § 504 does not allow punitive damages, neither should the ACAA.\textsuperscript{147}

\begin{footnotesize}
\textsuperscript{137}The only case I found that denied punitive damages was Rowley v. American Airlines. The court denied punitive damages because if these damages were awarded, the Court feared it would defeat the purpose of deregulation that protected bumping passengers on an overbooked flight. 875 F.Supp 708, 712 (Or. 1995). Furthermore, where the courts are split on the availability of punitive damages, the vast majority of courts allow them. Milani, \textit{supra} note 7, at 414.
\textsuperscript{139}\textit{Id.}; \textit{see} Shinault, 936 F.2d at 803; Tallarico, 881 F.2d at 571; Price v. Delta Airlines, 5 F. Supp 2d 226, 238 (Vt. 1998).
\textsuperscript{140}Rivera, 1997 U.S. Dist. LEXIS 14989. \textit{See} Shinault, 936 F.2d at 803; Tallarico, 881 F.2d at 571.
\textsuperscript{141}Kopp v. American Airlines, Inc., 938 S.W.2d 357, 362 (Tenn. 1996).
\textsuperscript{142}Rivera, 1997 U.S. Dist. LEXIS at 14989. \textit{See} Shinault, 936 F.2d at 801.
\textsuperscript{143}Shinault, 936 F.2d at 801.
\textsuperscript{144}\textit{Id.} at 804.
\textsuperscript{145}\textit{Id.}
\textsuperscript{146}Milani, \textit{supra} note 7, at 415. \textit{See} Shinault, 936 F.2d at 802.
\textsuperscript{147}Shinault, 936 F. 2d at 802.
\end{footnotesize}
However, in Shinault, several arguments were made in favor of punitive damages. Just because the ACAA was drafted in response to *PVA v. DOT*, one cannot assume the same remedies as § 504 are automatically transferred to the ACAA. The only thing one can assume is that the legislature intended federal rules to apply to commercial airlines, regardless of federal funding.

The Shinault court provided another argument to support punitive damages for infractions of the ACAA. Even if the ACAA was an "extension" of § 504, § 504 was derived from §601 of Title VI of the Civil Rights Act. The Civil Rights Act addressed remedies pertaining to the reliance of federal funds. The entire purpose of the ACAA was to address all airlines, regardless of receipt of federal funds. Another obvious difference between the ACAA and § 504 is the ACAA was not passed under the Spending Clause of Congress, whereas § 504 was. Therefore, the argument that the ACAA is an extension of § 504 to prevent punitive damages based on the Act's derivation is unsound.

Moreover, when contemplating the appropriate damages to assign to ACAA infractions, one should again remember that the intent of the ACAA is to assist and prohibit discrimination of travelers with disabilities. A guaranteed way to ensure this is to reward punitive damages to travelers with disabilities who experience discrimination.

Generally, to award punitive damages, plaintiff must show that "defendant exhibits oppression, malice, gross negligence, willful or wanton misconduct, or reckless disregard for plaintiff's rights." Plaintiffs rarely attempt to recover punitive damages because of fear of defeat. This fear can be eliminated if plaintiffs allege that the airlines

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148 *Id.*
149 *Id.*
150 *Id.*
151 *Id.*
152 Shinault, 936 F.2d at 802.
153 *Id.*
154 *Id.*
155 The spending clause does not provide for remedies that make the complainant whole. *Id.* at 803.
156 *Id.* at 802.
157 14 C.F.R. § 382.1.
158 Milani, *supra* note 7, at 411. See *Tallarico*, 881 F.2d at 571.
are willfully, wantonly, or grossly negligently denying passengers with disabilities the opportunity to fly — the same opportunity that passengers without disabilities are automatically afforded.\textsuperscript{159} Perhaps punitive damages would eliminate discrimination altogether by reinforcing the importance of adhering to the ACAA.\textsuperscript{160}

In \textit{Rivera v. Delta Air Lines, Inc.}, the plaintiff alleged discrimination because she was not provided with a wheelchair.\textsuperscript{161} She had requested a wheelchair to transport her throughout the airport and to the airplane, but Delta Airlines disputed her disability when she arrived and did not provide her with a wheelchair.\textsuperscript{162} The plaintiff was able to withstand defendant’s motion for summary judgment, but was denied punitive damages because she did not prove willful or wanton misconduct by the airline.\textsuperscript{163} This appears to be blatant willful or wanton misconduct, considering that the nature of the plaintiff’s request was merely to provide the passenger with a wheelchair. Perhaps with a punishment of punitive damages, this airline would not think twice about providing a wheelchair for a passenger who requests one ahead of her flight.

