Trouble In The Skies: The ACAA's Failure to Protect Passengers With Disabilities

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Introduction

Bede Vanderhorst waited to board a flight from Newark, New Jersey to Los Angeles on September 2, 2012.[1] He waited with his parents, Joan and Robert Vanderhorst, as they looked forward to a relaxing trip in their first class seats on the American Airlines flight.[2] This was not the first time that sixteen-year-old Bede had flown.[3] In fact, Bede had traveled on dozens of flights with his parents.[4] This would be the first time his family had flown first class.[5] The seating arrangement allowed the family to sit close together, with one parent next to Bede.[6]

As the Vanderhorsts sat waiting to board, an American Airlines representative informed Robert and Joan that they were unable to board the family on the flight because Bede presented a "flight risk."[7] The airline then asked the family to take the next flight because, as the airline later reported, Bede was "agitated" and running around in the waiting area.[8] Joan Vanderhorst

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1. Aaron Cooper, *Teen with Down Syndrome Stopped from Boarding Plane*, CNN TRAVEL (Sept. 5, 2012), http://www.cnn.com/2012/09/05/travel/airline-down-syndrome/index.html.

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. Lewis Griswold, *Down Syndrome Teen Barred from One U.S. Flight, Kept Isolated on Second, Family Says*, THESTAR.COM (Sept. 6, 2012), http://www.thestar.com/news/world/2012/09/06/down_syndrome_teen_barred_from_one_us_flight_kept_isolated_on_second_family_says.html.

7. *See* Victoria Cavaliere, *Down Syndrome Teen Booted from AA Flight*, NY DAILY NEWS (Sept. 4, 2012, 6:51 PM), http://articles.nydailynews.com/2012-09-04/news/33587158_1_aa-flight-bede-pilot-and-crew (quoting airline statement, "[a]sking the family to take the next flight was a decision that was made with careful consideration and that was done based on the behavior of the teen"); Agnes Pawlowski, *Teenager with Down Syndrome Not Allowed to Board American Airlines Flight*, NBC NEWS (Sept. 5, 2012), http://www.nbcnews.com/travel/teenager-down-syndrome-not-allowed-board-american-airlines-flight-981124 (discussing how the airline's safety concern stemmed from Bede's size of 5'1" and weight of 160 pounds, as well as how close his first-class seat was to the cockpit of the airplane).

8. Griswold, *supra* note 6; Cooper, *supra* note 1.

started recording the incident on her cell phone but an airline official warned her that she could not record anything because she was "in a security-controlled area."[9] Joan did manage to capture video of Bede sitting quietly while he played with his hat.[10] The video also displays Robert Vanderhorst arguing on Bede's behalf by saying that Bede was behaving well and showing that he was not a problem.[11] However, nothing could help the shocked and upset Vanderhorst family. They had been banned from the flight.

The reason the Vanderhorsts were banned from the flight may seem unclear, but for Joan and Robert Vanderhorst, it is obvious why Bede was deemed a flight risk.[12] As Robert told various news sources after the incident, the family believes that American Airlines discriminated against them because Bede Vanderhorst has Down syndrome.[13] Robert also said that another airline discriminated against his family later that day.[14] After the distressing incident, the Vanderhorsts boarded a United Airlines flight only to find themselves seated in the very back row of the plane behind two empty rows of seats.[15]

In a written statement, an American Airlines spokesman said that the pilot noticed Bede's agitated behavior and asked a customer service manager to talk to the family to see if the airline could "help him calm down and get better acclimated to the situation."[16] The airline also stated that their effort was "ultimately unsuccessful"[17] and explained that the video showing Bede behaving "was taken in a quiet moment."[18] The *New York Daily News* eventually reported that the pilot and crew never spoke to the Vanderhorsts and that the airline would not comment on whether other passengers had witnessed Bede's alleged "agitation."[19] The Vanderhorsts have said that they would like to file suit against both American Airlines and United Airlines, but it

9. Cavaliere, *supra* note 7.

10. *Id.*

11. *Id.*

12. E-mail from Robert Vanderhorst to author (Nov. 15, 2012, 2:23 AM) (on file with author); *see* Debra Cassens Weiss, *Lawyer Considers Suit after American Bars His Son with Down Syndrome from Plane*, ABA JOURNAL (Sept. 5, 2012, 6:37 AM), http://www.abajournal.com/news/article/lawyer_considers_suit_after_american_bars_his_down_syndrome_son_from_plane.

13. E-mail from Robert Vanderhorst, *supra* note 12.

14. Griswold, *supra* note 6.

15. *Id.*

16. Cooper, *supra* note 1 (quoting an American Airlines spokesman).

17. *Id.*

18. Griswold, *supra* note 6 (quoting an American Airlines spokesman).

19. Cavaliere, *supra* note 7.

is likely that their case has less traction than it seems.[20]

All U.S. air carriers, including any foreign air carrier that provides air transportation to and from the United States, are governed by the Air Carrier Access Act (ACAA).[21] The ACAA purports to prohibit discrimination by air carriers against passengers with qualified physical or mental impairments.[22] The Department of Transportation (DOT) implemented the ACAA by developing a set of regulations, with which all air carriers must comply.[23] These regulations include procedures that airlines must follow, such as the services that must be provided to those with disabilities, the rights of the airlines when dealing with passengers with disabilities, and the method passengers must use when filing complaints that an airline has discriminated against them.[24] While there is a full complaint system in place to protect passengers, the system itself may not be as effective as Congress intended it to be.[25]

Unfortunately for the Vanderhorsts, the statute and the regulations do not expressly grant a private right of action for the victims of discrimination.[26] Most recently, the Second Circuit considered whether an implied right of action exists in the ACAA in *Lopez v. Jet Blue Airways*.[27] That court ultimately followed the Tenth and Eleventh Circuits, which found no implied private right of action in the ACAA.[28] In *Lopez*, the court also considered whether victims of discrimination by air carriers could allege a cause of action under Title III of the Americans with Disabilities Act of 1990 (ADA).[29] The court found that the ADA carves out an exception for air carriers and facilities that airlines use primarily for air transportation such as airport terminals.[30] The court upheld the dismissal of Lopez's discrimination complaint because

20. Vanderhorst, *supra* note 12 (stating that while American Airlines is in bankruptcy only a creditor's claim may be filed against the airline).

21. 49 U.S.C. § 41705 (2012).

22. *Id.*

23. 1 CHARLES KRAUSE & KENT KRAUSE, AVIATION TORT AND REGULATORY LAW § 5:18 (2012).

24. 14 C.F.R. § 382 (2012).

25. *See* AVIATION CONSUMER PROT. DIV., U.S. DEP'T OF TRANSP., ANNUAL REPORT ON DISABILITY-RELATED AIR TRAVEL COMPLAINTS 6–7 [hereinafter ANNUAL REPORT], *available at* www.dot.gov/airconsumer/annual-report-disability-related-air-travel-complaints (last updated June 29, 2012) (discussing DOT fines for undercounting complaints).

26. KRAUSE & KRAUSE, *supra* note 23.

27. 662 F.3d 593, 596 (2d Cir. 2011).

28. *Id.* at 597.

29. *Id.* at 598.

30. *Id.* at 599.

an air carrier could not be held liable under Title III of the ADA and because no private right of action existed for a violation of the ACAA.[31]

While Bede Vanderhorst's story seems more shocking than most, disability discrimination exists in many forms. A man named Johnnie Tuitel experienced a similar situation when he was banned from a flight because he was "too disabled to fly alone."[32] Like Bede's situation, the airline cited safety reasons for refusing to allow Mr. Tuitel to board the plane.[33] Though he has cerebral palsy and uses a wheelchair, Tuitel was insulted and bewildered that the airline had labeled him as unable to help himself, when those who had made that judgment had no medical knowledge.[34] Increased publicity about potential airline discrimination has also come from abroad.[35] In 2012, the European Commission established new guidelines for European Union (EU) airlines to follow so that thousands of Paralympians flying to London would not be subjected to the discrimination becoming more common among EU airlines.[36] Complaints of discrimination in the United States have not been highly visible to the general public, but the detailed breakdown of complaint data from passengers with disabilities includes hundreds of complaints that range from the inaccessibility of aircraft to damage to assistive devices (such as wheelchairs) to the failure of the air

31. *Id.* at 600.

32. Marnie Hunter, *Passenger: Airline said I'm 'too disabled' to fly alone*, CNN TRAVEL (Oct. 16, 2010, 2:20 PM), http://www.cnn.com/2010/TRAVEL/10/15/usairways.disabled.flier/index.html (describing Tuitel's experience flying numerous times alone because of his work as a motivational speaker).

33. *Id.* ("[T]he airline's official policy requires passengers with severe mobility impairments to travel with someone who would be able to help them evacuate the aircraft.").

34. *Id.* (quoting Johnnie Tuitel, "They basically told me I was too disabled to fly and I had to fly with a companion and I had to purchase that companion's ticket").

35. *See* Geoff Meade, *Disabled Travelers Still Face Airline Refusals*, INDEPENDENT (June 14, 2012), http://www.independent.co.uk/news/uk/home-news/disabled-travellers-still-face-airline-refusals-european-commission-warns-7851102.html ("[P]assengers have been facing 'recurring problems with refusals and inconsistent requirements for medical certificates and for passengers to be accompanied.'"); *see also* Kate Schneider, *How Air Travel Is Plane Hell For the Disabled*, HERALD SUN (Oct. 25, 2012), http://www.heraldsun.com.au/travel/news/how-air-travel-is-plane-hell-for-the-disabled/story-fn32891l-1226503054799 (reporting that Australian airlines may be able to claim "unjustifiable hardship" as a basis for refusing to allow passengers with disabilities to board flights).