Similarly, in \textit{Shinault v American Airlines}, Mr. Shinault, who was a quadriplegic and a spokesman for the Easter Seal Society, was traveling to attend a speaking engagement.\textsuperscript{164} His flight was delayed, which increased the chance of missing his connecting flight.\textsuperscript{165} Mr. Shinault alerted American Airlines that he was in a hurry and needed to catch another flight.\textsuperscript{166} However, the flight attendant did not allow him to deplane first in order to catch his flight.\textsuperscript{167} Mr. Shinault alleged that the airline was concerned that he would take up too much time and may hold up the rest of the aircraft.\textsuperscript{168} Once Mr. Shinault finally deplaned and reached his connecting flight’s gate, airline personnel informed Mr.

\begin{footnotes}
\item [159]\textit{Tallarico}, 881 F.2d at 571.
\item [160]\textit{Milani, supra} note 7, at 415.
\item [161]1997 U.S. Dist. LEXIS 14989.
\item [162]\textit{Id.}
\item [163]\textit{Id.}
\item [164]\textit{Shinault}, 936 F.2d at 798.
\item [165]\textit{Id.}
\item [166]\textit{Id.}
\item [167]\textit{Id.}
\item [168]\textit{Id.} at 799.
\end{footnotes}
Shinault he was too late to board the flight. However, Mr. Shinault later learned that when he arrived at the gate, the jet bridge door was still open; therefore it really was not too late. Again, it might be assumed that the airline did not want to be troubled with Mr. Shinault’s boarding the aircraft. Once more, willful and wanton misconduct of the airline resulted in wrongfully denying Mr. Shinault an opportunity to fly. Awarding punitive damages may reinforce the necessity to adhere to the ACAA.

In Tallarico, the court never examined the issue of whether punitive damages were allowed. Instead the court ruled that the plaintiff did not provide ample evidence to sustain a punitive damage award. As previously discussed, the plaintiff, Polly Tallarico was a fourteen-year-old girl who suffered from cerebral palsy, but was able to move by crawling and communicating via a communication board or a computer. She alleged that she neither threatened other passengers’ safety, nor was unable to comply with the airline’s safety standards. Thus, there was no justifiable reason for the airline personnel to require that she travel with an attendant. Again, because there was no threat to safety, the airline could be seen as recklessly disregarding the plaintiff’s rights. Punitive awards would likely force airlines to accommodate more qualified travelers with disabilities.

One court’s decision relayed a strong message to society. In Tunison v. Continental Airlines Corp., the plaintiff, who was blind and deaf, was able to communicate by “touching the hands of a person performing sign language, or by having letters traced in her palm.” However, after consulting their airline’s policy manuals, the airline crew did not feel comfortable allowing her to travel unaccompanied. The District Court held that the airline had clearly violated the ACAA

169 Shinault, 936 F.2d at 798.
170 Id.
171 Tallarico, 881 F.2d at 572.
172 Id.
173 Id. at 567.
174 Id.
175 Id.
177 Id.
by prohibiting her to fly by herself.\textsuperscript{178} Furthermore, the Court granted summary judgment to the punitive damage and injunctive relief claims, but the compensatory damages claims proceeded to trial.\textsuperscript{179} Defendants offered a settlement but the plaintiff refused it.\textsuperscript{180} Based on plaintiff's refusal, the District Court recognized that defendants violated the ACAA and made plaintiff the prevailing party but without awarding damages.\textsuperscript{181} Later, the Court of Appeals reversed the decision and ruled against the plaintiff stating: "The prevailing party must receive some affirmative relief."\textsuperscript{182} Since there were no damages awarded, the plaintiff could not remain the prevailing party.\textsuperscript{183} Thus, the holding of the Tunison court established a precedent that, if no damages are awarded, there is effectively no deterrence.

**Misunderstood Role of Airlines**

The experience of a traveler with a disability depends on the airline's compliance with the ACAA. Inherent in this compliance are four factors that are often ignored and/or misunderstood. First, airlines are required to hold travelers with disabilities to a higher duty of care.\textsuperscript{184} Second, the airlines are also required to presume competence rather than incompetence on behalf of passengers with disabilities, rather than incompetence.\textsuperscript{185} Third, the ACAA mandates that airlines do not abuse their discretion to allow travelers with disabilities on their aircraft.\textsuperscript{186} Finally, airlines need to eliminate stereotypes pertaining to disabilities.

**Maintain a Higher Duty of Care**

Airlines have always been held to a higher duty of care for people with disabilities.\textsuperscript{187} This higher standard of care arose from the control issue of traveling via air carriers.\textsuperscript{188} If a passenger decides to travel on foot,
the traveler is in complete control of her own destiny. However, when a passenger decides to utilize an air carrier, the passenger relinquishes control over her travel, placing it in the hands of the airline.\textsuperscript{169}

As society recognized the need to adapt to the needs of people with disabilities, the air travel industry was no exception.\textsuperscript{159} Thus, an inherent, even higher standard of care applied to travelers with disabilities.\textsuperscript{191} Opponents raise the issue that the ACAA should not treat travelers with disabilities differently by applying a higher duty of care to travelers with disabilities.\textsuperscript{192} Instead, the airlines should apply the same duty of care to all travelers.\textsuperscript{193} However, people with disabilities usually require more services or assistance.\textsuperscript{194} As a result of the ACAA, airlines owe a higher duty of care to passengers with disabilities.\textsuperscript{195} Airlines are required to provide reasonable care to maintain passenger safety, in addition to a “duty to exercise additional care for his safety as was reasonably required.”\textsuperscript{196}

\textbf{Eliminate the Presumption of Incompetence}

Before the Americans with Disabilities Act, people with disabilities were presumed to be incompetent.\textsuperscript{197} However, this legislation attempted to change society’s outlook by changing the presumption to that of competency.\textsuperscript{198} This new presumption was transferred on to the ACAA.\textsuperscript{199}

If an airline knowingly accepts a passenger with a disability, the airline owes a duty to that passenger to provide any necessary special care or accommodations.\textsuperscript{200} Likewise, when an airline allows access to

\textsuperscript{169}Id.
\textsuperscript{159}Id.
\textsuperscript{191}Id.
\textsuperscript{192}Milani, supra note 7, at 372.
\textsuperscript{193}Id. at 369.
\textsuperscript{194}Id. at 372.
\textsuperscript{195}Vaughn v. Northwest Airlines, Inc., 558 N.W.2d 736, 743 (Minn. 1997).
\textsuperscript{196}Id.
\textsuperscript{197}Milani, supra note 7, at 372.
\textsuperscript{198}Id.
\textsuperscript{199}Id.
\textsuperscript{200}Id. at 377.
a passenger who is unable to care for herself, the airline must provide an attendant.\textsuperscript{201}

An airline’s duty is not implicated merely by the existence of a disability.\textsuperscript{202} The air carrier must be aware of the disability. There is no duty on behalf of the airline to conduct an investigation to establish a disability.\textsuperscript{203} Furthermore, the disability must be serious enough to render assistance.\textsuperscript{204} Despite the ambiguous standard of "serious enough," this standard seems to be a workable one.