36. While the EU prohibited discrimination by airlines against passengers with disabilities in 2008, the guidelines reinforced the principle that air carriers may deny boarding to passengers with disabilities if the denial is "based on clearly justified safety reasons." Meade, *supra* note 35 (quoting EU Transport Commissioner Siim Kallas).

carrier to provide adequate assistance.[37]

This Note advocates for supplying disabled individuals with a private right of action against air carriers who discriminate against them. This Note will begin in Part I by providing an in-depth look at the ACAA and the current view of case law covering the ACAA. It will also briefly discuss the ADA and why it does not cover air carriers. In Part II, this Note will argue that including a private right of action in the ACAA is an important step in developing the law of disability rights. Part III will explain why the complaint and enforcement procedures of the ACAA are inadequate. Finally, in Part IV, this Note recommends both that Congress amend the ACAA to include a private right of action and create other alternatives for supplying those who are disabled with a private right of action against air carriers.

I. The ACAA and Disability Rights Today

The statutory language of the ACAA is relatively vague,[38] so most of its substance comes from federal regulations.[39] These regulations set forth the basic rules that airlines must follow when dealing with passengers with disabilities.[40] There is no language about a private right of action in either the statute itself or the regulations governing it.[41]

A. Requirements of the ACAA

Under the ACAA, an airline may not discriminate against any individual with a physical or mental impairment.[42] The DOT further defined members of the protected group as any individual who has a physical or mental impairment that "substantially limits one or more major life activities" on a permanent or temporary basis, "has a record of such an impairment, or is

37. ANNUAL REPORT, *supra* note 25, at App. A; *see* 14 C.F.R. § 382.157(b) (2012) (stating that airlines must report the passenger's disability as well as the alleged discrimination or service problem, including "refusal to board, refusal to board without an attendant, security issues concerning disability, aircraft not accessible, airport not accessible, advance notice dispute, seating accommodation, failure to provide adequate or timely assistance, damage to assistive device, storage and delay of assistive device, service animal problem, unsatisfactory information, and other" problems).

38. *See* 49 U.S.C. § 41705 (2012).

39. 14 C.F.R. § 382 (2012).

40. *Id.*

41. *See* 49 U.S.C. § 41705; 14 C.F.R. § 382.

42. 49 U.S.C. § 41705(a)(1) (2012). The ACAA also prohibits discrimination against individuals with "a record of such an impairment" and "regarded as having such an impairment." 49 U.S.C. § 41705(a)(2)–(3) (2012).

regarded as having such an impairment."[43] The regulations expressly incorporate several impairments as covered by the ACAA, such as cerebral palsy, epilepsy, muscular dystrophy, drug addiction, cancer, alcoholism, and orthopedic, visual, speech, and hearing impairments.[44] Based on the definitions in the regulations, it would be hard to identify a physical or mental impairment not covered by the ACAA.[45]

The ACAA fully applies to all U.S. air carriers and to foreign carriers with respect to flights that begin or end in a U.S. airport.[46] The only exception permitted to these regulations is if an airline fills out an application that proposes a detailed description of an "alternative policy, practice, or other accommodation" that the airline would use instead of complying with ACAA regulations.[47] The airline must also provide some explanation as to how the alternative practice "provides substantially equivalent accessibility to passengers with disabilities."[48] After reviewing each application, the DOT may grant the application if it determines that the proposed policy protects passengers with disabilities as well as airlines that directly comply with the ACAA regulations.[49] Currently, there is no record of an airline proposing an alternate policy; accordingly, all airlines with flights that begin or end in a U.S. airport must comply with ACAA regulations.

The regulations also set forth a general nondiscrimination requirement stating that air carriers "must not discriminate against any qualified individual with a disability, by reason of such disability, in the provision of air transportation" either directly or indirectly, such as by contract, license, or other indirect means.[50] Air carriers also may not require passengers with disabilities to accept special services that they do not request.[51] Air carriers must not limit the number of passengers with disabilities on a flight,[52] and they may not refuse to provide transportation to a passenger with a disability on the basis of his disability.[53]

43. 14 C.F.R. § 382.3 (2012).
44. *Id.*
45. *See id.*
46. 14 C.F.R. § 382.7 (2012).
47. 14 C.F.R. § 382.10(c)(2).
48. *Id.*
49. 14 C.F.R. § 382.10(d).
50. 14 C.F.R. § 382.11(a)(1).
51. 14 C.F.R. § 382.11(a)(2).
52. 14 C.F.R. § 382.17 (2012).
53. 14 C.F.R. § 382.19(a).

ACAA regulations do state that air carriers may ban passengers with disabilities on the basis of safety.[54] This regulation might seem particularly confusing and concerning for travelers with disabilities. The regulations explicitly state that air carriers may not refuse to provide transportation to an individual with a disability because "the person's disability results in appearance or involuntary behavior that may offend, annoy, or inconvenience crewmembers or other passengers."[55] Nevertheless, the air carrier may determine that a passenger with a disability poses a "direct threat" and therefore, the air carrier is allowed to ban this passenger from a flight.[56] The ACAA defines a 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."[57] As the regulations state, the only way that Bede Vanderhorst could have been legitimately banned from the American Airlines flight is if he had presented a significant risk to the health or safety of others on a "direct threat" level.

To determine if Bede posed a direct threat, the ACAA required American Airlines to make an "individualized assessment, based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence."[58] Using reasonable judgment that is based on this knowledge or evidence, the carrier should determine "i) [t]he nature, duration, and severity of the risk; ii) [t]he probability that the potential harm to the health and safety of others will actually occur; and iii) [w]hether reasonable modifications of policies, practices, or procedures will mitigate the risk."[59]

If a carrier thus determines that a passenger with a disability presents a "direct threat," the carrier must "select the least restrictive response from the point of view of the passenger, consistent with protecting the health and safety of others."[60] If the carrier can protect the health and safety of others without banning the passenger from the flight, ACAA regulations require the carrier to pursue this option.[61] The regulations emphasize this point in another section that requires air carriers to modify their

54. 14 C.F.R. § 382.19(c).
55. 14 C.F.R. § 382.19(b).
56. 14 C.F.R. § 382.19(c)(1).
57. 14 C.F.R. § 382.3.
58. 14 C.F.R. § 382.19(c)(1) (2012).
59. *Id.*
60. 14 C.F.R. § 382.19(c)(2).
61. *Id.*

"policies, practices, and facilities" when necessary in an effort to provide nondiscriminatory service to a passenger with a disability.[62] If the airline ultimately refuses transportation to the passenger, the carrier must provide a written statement to the passenger explaining why the passenger was justifiably barred from the flight within ten days of the ban.[63] Other regulations prohibit air carriers from requiring either that passengers with disabilities provide a medical certificate for flying[64] or advance notice that a passenger with a disability is traveling on the flight[65] (unless the passenger needs certain specific services in connection with the flight).[66] Carriers may not impose restrictions on passengers with disabilities that do not apply to other passengers, such as restricting the passenger's movement in the terminal.[67]

Airlines must also comply with accessibility requirements that pertain to armrests, seating, lavatories, and other airline facilities to ensure that passengers with disabilities have complete access to the aircraft.[68] ACAA regulations set forth seating, boarding, storage, and deplaning guidelines that implicate nearly every part of the flight in an effort to provide adequate service to passengers with disabilities.[69] Another important regulation requires airlines that operate aircraft with nineteen or more passenger seats to provide training for all personnel who deal with the "traveling public."[70] The ACAA requires air carriers to train each employee "to proficiency" with the requirements of the ACAA and the air carrier's procedures for complying with the ACAA.[71] However, the regulations do not define "proficiency."[72] Air carriers must train employees "with respect to awareness and appropriate responses to passengers with a disability" and to recognize disabilities and aid in providing effective service to these

62. 14 C.F.R. § 382.13(a).

63. 14 C.F.R. § 382.19(d).

64. 14 C.F.R. § 382.23 (2012).

65. 14 C.F.R. § 382.25.

66. 14 C.F.R. § 382.27.

67. 14 C.F.R. § 382.33.

68. 14 C.F.R. § 382.61-65 (establishing that aircrafts with only one aisle are not subject to the lavatory requirements).

69. 14 C.F.R. § 382.

70. 14 C.F.R. § 382.141(a) (2012) (mandating that airlines also train employees to "recognize requests for communication accommodation from individuals whose hearing or vision is impaired" and to consult with organizations representing persons with disabilities when airlines develop their training programs).