**Maintain Appropriate Level of Discretion**

An airline’s responsibility includes an intrinsic discretion to deny passengers with disabilities.\textsuperscript{205} Airlines have the ability to deny passengers with disabilities the opportunity to fly if they threaten their own safety or the safety of other passengers.\textsuperscript{206} Because of the lack of enforceability of the ACA, there is definite room for airlines to abuse this discretion. Even though the language in the DOT v. PVA hints that air carriers would have discretion, it is certainly not meant to be limitless.\textsuperscript{207}

**Change Views Regarding People with Disabilities by Eliminating Stereotypes**

One last obstacle that clouds the role of the airlines is the false notion that travelers with disabilities are more likely to experience medical difficulties than travelers without disabilities.\textsuperscript{208} This stereotype may often distort an airline’s decision making process. However, there is no proof of this assumption. The Jacobson court deemed this concept completely unfounded and restricted by the Rehabilitation Act,\textsuperscript{209} the main purpose of which is to prevent general stereotypes.\textsuperscript{210} Just

\textsuperscript{201}Id.
\textsuperscript{202}Milani, supra note 7, at 380.
\textsuperscript{203}Id.
\textsuperscript{204}Id.
\textsuperscript{205}14 C.F.R. § 382.
\textsuperscript{206}Id.
\textsuperscript{207}Id.
\textsuperscript{208}Jacobson, 742 F.2d at 1206.
\textsuperscript{209}Id.
\textsuperscript{210}Id.
because a passenger is unable to walk does not imply that this passenger was more likely to experience further medical complications more so than another passenger who was completely ambulatory. 211 "Mere possession of a handicap is not a permissible ground for assuming an inability to function in a particular context." 212

**Passive Enforcement of ACAA**

If a traveler with disabilities has experienced discrimination, she would have the option to address the airline itself or file a complaint with the Department of Transportation. 213 Because this system is completely complaint driven, it is not the most efficient way to ensure airlines are adhering to the ACAA.

If a passenger chooses to contact the airline directly, there are guidelines. 214 Each airline is required to have a complaint resolution officer (CRO) either in each airport the airline services or accessible by phone (including a phone with a TDD). 215 The CRO manages complaints regarding violations of the ACAA. 216 Even though the CRO has the authority to resolve disputes when it is possible, 217 the CRO does not have the authority to override a pilot's safety assessment in refusing a passenger. 218 Should the CRO agree that a violation of the ACAA has occurred, the entire situation must be put in writing, including the proposed resolution. 219 Regardless of the outcome of the passenger's complaint, the CRO is obligated to inform the passenger of her right to file a complaint with the DOT. 220

The DOT is charged with enforcing the ACAA. 221 However, this process is complaint driven, in that once the bureau receives a

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211 Milani, *supra* note 7, at 397.
212 *Id.*
213 14 C.F.R. § 382.65(a)(5)(iv).
214 *Id.*
215 *Id.* at § 382.65(a)(2). TDD stands for Telecommunications Devices for the Deaf.
216 *Id.* at § 382.65(a)(1).
217 *Id.* at § 382.65(a)(4).
218 14 C.F.R. § 382.65(a)(5).
219 *Id.*
220 *Id.*
221 *Id.* at § 382.65.
complaint, only then will it pursue the issue.\textsuperscript{222} This procedure clearly explains why there are so many violations of the ACAA: there is no proactive process to combat violations, rather there is only a passive approach. Perhaps random spot checks by the DOT on the aircraft itself would eliminate ACAA violations. Conceivably, this type of enforcement would remind the air carriers of the importance of the ACAA.

\textbf{CONCLUSION}

Although the disabled community has seen great progress in the realm of air travel, there are still more strides to be made. Airlines need to be reminded constantly that the purpose of the ACAA’s is to facilitate travel for people with disabilities without discrimination. In addition, changes among the legislation should be made. An absence of concrete standards to determine when a traveler with disabilities is capable of flying, either independently or with an attendant, complicates analysis of ACAA. A lack of consistent sensitivity and awareness training contributes to the discrimination toward travelers with disabilities, violating the ACAA. Further, punitive damages could serve as a key deterrent to remind airlines that ACAA violations will not be tolerated. Airlines’ roles need to be more clearly defined. Finally, an active method of enforcement on behalf of the DOT would promote compliance with the ACAA. As we enter the new millennium, changes must be made to ensure the ACAA is actively enforced.

\textsuperscript{222}Id.