71. *Id.*

72. *See* 14 C.F.R. § 382.3 (listing definitions for various terms found in the statute but not for the term "proficiency").

individuals.[73] The statute requires air carriers to create programs that will ensure that all personnel receive "refresher training" to maintain proficiency at least once every three years.[74] Even air carriers that operate smaller aircraft must complete some, albeit minimal, training.[75]

B. ACAA Complaint and Enforcement Procedures

The DOT created a complaint system and enforcement procedures as the only means of redress under the ACAA to individuals who feel they have been wronged by an air carrier.[76] Carriers providing service on larger aircraft must provide trained Complaint Resolution Officials (CROs) to carry out this system.[77] When an individual complains to a CRO before there is a violation of the ACAA, the CRO must take "whatever action is necessary to ensure compliance with the regulations."[78] CROs possess the authority to resolve complaints on behalf of the carrier and to overrule decisions made by other airline representatives, except decisions made by the pilot of the aircraft in the name of safety.[79]

If a violation has already occurred and the CRO agrees that a violation has occurred, the CRO must provide a written statement that establishes the next steps the carrier will take in response to the violation.[80] When a CRO does not agree that there was a violation, the CRO must provide the complainant with a written statement of the reason why the CRO determined there was no violation.[81] Carriers must respond to written disability complaints and either admit or deny that a violation occurred.[82] Yet, these procedures do not ensure that the matter will actually be investigated. The DOT can investigate an alleged violation of the ACAA and pursue an enforcement action if the complainant files a formal complaint within six months of the incident.[83] The DOT may invoke several remedies, including issuing orders to compel

73. 14 C.F.R. § 382.141(a)(2).

74. 14 C.F.R. § 382.141(a)(5).

75. 14 C.F.R. § 382.141(b).

76. 14 C.F.R. § 382(K) (2012).

77. 14 C.F.R. § 382.151(d) ("Each CRO must be thoroughly familiar with the requirements of this Part and the carrier's procedures with respect to passengers with a disability.").

78. 14 C.F.R. § 382.153(a).

79. 14 C.F.R. § 382.151(e).

80. 14 C.F.R. § 382.153(b).

81. 14 C.F.R. § 382.153(c). The statement must also "inform the complainant of his or her right to pursue DOT enforcement action." 14 C.F.R. § 382.153(d) (2012).

82. 14 C.F.R. § 382.155 (2012).

83. 14 C.F.R. § 382.159 (2012).

compliance with an applicable statutory provision,[84] revoking an airline's air carrier certificate,[85] charging the air carrier with fines,[86] or bringing enforcement actions against the air carrier.[87] A single violation under the ACAA regulations can warrant over $25,000 in fines, but this money does not go to the injured party.[88] Furthermore, an individual with "a substantial interest" in a DOT enforcement action may petition for judicial review of a DOT enforcement by the United States Court of Appeals.[89] The Court of Appeals may "affirm, amend, modify, or set aside" the DOT enforcement as well as order that further proceedings be undertaken.[90]

The regulations also require carriers to "categorize disability-related complaints . . . according to the type of disability and nature of [the] complaint," and to submit a report of this data annually.[91] While the complaint system is undoubtedly efficient, it is questionable whether it alone can fully vindicate the rights of victims of discrimination.

C. The ACAA and the Lack of a Private Right of Action

With a private right of action, a passenger against whom an air carrier has discriminated on the basis of her disability in violation of the ACAA could bring a lawsuit against that air carrier. It is clear that there is no express private right of action contained in the ACAA.[92] Because of the ACAA's silence on this point, plaintiffs have asked several courts to determine whether the ACAA provides an implied private right of action.[93]

Before 2001, the Fifth and Eighth Circuits found that the

84. 49 U.S.C. § 46101(a)(4) (2012).

85. 49 U.S.C. § 41110(a)(2)(B) (2012); *see* 14 C.F.R. § 119.1 (2012) (describing how the Federal Aviation Administration must issue an air carrier a certificate before the air carrier can operate).

86. 49 U.S.C. § 46301(a)(1) (2012).

87. 49 U.S.C. § 46106 (2012); 49 U.S.C. § 46107(b)(1) (2012).

88. Andrea Kennedy, *What Happens When Airlines Violate the Air Carrier Access Act (The ADA of the Skies)*, EXAMINER.COM (Oct. 29, 2010), http://www.examiner.com/article/what-happens-when-airlines-violate-the-air-carrier-access-act-the-ada-of-the-skies.

89. 49 U.S.C. § 46110(a) (2012).

90. 49 U.S.C. § 46110(c).

91. 14 C.F.R. § 382.157 (2012).

92. 49 U.S.C. § 41705 (2012).

93. Boswell v. Skywest Airlines, Inc., 361 F.3d 1263, 1269 (10th Cir. 2004); Love v. Delta Air Lines, 310 F.3d 1347, 1351–52 (11th Cir. 2002); Shinault v. American Airlines, Inc., 936 F.2d 796, 803–04 (5th Cir. 1991); Tallarico v. Trans World Airlines, Inc., 881 F.2d 566, 570 (8th Cir. 1989).

ACAA provided an implied private right of action.[94] The Eighth Circuit examined the legislative history of the ACAA and found that Congress did not express an intention to create or deny an implied private right of action to enforce the ACAA.[95] They did find that the "circumstances surrounding the enactment of the Act" supported finding an implicit intent to create a private cause of action.[96] The court found that providing a remedy for passengers with disabilities who were victims of air carrier discrimination was consistent with the purpose of the ACAA, which is to prevent discrimination against passengers with disabilities.[97]

The Fifth Circuit took a different approach than the Eighth Circuit by invoking a "well-established canon of statutory construction."[98] The court went on to explain that the canon states that if a statutory right exists, this right "implies the existence of all necessary and appropriate remedies."[99] The court focused on the abrogation of this statutory right and the right to redress this abrogation with damages if the plaintiff is able to "prevail on the merits."[100] Therefore, both circuits concluded that the ACAA does provide an implied right of action.

However, in *Alexander v. Sandoval*,[101] the Supreme Court held that Congress must create a private right of action in order for private citizens to enforce a federal law.[102] The Court also reaffirmed that congressional intent to create a private right and a private remedy must be apparent.[103] Without congressional intent to create a private remedy, "a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute."[104]

After *Sandoval* clarified the standard that courts must use to find an implied right of action, the Tenth and Eleventh Circuits

94. *Shinault*, 936 F.2d at 803–04; *Tallarico*, 881 F.2d at 570.

95. *Tallarico*, 881 F.2d at 568.

96. *Id.* at 568–69.

97. *Id.* at 570.

98. *Shinault*, 936 F.2d at 804.

99. *Id.* (citing Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 239 (1969)); *see* Wicker v. Hoppock, 73 U.S. 94, 99 (1867) ("The general rule is, that when a wrong has been done, and the law gives a remedy, the compensation shall be equal to the injury.").

100. *Shinault*, 936 F.2d at 805.

101. 532 U.S. 275 (2001).

102. *Id.* at 286 (citing Touche Ross & Co. v. Redington, 442 U.S. 560, 578 (1979)).

103. *Sandoval*, 532 U.S. at 286.

104. *Id.* at 286–87.

examined the ACAA for an implied private right of action.[105] Because the Fifth and Eighth Circuits reached decisions under a different standard, the Eleventh Circuit rejected the holdings of these cases as irrelevant to their inquiry.[106] The Eleventh Circuit looked to "rights-creating" language in the ACAA that would "explicitly confer a right directly on a class of persons."[107] The court also examined the ACAA's enforcement provisions as well as the legislative history and circumstances surrounding the ACAA's enactment.[108] The court found that the ACAA's enforcement procedures, including the CRO complaint system, the possibility of DOT enforcement, and the opportunity to seek review by the U.S. Court of Appeals, provided adequate redress for passengers with disabilities who want to file suit.[109]

The Eleventh Circuit concluded that because Congress expressly provided certain outlets to passengers with disabilities claiming discrimination, it did not intend to provide other outlets such as a private right of action.[110] The court also reasoned that, while Congress passed the ACAA to protect individuals with disabilities from discriminatory treatment by the air carriers,[111] it could have established a private right of action to accomplish this goal.[112] Instead, Congress chose to "create an elaborate administrative enforcement scheme" subject to limited review by a federal court of appeals.[113] The court held that, because Congress had created so many other mechanisms for redressing injuries to passengers with disabilities, and because there was a right of action in a different form, the court could not in good conscience create a private cause of action.[114]

Two years after *Love v. Delta Air Lines*, the Tenth Circuit echoed the Eleventh Circuit.[115] In *Boswell v. Skywest Airlines*, the court also held that the ACAA lacked a private right of action, relying heavily on the Eleventh Circuit's reasoning.[116] The court

105. Boswell v. Skywest Airlines, Inc., 361 F.3d 1263, 1269 (10th Cir. 2004); Love v. Delta Air Lines, 310 F.3d 1347, 1351–52 (11th Cir. 2002).

106. *Love*, 310 F.3d at 1358–59.

107. *Id.* at 1352.

108. *Id.* at 1352–53.

109. *Id.* at 1354–56.

110. *Id.*, 310 F.3d at 1357.

111. *Id.* at 1358 (citing S. Rep. No. 400, at 2329 (1986)).

112. *Love*, 310 F.3d at 1358.

113. *Id.*

114. *Id.*

115. Boswell v. Skywest Airlines, Inc., 361 F.3d 1263, 1264–65 (10th Cir. 2004).

116. *Id.* at 1269.

focused on the complaint and enforcement scheme and found compelling the argument that Congress intended to preclude other ways of enforcing the ACAA.[117] While the plaintiff in *Boswell* argued that a private right of action would give individuals "more comprehensive relief" for ACAA violations, the Tenth Circuit was unwilling to impose a private right of action as a remedy.[118] The court stated that it was "simply not authorized to compare the remedies specifically provided by Congress with a private right of action and to then impose the latter remedy if we deem it a better means of enforcing the statute."[119]

The Second Circuit Court of Appeals decided one of the most recent cases to consider a private right of action in the ACAA in December 2011.[120] In *Lopez v. Jet Blue Airways*, the court addressed disability discrimination claims under the ACAA and the ADA.[121] The court agreed with the Tenth and Eleventh Circuits, concluding that the text and structure of the ACAA did not indicate that Congress intended to include a private right of action in the statute.[122] Days after the *Lopez* decision, a federal district court similarly held that the plaintiffs lacked a private right of action under federal law because the ACAA did not provide one.[123] The district court appeared to put a definitive end to litigation on this topic when it stated that the ACAA provided "an administrative mechanism to compel compliance but not to compensate parties injured by a violation."[124]

Additionally, the plaintiff in *Lopez* claimed a private right of action under Title III of the ADA.[125] Title III lays out a private right of action for injunctive relief for violations of the ADA.[126] In *Lopez*, a private right of action might have flowed from two parts of the ADA: the right could have arisen from disability discrimination in "specified public transportation services"[127] and/or in a "place of public accommodation."[128]

In Title III, the provision concerning specified public

117. *Id.*
118. *Id.* at 1270.
119. *Id.*
120. Lopez v. Jet Blue Airways, 662 F.3d 593, 593 (2d Cir. 2011).
121. *Id.* at 595.
122. *Id.* at 598.
123. Gill v. JetBlue Airways Corp., 836 F. Supp. 2d 33, 47–48 (D. Mass. 2011).
124. *Id.* at 47.
125. *Lopez*, 662 F.3d at 598.
126. 42 U.S.C. § 12188(a) (2012).
127. 42 U.S.C. § 12184.
128. 42 U.S.C. § 12182.

transportation services prohibits disability discrimination by private entities whose primary function as a business is transporting people.[129] Under the ADA, specified public transportation is defined as "transportation by bus, rail, or any other conveyance (other than by aircraft) that provides the general public with general or special service (including charter service) on a regular and continuing basis."[130] The Second Circuit reasoned that all air carriers are exempt from this provision of the ADA since the statute specifically carves out an exception for aircraft.[131]

The statute also prohibits disability discrimination by anyone who "owns, leases . . . , or operates a place of public accommodation."[132] As the *Lopez* court noted, out of twelve categories for public accommodations, the only one apparently relevant to air carriers is "a terminal, depot, or other station used for specified public transportation."[133] The problem with this claim is that these locations (terminals, depots, etc.) are considered public accommodations "only if they are 'used for' modes of transportation that fall within the statutory definition of 'specified public transportation.'"[134] This definition brought the court back to the claim for a private right of action in specified public transportation services. Because the putative discrimination occurred at an airport terminal, and because airport terminals are used primarily for air transportation, the terminal is not a public accommodation under Title III.[135]

While the *Lopez* court only examined two parts of the ADA and its applicability to air carriers, there are other provisions in Title III under which a court might still hold air carriers liable.[136] First, the court could consider the air carriers under each of the twelve definitions for public accommodations instead of just the one category dealing with terminals, depots, or other stations used for specified public transportation.[137] Second, the court could have inquired into whether air carriers should be held liable for

129. 42 U.S.C. § 12184(a).

130. 42 U.S.C. § 12181(10)).

131. Lopez v. Jet Blue Airways, 662 F.3d 593, 598 (2d Cir. 2011).

132. 42 U.S.C. § 12182(a) (2012).

133. *Id.*; *Lopez*, 662 F.3d at 599.

134. *Lopez*, 662 F.3d at 599 (citing 42 U.S.C. § 12181(7)(G)).

135. *Lopez*, 662 F.3d at 599.

136. William Goren, *The ADA Doesn't Reach Everywhere*, UNDERSTANDING THE AMERICANS WITH DISABILITIES ACT (ADA) (Sept. 5, 2012), http://www.williamgoren.com/blog/2012/09/05/ada-air-carier-access-act-private-cause-of-action-title-iii-applicability-scop/.

137. *See* 42 U.S.C. § 12181(7) (2012).

disability discrimination that occurs when the air carrier is providing general travel services other than by plane.[138] Third, the court failed to answer the question of whether air carriers could be held liable for disability discrimination in a terminal or depot that is not primarily used for air travel.[139]

Because the courts have not looked favorably upon the idea that the ACAA implicitly provides a private right of action, Congress would have to amend the ACAA to expressly provide one in order for courts to enforce it. Moreover, the skepticism with which the Second Circuit regarded the ADA's application to air carriers in *Lopez* has rendered more searching consideration of the issue by other circuits unlikely.[140]

II. Disabled by the Law: The Importance of a Private Right of Action in the ACAA

It is hard to say whether Bede Vanderhorst was the victim of discrimination without knowing all the facts, but unfortunately, Bede's case cannot be decided in court without a private right of action. If he was the victim of discrimination, it is impossible for Bede to be compensated for any harms that he suffered.[141] These are just two of several reasons why a private right of action is important under the ACAA for passengers with disabilities.

A. The Lack of a Private Right of Action Creates More of a Disability

Dean William Prosser once said that "[t]he man who is blind, or deaf, or lame, or is otherwise physically disabled, is entitled to live in the world . . . ."[142] Laws like the ADA, the Fair Housing Act, and the Individuals with Disabilities Education Act all embody the same basic principle: that those who are disabled deserve to live in this world in the same way that those without disabilities do.[143] For centuries, around the world, individuals with disabilities were often thought to be inferior, possessed by evil spirits, unfit, and

138. *See* 42 U.S.C. § 12181(10).

139. *See* 42 U.S.C. § 12181(7)(G).

140. *Lopez*, 662 F.3d at 598–99.

141. Office of Aviation Enforcement and Proceedings, *Complaints Alleging Discriminatory Treatment Against Disabled Travelers under the Air Carrier Access Act and 14 CFR Part 382*, U. S. DEP'T OF TRANSP. [hereinafter *Complaints*], http://airconsumer.ost.dot.gov/ACAAcomplaint.htm.

142. Jacobus tenBroek, *The Right to Live in the World: The Disabled in the Law of Torts*, 54 CAL. L. REV. 841, 851 (1966).

143. *See* U.S. DEP'T OF JUST., A GUIDE TO DISABILITY RIGHTS LAWS 1–7, 9–10, 15 (2009), *available at* http://www.ada.gov/cguide.htm [hereinafter GUIDE].

were completely rejected by many cultures.[144] Today, our society has mostly moved to a policy of "integrationism" that supports "entitling the disabled to full participation in the life of the community" and encourages and enables them to do so.[145] Access to airlines is an important part of life in modern society; reliable and equal access to the airlines is crucial for all people.[146] While the ACAA sets forth particular regulations that entitle people with disabilities to use airlines, many passengers like Bede Vanderhorst and Johnnie Tuitel fall victim to discrimination by airlines which bars them from fully participating in society to the same extent as a nondisabled citizen.

Discriminatory behavior by airlines exacerbates a passenger's disability by forcing the passenger to deal with even more challenges. Passengers who are disabled do have a right to utilize the airlines, but airlines seem to have placed conditions on their presence on airplanes. These behavioral standards put undue pressure on people with disabilities to act within these standards even though their disability may not allow them to do so. In Bede Vanderhorst's case, the airline expected him to conform to a particular behavioral standard that he apparently could not meet at that time.[147] Safety is undoubtedly an issue for airlines, but crossing the line into discriminatory behavior should be equally concerning. Passengers with disabilities who have been victims of discrimination deserve the opportunity to be heard in court. A private right of action would empower those who are disabled with leverage against airlines who might be inclined to discriminate against them.

B. A Private Right of Action is Important Because Discrimination Causes Real Harms to Passengers with

144. *See* Chomba Wa Munyi, *Past and Present Perceptions Towards Disability: A Historical Perspective*, 32 DISABILITY STUDIES Q. (2012), *available at* http://dsq-sds.org/article/view/3197/3068.

145. *See* tenBroek, *supra* note 142, at 843.

146. ANNUAL REPORT, *supra* note 25 (estimating that in 2011, more than twenty million people with disabilities traveled by air in the United States).

147. The behavioral standards with which passengers are expected to comply are undefined and arbitrarily set by airlines. This can present a problem for passengers with disabilities such as Tourette Syndrome. The disorder causes involuntary movements and vocalizations, so the behavior may never be treated as acceptable by an airline. *What Is Tourette Syndrome?*, NAT'L TOURETTE SYNDROME ASS'N, http://tsa-usa.org/aMedical/whatists.html (last visited Mar. 3, 2013); *see* Griswold, *supra* note 6 (reporting that an airline representative informed the Vanderhorsts that the pilot would not allow Bede to board unless the pilot's "special rules" were followed, although the Vanderhorsts were never advised as to what those rules were).

Disabilities

In the world of disability rights, people with disabilities may bring lawsuits against those who discriminate against them under legislation such as the ADA[148] and the Fair Housing Act.[149] One of the basic premises underlying a private right of action is that those who have been harmed through discrimination can directly seek redress from those who have harmed them. Discrimination against passengers with disabilities can cause real harms that include unnecessary expense, emotional distress, and damage to property.

If an airline bars a passenger like Bede Vanderhorst from a flight because of his or her disability, the passenger is likely to experience added expense and difficulties due to missing that flight. Passengers with disabilities usually must take extra measures to prepare for a flight, so missing a flight can become an extremely taxing experience. Passengers are encouraged to take steps ahead of time to let the airline know that they may need certain accommodations.[150] While passengers without disabilities typically are instructed to arrive at the airport about one hour before their flight,[151] individuals with disabilities are advised to get to the airport an additional hour earlier.[152]

If a passenger with a disability requires assistance to get through security to the boarding gate from any individual who does not have a ticket, this individual is required to get a certain "pass" that will allow him to go through the security checkpoint.[153]

148. *See* GUIDE, *supra* note 143, at 1–7 (prohibiting discrimination on the basis of disability in many areas including employment, telecommunications, transportation, state and local government, commercial facilities, and public accommodations).

149. *See id.* at 10 ("The Fair Housing Act may also be enforced through private lawsuits.").

150. Mobility Int'l USA, *Air Travel Tips for People with Disabilities*, NAT'L CLEARINGHOUSE ON DISABILITY AND EXCH., http://www.miusa.org/ncde/tipsheets/airlinetips (last visited Nov. 11, 2012) (advising passengers to inform travel agents, airline representatives, and the airline directly of the type of disability, equipment aids, dietary requirements, and who will accompany the disabled passenger).

151. *See Suggested Arrival Times*, AMERICAN AIRLINES, http://www.aa.com/i18n/travelInformation/checkingIn/arrivalTimes.jsp (last visited Mar. 3, 2013) (explaining that passengers are asked to arrive earlier if they are traveling internationally); *see also Check-In Requirements*, DELTA, http://www.delta.com/content/www/en_US/traveling-with-us/check-in/requirements.html (last visited Mar. 3, 2013) (identifying the required check-in times: one hour or less for individuals needing to check baggage on domestic flights).

152. Mobility Int'l USA, *supra* note 150.

153. *Id.* (stating that, while air carriers must provide assistance getting on and

Although passengers without disabilities are patted down every so often, the Transportation Security Administration (TSA) uses walk-through metal detectors and Advanced Imaging Technology (AIT) to check passengers without disabilities in the majority of cases.[154] The TSA uses AIT only for passengers who can stand still "with their arms above their heads for 5–7 seconds without the support of a person or device."[155] Passengers cannot be screened using walk-through metal detectors if they cannot walk through on their own.[156] These policies preclude many passengers with disabilities from the usual screening process. The TSA uses pat-downs as an alternative to these screening processes,[157] but pat-downs tend to be much more invasive, uncomfortable, and time-consuming for passengers.

Other sources advise passengers to carry copies of airline policies on the rights of passengers with disabilities to support any request for accommodation by the airline.[158] Passengers with disabilities may have to take multiple shorter connecting flights rather than long flights because some aircraft restrooms may not be accessible to them.[159]

Considering all the additional precautions and steps that passengers with disabilities must take just to get on a flight, using the airlines is a difficult experience for these passengers as it is. It would be even more difficult for passengers with disabilities to travel on the airlines if they missed a flight due to a disability that is out of their control or if they were the victims of some other kind of discrimination. Because there have been several reports of airlines denying access to people with disabilities, it is worth exploring some of the difficulties and harms that might befall a passenger with a disability if she were turned away from a flight.

If an airline denies boarding to a disabled passenger like Bede Vanderhorst, the passenger must immediately address a number of problems. First, the passenger must try to get on a new flight in an effort to get to his intended destination. Airline

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off the plane to passengers who request it, the air carrier has discretion in how this assistance is provided).

154. Dep't of Homeland Sec., Transp. Sec. Admin., *Advanced Imaging Technology and Walk-Through Metal Detector*, TRANSPORTATION SECURITY ADMINISTRATION (Jan. 28, 2012), http://www.tsa.gov/traveler-information/advanced-imaging-technology-and-walk-through-metal-detector.

155. *Id.*

156. *Id.*

157. *Id.*

158. Mobility Int'l USA, *supra* note 150.

159. *Id.*

policies vary, but many will help out passengers who have missed flights.[160] If it is not the passenger's fault that he missed the flight, airlines are usually more likely to refund the passenger's money or put the passenger on the next flight free of charge.[161] However, if the passenger is clearly at fault, the airline may not refund her money and may ask the passenger to pay a penalty on a new ticket.[162] An airline policy that refunds money based on who is at fault presents an issue for a passenger with a disability who has been barred from the flight. The question becomes whether the airline would consider it the passenger's fault that he was not able to be on their flight. Policies tend not to protect passengers with disabilities from being forced to pay a penalty on a new ticket because they were not allowed on their original flight.[163] In the Vanderhorst's case, American Airlines reported that it had refunded the money that the family had paid to sit in first class.[164] As of September 2012, the Vanderhorsts still had not received the refund.[165]

Second, getting onto the next flight if one is available can be a very difficult process because many airlines cannot guarantee the passenger a seat. For someone who is disabled, it may be impossible to get onto another flight right away because under the ACAA, airlines may require advance notice if specific accommodations are needed for the passenger.[166] Furthermore, mobility around an unfamiliar airport and from gate to gate can also be difficult for passengers who use wheelchairs or need assistance due to other kinds of impairments. Transportation can become even more of a problem if the passenger has to wait until the next day to catch the next available flight to her destination. If this is the case, a passenger would either have to stay at the airport all night or pay for a hotel room at his own expense, unless

160. *See* Linda Burbank, *Traveler's Aide: Missed Your Flight? Call The Airline Immediately!*, USA TODAY (Dec. 2, 2009, 5:00 AM), http://usatoday30.usatoday.com/travel/columnist/burbank/2009-12-02-missed-flight_N.htm.

161. *Id.*

162. *Id.*

163. *See id.* (stating that airline policies are not usually official rules but more like discretionary procedures that vary from carrier to carrier).

164. Cooper, *supra* note 1; *see also* Pawlowski, *supra* note 7 (reporting that the Vanderhorsts had spent $675 to upgrade to first class seats on top of the regular cost of three coach tickets).

165. Cooper, *supra* note 1.

166. 14 C.F.R. § 382.27(b) (2012) (allowing airlines to require passengers needing carrier-supplied in-flight medical oxygen, ventilators, or other assistive devices to provide up to seventy-two hours' advance notice for international flights and up to forty-eight hours' notice for domestic flights).

the passenger could go home for the night. While staying at an airport all night is a venture that most people would find highly uncomfortable, having a disability would turn it into an excruciating experience. Staying at a hotel instead of the airport might be more comfortable, but if the passenger is without luggage or even assistive devices that the passenger may have checked before her flight, the hotel stay might be an equally terrible experience.

Passengers may also miss connecting flights after failing to make their original flights. Passengers with disabilities are advised to take more short, connecting flights for certain reasons such as the fact that airplane restrooms are not always handicap accessible.[167] As a result, it is more likely that passengers with disabilities will have a number of connecting flights that they need to catch. While a passenger might be able to get a seat on the next available flight, he or she may miss a connecting flight, which would only strand the passenger at a different location. In addition to all of these challenges, passengers with disabilities must suffer from the hurt and humiliation of being publicly barred from a flight because of something that is a part of them and outside of their control.[168]

C. *A Private Right of Action is Important Because It Would Deter Airlines From Engaging in Discriminatory Conduct*

A private right of action can provide monetary relief for an individual who has been wronged, but it also serves a deterrent function. The party against whom a suit is brought may realize that the costs of a lawsuit far exceed the benefits gained from engaging in discriminatory conduct. When parties realize that lawsuits due to discriminatory practices can be very costly, parties will be more likely to avoid engaging in such practices in the future. Currently, the deterrent function of the ACAA is not strong enough to make a difference to the airlines, and the victims of discrimination have no other means to deter the airlines from discriminatory actions.

Research has shown that certainty of punishment is more powerful than severity of punishment when it comes to deterring

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167. Mobility Int'l USA, *supra* note 150.

168. *See* Cavaliere, *supra* note 7 (describing how American Airlines called the Port Authority police to escort the Vanderhorst family away from the gate and how this action only added to Vanderhorst's humiliation from being barred from the flight).

certain behaviors in individuals.[169] Without a private right of action, punishment for discriminatory conduct through the complaint system of the ACAA is not guaranteed. Admittedly, the legal system is not perfect, and many meritorious lawsuits do not win in a court of law. However, an airline does not have to worry at all about being taken to court by a disabled passenger against whom it might discriminate.

The current complaint system, discussed below, does not ensure that filed complaints are carefully examined or that airlines are punished for every violation of the ACAA.[170] Airlines may break the rules more often and discriminate more freely because they might not be reprimanded for their actions, and their discrimination—although a pain for the disabled passenger—might even be profitable for the airline.

III. The ACAA Complaint and Punishment System

A. *The ACAA Complaint System*

The DOT developed the ACAA complaint system to allow passengers to file complaints easily, but simultaneously limited passengers' participation in the complaint process. The complaint process begins with contacting a CRO, which can be prior to the action or after the incident.[171] If an airline provides service "using aircraft with 19 or more passenger seats," the airline must appoint at least one CRO who is available at every airport that the airline serves at all hours of operation.[172] ACAA regulations state that whenever a passenger with a disability "complains or raises a concern" about "discrimination, accommodations, or services," the airline must immediately notify the passenger that she has a right to contact the CRO.[173] Airlines may not comply with this regulation because it is not in their best interest to encourage passengers to complain to a CRO, leaving many complainants without knowledge of this right. Also, the decision of a CRO can be overruled by the pilot of an aircraft on the basis of safety,

169. *See* VALERIE WRIGHT, DETERRENCE IN CRIMINAL JUSTICE: EVALUATING CERTAINTY VS. SEVERITY OF PUNISHMENT 1 (2010), *available at* http://www.sentencingproject.org/doc/Deterrence%20Briefing%20.pdf.

170. 14 C.F.R. § 382.159(c) (2012).

171. 14 C.F.R. § 382.153.

172. 14 C.F.R. § 382.151(b)–(c) (stating also that CROs must be available in person or via telephone as well as provide service in different languages).

173. 14 C.F.R. § 382.151(c)(1) ("Your personnel must provide this information to the passenger in a format he or she can use.").

permitting the CRO's authority to be easily overridden.[174] Safety may often be a legitimate reason for making decisions about passengers, but the reason can also be exploited in an effort to keep passengers with disabilities off planes.

ACAA regulations, while requiring CROs to undergo "training," do not specifically mandate any kind of advanced disability education before they are allowed to make major decisions about how an airline will treat passengers with disabilities and what services will be provided to passengers.[175] The average person probably knows very little about the lifestyle of those who are disabled, so education and training are crucial to providing effective service and assistance to passengers with disabilities. It might make sense for a CRO to have a heightened ability to recognize different disabilities and to know how to easily interact with people who have certain types of disabilities. However, the training for a CRO is no different from the training of a regular airline employee in responding to passengers with disabilities.[176] Another concern is that a complaint after an alleged violation must be made in writing to the CRO, presenting problems for some passengers with disabilities.[177] ACAA regulations state that a CRO must inform the complainant in writing of his or her right to pursue a DOT enforcement action.[178] Understanding this right is especially important when a CRO determines that a particular action does not violate an ACAA regulation; the passenger with the disability should be aware that he still has the right to pursue an enforcement action. Conveying this right through a mere written statement to one who might be mentally disabled may not provide the passenger with adequate knowledge about what pursuing DOT enforcement actually means.

Also, ACAA regulations do not compel CROs to provide complainants with information about how to pursue a DOT enforcement action.[179] Moreover, disabled passengers might wrongly assume that they can utilize the legal system to file a lawsuit for discrimination against the airline under the ADA. Passengers might forgo pursuing an enforcement action that requires that a formal complaint be filed within six months of the

174. 14 C.F.R. § 382.151(e).
175. 14 C.F.R. § 382.141(a)(7).
176. *Id.*
177. 14 C.F.R. § 382.153.
178. 14 C.F.R. § 382.153(d).
179. *See id.*; 14 C.F.R. § 382.155(d)(3).

date of the incident.[180] This may cause the victims of egregious actions that would seem extremely discriminatory in a court of law to seek damages in the form of a lawsuit instead of reporting the discriminatory actions to the DOT. If the passenger chooses to bring a lawsuit against an airline for discrimination on the basis of a disability rather than appealing a DOT decision, the lawsuit will probably fail based on current case law,[181] and the DOT will not have as great of an opportunity to hold the airline responsible for its actions in any way.

After a complaint is made directly to a CRO or to an airline through a written complaint, the CRO or airline either takes action to fix the problem or writes a statement describing the reasons why no action was taken in response to the complaint.[182] Some U.S. air carriers must record this complaint data.[183] Then, the air carrier must make a complete report of all disability-related complaints received every year.[184] Under the ACAA, the Secretary of Transportation must investigate all complaints that are received.[185] The ACAA regulations state that the only way to ensure investigation of a complaint is to file the complaint directly with the DOT.[186] Because of these conflicting provisions and a lack of transparency about the investigative process, the scope of the investigation that is done on each complaint remains unclear.

The DOT assures passengers that their complaints will be reviewed and investigated.[187] Based on the Secretary's annual report to Congress, one can only guess at how much time each complaint is given.[188] According to the annual report made by the

180. 14 C.F.R. § 382.159(c).

181. Courts have held that there is no private right of action under the ACAA or the ADA. *See, e.g.*, Lopez v. Jet Blue Airways, 662 F.3d 593, 598 (2d Cir. 2011); Boswell v. Skywest Airlines, Inc., 361 F.3d 1263, 1269 (10th Cir. 2004); Love v. Delta Air Lines, 310 F.3d 1347, 1352 (11th Cir. 2002).

182. 14 C.F.R. § 382.153(b)–(c).

183. 14 C.F.R. § 382.157(b) (declaring that only air carriers that conduct passenger operations with at least one aircraft designed to seat more than sixty passengers and all foreign carriers must report disability-related complaints).

184. *Id.*

185. 49 U.S.C. § 41705 (2012) ("The Secretary shall investigate each complaint. . . .").

186. 14 C.F.R. § 382.159(c) ("You must file a formal complaint under this part within six months of the incident on which the complaint is based in order to ensure that the Department of Transportation will investigate the matter.").

187. *Complaints*, *supra* note 141 (describing how the Air Consumer Protection Division (ACPD) will advise the complainant of the status of his complaint once review has been accomplished and how the process takes a significant amount of time).

188. While 49 U.S.C. § 41705 states that the Secretary of Transportation is responsible for handling all complaints, the ACPD receives the complaints. The

Secretary of Transportation to Congress on 2011 complaint numbers, "49 U.S. carriers and 119 foreign carriers submitted the required disability-related complaint data."[189] The U.S. carriers reported 18,953 complaints and the foreign air carriers reported receiving 2,419 complaints.[190] The sheer volume of the complaints suggests that the Secretary does not do a thorough investigation into each complaint. The overall number of complaints is still on the rise.[191] Major airlines like Delta Air Lines, American Airlines, US Airways, and Southwest Airlines contribute most significantly to the number of complaints as can be expected by the larger numbers of people who utilize these airlines.[192] At the time of the Secretary's report in June of 2012, the Department had not audited or verified the number of complaints.[193] The report also stated that the substance of each complaint had not been reviewed "to determine whether the incidents constituted violations of the ACAA or the provisions of 14 CFR Part 382."[194]

One of the major problems with the complaint system is that not all air carriers have submitted the required disability-related complaint data.[195] In fact, the total number of carriers that reported all complaints decreased between 2010 and 2011.[196] The report notes that the decrease in carriers reporting complaints may be somewhat due to other factors such as the discontinued service of some airlines, but this impact should be balanced out by the fact that "other carriers received authority to operate passenger service to, from, or within the U.S."[197] If the DOT does not receive complete complaint data from all airlines, many complaints may not be heard by anyone.

Time restraints on the complaint process make it even more difficult for passengers to hold airlines responsible for discriminatory actions. Air carriers are not required to respond to written complaints that are "postmarked or transmitted more than

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number of people who work at the Division and handle the complaints is unclear.

189. ANNUAL REPORT, *supra* note 25, at 6.

190. *Id.* (stating that more than half of the complaints reported involved a failure to provide adequate assistance to persons using wheelchairs).

191. *Id.* at 6–7 (showing that complaints increased by two percent from 2010 to 2011, as opposed to a twenty-five percent increase from 2009 to 2010).

192. *Id.* at Appendix A (stating that among U.S. carriers, Delta Air Lines reported receiving the most complaints (3,352), followed by US Airways (2,872), American Airlines (2,702), and Southwest Airlines (2,306)).

193. *Id.* at 8.

194. ANNUAL REPORT, *supra* note 25, at 8.

195. *Id.* at 6.

196. *Id.*

197. *Id.*

45 days after the date of the incident."[198] This short time period benefits airlines, and it is likely that forty-five days is not adequate time for a passenger with a disability to find a way to write a complete and accurate complaint to the airline.[199] The other limitation period of six months to file a formal complaint with the DOT after the date of an incident is also a fairly short period of time.[200] For instance, in employment discrimination claims, the employee must file a charge within 180 days from the date of the alleged discrimination.[201] That date can be "extended to 300 calendar days if a state or local agency enforces a law that prohibits employment discrimination on the same basis."[202]

Lastly, the current system takes away all control over the discrimination complaint process from the complainant. Once she has filed a complaint, the complainant is not involved until she receives a reply from the DOT.[203] The complainant has no way of supervising the DOT to make sure that the Air Consumer Protection Division (ACPD) gives her complaint adequate attention or investigates the incident thoroughly.[204] The ACAA complaint process is contrary to the legal process of civil procedure where clients are allowed and encouraged to supervise their attorneys in an effort to drive liberal discovery.[205] Whereas complaints may get lost in the current system, a private right of action would allow complainants to be responsible for managing and controlling the advancement of their cases.

198. 14 C.F.R. § 382.155(c) (2012).

199. *Complaints*, *supra* note 141 (stating that complaints should include the complainant's full name, contact information, the name of the party who suffered the discriminatory conduct, if other than the person submitting the complaint, name of the airline involved in the incident, the flight date, flight number, origin and destination cities of the aggrieved party's trip, a detailed description of the incident, names of any witnesses, and any other information that might be helpful in supporting the complaint).

200. 14 C.F.R. § 382.159(c).

201. U.S. Equal Emp't Opportunity Comm'n, *Time Limits for Filing a Charge*, http://www.eeoc.gov/employees/timeliness.cfm (last visited Nov. 14, 2012).

202. *Id.*

203. *Complaints*, *supra* note 141 ("We will acknowledge your complaint and advise you of its disposition when we complete our review.").

204. *Id.* ("You should be aware that due to the time necessary for the carrier to conduct its own review of your complaint and get back to you and us, coupled with our need to then review your case and the hundreds of others we receive each year, our response to you will likely take some time.").

205. FED. R. CIV. P. 26(b)(1). *See, e.g.*, Hickman v. Taylor, 329 U.S. 495, 507 (1947) ("We agree, of course, that the deposition-discovery rules are to be accorded a broad and liberal treatment.").

B. Enforcement of the ACAA

While the complaint system of the ACAA presents a number of problems for travelers who might be victims of disability discrimination, the enforcement procedures of the ACAA are equally weak. The weaknesses of the enforcement procedures and the lack of any real reparation for passengers forced several injured parties to take matters into their own hands by filing lawsuits against the airlines.[206] However, the Second, Tenth, and Eleventh Circuit courts found that the ACAA complaint system does not allow complainants to seek personal compensatory relief through a private right of action.[207] What happens if an airline actually violates a provision of the ACAA or an ACAA regulation?

The DOT has taken less of a strict enforcement and more of an educational approach in an effort to boost compliance with the ACAA. The DOT reportedly "reached out to U.S. and foreign air carriers in 2011 to emphasize the requirements of the ACAA regulation."[208] The DOT also held forums for educating foreign carriers on their responsibilities under the ACAA after Congress revised the ACAA regulations in 2008.[209] Even though the revisions have been in place for four years, airlines still have problems complying with ACAA regulations. The DOT seems hesitant to fully enforce the regulations and make sure that airlines change behaviors that are discriminatory toward passengers with disabilities.[210]

Part of the reason why many airlines have not changed their behavior is because the punishments the DOT hands down to airlines are not great enough to hold the airlines truly accountable. For example, if the DOT discovered that an airline was not operating within the limitations or regulations of the ACAA because of a particular policy or procedure, the DOT Enforcement Office would direct the carrier to change its policy or procedure and warn the carrier about potential enforcement action if similar complaints continue to be received.[211] This action

206. *See* Lopez v. Jet Blue Airways, 662 F.3d 593, 598 (2d Cir. 2011); Boswell v. Skywest Airlines, Inc., 361 F.3d 1263, 1269 (10th Cir. 2004); Love v. Delta Air Lines, 310 F.3d 1347, 1354 (11th Cir. 2002).

207. *See Lopez*, 662 F.3d at 597; *Boswell*, 361 F.3d at 1270; *Love*, 310 F.3d at 1358.

208. ANNUAL REPORT, *supra* note 25, at 7.

209. *Id.*

210. *See infra* notes 217–224 and accompanying text.

211. *Complaints*, *supra* note 141 ("Complainants should also realize that the Department's authority . . . is limited to the issuance of cease and desist orders proscribing unlawful conduct by a carrier in the future and the assessment of civil

resembles nothing more than a slap on the wrist for an air carrier. Changing behavior often requires a much more severe and certain punishment.

One of the most severe punishments that the DOT can pursue is an enforcement action against an air carrier.[212] The DOT reported that if the ACPD notices a pattern of problems in complaint types or significant spikes in complaint levels for an airline, the ACPD may consider pursuing an enforcement action.[213] Even if only a few complaints describe particularly heinous conduct and the complaints are supported by evidence, the Enforcement Office might still bring an enforcement action against the air carrier.[214]

Limited resources provide another source of weakness for the enforcement division of the DOT.[215] The DOT is forced to budget its time, money, and personnel so it cannot be expected to thoroughly investigate every complaint or bring enforcement actions against every airline that violates the ACAA.[216] The lack of resources supports adding a private right of action to the ACAA because passengers could choose to pursue an action with their own resources. Under this model, the burden on government resources to investigate and enforce proceedings may be alleviated.

In addition, the low number of reported punishments stemming from investigations indicates that the DOT may not use their resources efficiently enough to conduct adequately thorough investigations.[217] In the last few years, the enforcement division of the DOT piloted several "on-site investigations."[218] While most of the investigation process is not widely publicized, the DOT did review several airlines' records to ensure that all the air carriers were accurately reporting all disability-related complaints.[219]

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penalties payable to the government.").

212. 14 C.F.R. § 382.19(c)(4) (2012).

213. *Complaints*, *supra* note 141 ("[T]he Department generally will pursue further enforcement action on the basis of a number of complaints from which it may infer a pattern or practice of discrimination.").

214. *Id.*

215. *Id.* (stating that enforcement actions based on one or a few complaints will only be brought against carriers if the DOT possesses adequate resources).

216. *See id.* Single instances of "particularly egregious" conduct will only be pursued if "resources permit[]." *Id.*

217. ANNUAL REPORT, *supra* note 25, at 8–9. The DOT reported six such punishments.

218. *Id.* at 8. These investigations "involved reviewing carrier records to, among other things, verify the accuracy of the carrier's disability reporting." *Id.*

219. *Id.*

Several notable punishments were cited in the Secretary's report to Congress. For instance, one airline was fined $100,000 in May 2010 for not reporting all disability-related complaints.[220] In February 2011, a second carrier was fined $2 million for several violations of the ACAA regulations, including undercounting disability-related complaints.[221] The report stated that four other airlines had been fined for similar violations.[222] The DOT informs complainants on its website that "the Department's authority does not allow it to award monetary damages or pecuniary relief to the injured party. . . ."[223] Instead, the DOT may only issue cease and desist orders to prevent airlines from engaging in certain practices that violate the ACAA and its regulations, or assess civil penalties or fines against a carrier which will be paid to the government.[224]

Individuals may also have a limited right to access a part of the legal system. Individuals may file a petition to ask a U.S. Court of Appeals to review a DOT administrative decision.[225] The individual who files the petition must have a "substantial interest" in the administrative decision as well.[226] This right to petition has not been widely publicized and is arguably not an appealing option for many plaintiffs to exercise.[227] The likelihood that a court of appeals would review an administrative decision made by the DOT over a complaint by an airline passenger is also very low.[228] Therefore, this review process is not effective as a means of holding an airline accountable.

No remedy that the DOT can pursue forces the air carrier to address the harm done to any particular complainant. If an

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220. *Id.*

221. *Id.* at 8–9.

222. *Id.* at 9.

223. *Complaints*, *supra* note 141.

224. *Id.* (explaining that these actions can only be accomplished through settlements and formal hearings in front of administrative law judges in which the airlines will settle with the government).

225. Lopez v. Jet Blue Airways, 662 F.3d 593, 597 n.4 (2d Cir. 2011) (citing 49 U.S.C. § 46110(a)).

> [A] person disclosing a substantial interest in an order issued by the Secretary of Transportation . . . may apply for review of the order by filing a petition for review in the United States Court of Appeals for the District of Columbia Circuit or in the court of appeals of the United States for the circuit in which the person resides or has its principal place of business.

Id.

226. *Id.*

227. The fact that individuals cannot collect monetary damages from a DOT enforcement will likely lead many complainants to bypass this option.

228. 49 U.S.C. § 46110(c) (2012) ("Findings of fact by the Secretary, Under Secretary, or Administrator, if supported by substantial evidence, are conclusive.").

airline discriminates against disabled passengers and receives several thousand complaints, but is only fined for one of those violations, the airline has little incentive to change its behavior.

IV. Amending the ACAA: Providing a Private Right of Action After Consideration of Counterarguments

A private right of action has become a necessity for passengers who have suffered from disability discrimination at the hands of air carriers. Without a private right of action, passengers who are harmed by discrimination have no real way to redress their harms. The complaint procedure and enforcement system do not always bring the airlines to justice, as punishments that the DOT might hand out do nothing to address the personal injury done to many passengers with disabilities.[229] Moreover, the combined weakness and infrequency of punishments undermines the statute's ability to seriously deter airlines from continuing to engage in discriminatory conduct. Theoretically, the pressure of thousands of potential lawsuits may better encourage airlines to deliver quality, nondiscriminatory service to passengers than a single punishment from the DOT. While not every complainant would file a lawsuit against an airline, those who have suffered from especially egregious types of discrimination might be more likely to do so.

A private right of action would also significantly lessen the burden on the DOT. For example, Congress could create a policy that would allow complainants to choose either to exercise their right to file suit against an airline or to file a complaint with the DOT with the assurance that the department will investigate the complaint. The number of complaints sent to the DOT could be lessened under this policy, and the DOT could investigate each complaint that is received more thoroughly.

Opening the floodgates to a significant amount of litigation in this area is always a concern when a statute allows a private right of action.[230] Congress might also consider requiring complainants to exhaust their administrative remedies first before allowing them to file suit against an airline. Under an administrative exhaustion policy, a passenger would bring his or her complaint to an airline CRO at the time of the violation or write a complaint letter to the airline after the incident. The passenger would then

229. *See supra*, Part III.B.

230. Toby J. Stern, *Federal Judges and Fearing the "Floodgates of Litigation"*, 6 U. PA. J. CONST. L. 377, 388 (2003) (citing the creation of private rights under Title VII of the Civil Rights Act of 1964 as a source of increased caseloads).

be required to directly file his or her complaint with the DOT.

From the airlines' perspective, a private right of action could further damage the airlines' already fragile financial situation.[231] American Airlines provides the perfect example of an airline that has faced its share of fiscal struggles.[232] After filing for bankruptcy in November of 2011,[233] American Airlines discovered that the Federal Aviation Administration (FAA) sought civil penalties against the carrier for safety and maintenance violations.[234] According to bankruptcy court documents, the FAA could force the company to pay fines of up to 162 million dollars.[235] Airline lobbyists might argue that allowing passengers with disabilities to sue carriers for discrimination would be financially devastating to airlines that are already heavily burdened with bankruptcy,[236] safety issues, and labor unrest.[237] Protecting the air transportation industry is important, but it is no more important than protecting the rights of travelers with disabilities who want to use airlines. Air carriers already face potential fines from the DOT for

231. *See* Scott McCartney, *Do Government Bailouts Work? Ask the Airlines*, WALL ST. J. BLOGS (Sept. 22, 2008, 11:42 AM), http://blogs.wsj.com/middleseat/2008/09/22/do-government-bailouts-work-ask-the-airlines/ (discussing the government bailout program for airlines that ended in 2006); *see also* Jeffrey H. Bimbaum, *Airline Lobbyist's Job Is a Dogfight*, WASH. POST (July 17, 2007), http://www.washingtonpost.com/wp-dyn/content/article/2007/07/16/AR2007071601669.html (describing how, despite the bailout program, "airlines have continued to push hard for additional benefits" to keep their businesses intact).

232. *See* Agnes Pawlowski, *Safety Concerns, Labor Issues, Bankruptcy Take Toll on American Airlines*, NBC NEWS (Oct. 2, 2012), http://www.nbcnews.com/travel/safety-concerns-labor-issues-bankruptcy-take-toll-american-airlines-6235203.

233. *Id.*

234. Kendra Lyn, *FAA Could Fine American Airlines $162M for Violations*, NBCDFW.COM (Aug. 7, 2012), http://www.nbcdfw.com/news/business/FAA-Could-Fine-AA-for-Violations-165254636.html (citing an investigation that revealed that American Airlines knowingly violated safety and maintenance rules, with some violations dating back to 2007).

235. *Id.* ("The FAA would typically propose a penalty in these matters, and then the amount of the fine would be negotiated down — a process that could take years.").

236. *See* Pawlowski, *supra* note 232. *But see* Thomas C. Lawton, *American Airlines Is Thriving Despite Bankruptcy*, U.S. NEWS (June 15, 2012), *available at* http://www.usnews.com/opinion/blogs/economic-intelligence/2012/06/15/american-airlines-is-thriving-despite-bankruptcy (reviewing the economic strategies that American Airlines has pursued in an effort to be out of bankruptcy by late 2012). Moreover, securing a judgment against an insolvent defendant would make the satisfaction of that judgment difficult, if not impossible.

237. *See* Pawlowski, *supra* note 232 (discussing the rise in flight delays and cancellations after American Airlines imposed new terms on its pilots that would cut costs).

disability discrimination claims.[238] Currently, the DOT receives the money from the fines.[239] With a private right of action, however, passengers who have been wronged through discrimination would receive the damages themselves.

Although airlines might expect an onslaught of lawsuits if Congress established a private right of action, many complainants may not be able to afford to pursue a lawsuit against an airline. In the same vein, many complainants might simply not want to pursue such a lawsuit. Some passengers might take advantage of their private right of action against an airline, but carriers must expect that not all suits will be deemed meritorious in a court of law. Statistics from other civil rights contexts, like employment discrimination, show that many plaintiffs are often unsuccessful and that "settlements tend to be smaller than most people might expect."[240] No one can be sure whether this trend would carry over into the area of disability discrimination by airlines, but it demonstrates one example where a private right of action has arguably had minimal impact on businesses. These statistics do not suggest that creating a private right of action would be a completely pointless endeavor. Complainants might be happy to pursue a lawsuit that could result in some payment of damages, as opposed to participating in the current system, which completely denies them the opportunity to receive any compensation for the harm that they have suffered.[241]

In the years following the September 11, 2001 terrorist attacks, airplane security has attained the utmost importance.[242] The principle of airline safety is so paramount that airlines are

238. 49 U.S.C. § 46301(a)(1) (2012).

239. *Complaints*, *supra* note 141.

240. John Richards, *Most Employment Discrimination Lawsuits Don't Net Much Money*, LEGALMATCH LAW BLOG (June 18, 2010), http://lawblog.legalmatch.com/2010/06/18/most-employment-discrimination-lawsuits-dont-net-much-money/ (contextualizing the low success rates of employment discrimination lawsuits and arguing that these rates often pressure victims of discrimination to settle for small amounts out of court). *See also* Martha Neil, *Most Job Discrimination Suits Win, at Best, Small Settlements, Study Says*, ABA JOURNAL (June 9, 2010, 4:49 PM), http://www.abajournal.com/news/article/most_job_discrimination_suits_win_small_settlements_at_best_study_says/ (stating that only six percent of plaintiffs in most of the federal employment discrimination cases between 1987 and 2003 made it to trial and that at trial, plaintiffs have a one-in-three chance of winning).

241. *See Complaints*, *supra* note 141.

242. *Drastic Changes in Airport Security After 9/11 Stir Controversy*, PBS NEWS HOUR (Sept. 8, 2011), http://www.pbs.org/newshour/bb/terrorism/july-dec11/safeskies_09-08.html (detailing heightened airport security measures that have garnered significant criticism).

protected from lawsuits that might arise from banning a passenger from a flight if the passenger's disability presents a direct threat to airline safety.[243] If a private right of action was approved, airlines might feel as though they could not ban a passenger with a disability from a flight in the interest of safety for fear of being sued for discrimination. However, a private right of action is unlikely to discourage airline employees from banning people from flights out of safety concerns because there is already the threat of punishment from a DOT enforcement action if discrimination is alleged.[244]

Airline employees might proceed more cautiously and carefully document reasons why a particular passenger is banned from a flight so that if it is faced with a lawsuit, the airline may provide the proper explanation for its actions. Airline representatives also may work harder to follow the ACAA regulation that airlines "must not refuse transportation to the passenger" if the airline "can protect the health and safety of others by means short of a refusal."[245] In the case of Bede Vanderhorst, it seemed that part of the "direct threat" created by his presence was the location of his seat on the plane, which logically could have been remedied by moving his seat.[246] The failure of the airline to consider other options only strengthens a discrimination lawsuit; airlines could better protect themselves if they documented other options that were considered, and then discussed how these options would not mitigate the danger to the airplane and its occupants.

The importance of safety on airplanes is probably the strongest counterargument against a private right of action. As mentioned earlier, airlines do not want to feel obligated to ensure that passengers with disabilities are allowed to board a plane if the presence of such a passenger may put an airplane or other passengers at risk. The airlines' concern might be somewhat justified, but the plethora of other pressing safety issues facing airlines calls into question the motivation behind using the safety rationale to deny a class of passengers a private right of action, especially where civil rights are implicated.

While the importance of airline safety is trumpeted by airlines, the FAA found that airlines might be presenting some of

243. 14 C.F.R. § 382.19(c)(1) (2012).
244. Kennedy, *supra* note 88.
245. 14 C.F.R. § 382.19(c)(2).
246. Pawlowski, *supra* note 7.

the most direct threats to their passengers.[247] The problems cited by the FAA against American Airlines include wiring issues between engines and wings, unsafe landing gear and testing issues, and failure to fix cracks in key structural parts of planes.[248] The FAA became particularly concerned when the airline continued to fly passengers without making the required changes.[249] While American Airlines maintains that it has never operated a plane that was unsafe for a flight, the FAA claims that American flew nearly 15,000 flights with passengers after knowing about maintenance issues.[250] Considering these unsafe practices, a finding that Bede Vanderhorst was a direct threat to the safety of the passengers on the plane is hypocritical.

Although many airlines would argue against a private right of action because of safety concerns and financial problems, passengers with disabilities deserve the added protection of a private right of action. Without one, meritorious complaints will continue to go unnoticed as airlines carry on their operations without real liability for discriminatory actions. Bede Vanderhorst and other passengers with disabilities should have a right to their day in court, and establishing a private right of action under the ACAA appears to be the most efficient, effective mechanism for increasing accessible airway travel for all.[251]

Conclusion

People with disabilities face the possibility of discrimination every day. A normal flight turned into a challenging and bewildering experience for Bede Vanderhorst and his family. Because there is no private right of action in the ACAA, American Airlines may never be held responsible for actions that seem discriminatory on their face. While Congress created the ACAA to

247. Lyn, *supra* note 234.

248. *Id.*

249. *Id.* (stating that American Airlines admitted that between 2006 and 2008, the airline kept some of its jets in service after the airline used the wrong fasteners to fix cracks in the planes).

250. *Id.* (quoting a company spokesperson who said, "Safety is fundamental to the success of American Airlines, and at no time did American operate an aircraft that was unsafe for flight. Nothing is more important than the safety of our customers, our people and our planes.").

251. Congress has previously considered adding a private right of action to the ACAA on one occasion as part of the "Fairness and Individual Rights Necessary to Ensure a Stronger Society: the Civil Rights Act of 2004." Also known as the "Fairness Act," this sweeping legislation would have guaranteed that "victims of discrimination and unfair labor practices ha[d] access to the courts when necessary to enforce their rights and to obtain effective remedies." 150 CONG. REC. S1296 (daily ed. Feb. 12, 2004) (statement of Rep. Kennedy).

protect airline passengers with disabilities from discrimination, the statute fails to fully defend the class of people that it aims to protect. Its complaint and enforcement systems do little to deter airlines from discriminatory conduct. Given that discrimination on the basis of disability is already illegal under federal law and that procedural safeguards already allow airlines to exercise substantial discretion to ensure that accommodations do not compromise airline safety, no compelling justification exists for denying passengers a private right of action under the ACAA. A private right of action would empower victims of discrimination to seek redress for harms caused, and is therefore necessary for effective protection of passengers with disabilities.