No. 02-4188

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

SUSAN BOSWELL,

Plaintiff-Appellant

v.

SKYWEST AIRLINES, INC., a Utah corporation,

Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
THE HONORABLE PAUL G. CASSELL

BRIEF OF THE UNITED STATES DEPARTMENT OF TRANSPORTATION AS AMICUS CURIAE

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QUESTIONS POSED TO THE UNITED STATES DEPARTMENT OF TRANSPORTATION

This Court invited the Department of Transportation to submit an amicus brief addressing two questions:

> (1) Pursuant to the Air Carrier Access Act, 49 U.S.C. § 41705, and accompanying regulations, is the defendant-appellee SkyWest required to provide the plaintiff-appellant * * * with medical oxygen on flights between St. George, Utah and Salt Lake City, Utah unless SkyWest can demonstrate that the provision of medical oxygen "would constitute an undue burden or would fundamentally alter [its] program," 14 C.F.R. § 382.7, see *Boswell* v. *SkyWest*, 217 F. Supp.2d 1212, 1220 (D. Utah 2002)?

(2) Does the Air Carrier Access Act, 49 U.S.C. § 41705, create a private cause of action?

Order, *Boswell* v. *SkyWest Airlines, Inc.*, No. 02-4188 (10th Cir. Sept. 9, 2003).

STATEMENT

Congress, through the Air Carriers Access Act of 1986 (ACAA), has prohibited air carriers from discriminating against otherwise qualified persons with disabilities on the basis of their disabilities. The Secretary of Transportation (Secretary), pursuant to authority granted by Congress, has promulgated regulations to implement that prohibition. At the same time, Congress has consistently and explicitly recognized that safety must have the highest priority in the regulation of air commerce, and it has consistently instructed the Secretary and the Federal Aviation Administrator (Administrator) that they must "assure the highest degree of safety in" air transportation. See Civil Aeronautics Act of 1938, § 2(b), 52 Stat. 973, 980 (June 23, 1938); see also Federal Aviation Act of 1958, §§ 102(b), 103, 72 Stat. 731, 740 (Aug. 23, 1958); Airline Deregulation Act of 1978 (A. Dereg. A. of 1978), § 102(a)(1), 92 Stat. 1705, 1706 (Oct. 24, 1978). Congress reiterated this priority in Section 3 of the ACAA.

In 1982, the Civil Aeronautics Board (CAB) promulgated regulations prohibiting air carriers from discriminating against passengers on the basis of disability. 47 Fed. Reg. 25936, 25948 (June 16, 1982). It applied Subpart A of the regulations, a general prohibition against discrimination against persons with a disability, to all air carriers. Subparts B and C set out specific requirements and procedures regarding individuals with a disability. The CAB believed that it was exercising authority granted by Section 504 of

the Rehabilitation Act of 1973, 29 U.S.C. 794 (Section 504), thereby limiting Subparts B and C only to those air carriers that received direct federal financial assistance.

In *United States Department of Transportation* v. *Paralyzed Veterans of America*, 477 U.S. 597 (1986) (*PVA*), the Paralyzed Veterans of America and other organizations representing persons with a disability argued that because air carriers used federally financed airports and the federally operated air traffic control system, "financial assistance" extended to all air carriers, thus making Section 504 applicable to all carriers. The Supreme Court disagreed, holding that the non-subsidized air carriers were not subject to the provisions of Section 504 and thus beyond the reach of Subparts B and C.

Through enactment of the ACAA, Congress responded to *PVA* by amending the Federal Aviation Act of 1958, *not* by amending Section 504. See S. Rep. No. 400, 99th Cong., 2d Sess. (1986), at 2 ("In recognition of the unique difficulties now faced by handicapped air travelers, [the ACAA] would mitigate the effect of [*PVA*] by amending section 404 of the [Federal Aviation Act] to prohibit discrimination against otherwise qualified handicapped individuals."). Congress added the following language as Subsection (c) of Section 404 of the Federal Aviation Act (FAA):

> (1) No air carrier may discriminate against any otherwise qualified handicapped individual, by reason of such handicap, in the provision of air transportation.
>
> (2) For the purposes of paragraph (1) of this subsection the term "handicapped individual" means any individual who has a physical or mental impairment that substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment.

ACAA § 2, 100 Stat. 1080.

As originally enacted, the ACAA directed the Secretary of Transportation to promulgate regulations "to ensure non-discriminatory treatment of qualified handicapped individuals consistent with safe carriage of all passengers on air carriers." ACAA § 3, 100 Stat. 1080. The Secretary promulgated these regulations in 1990. 55 Fed. Reg. 8008 (Mar. 6, 1990).

In 1994, Congress enacted Title 49 as positive law, and made slight, non-substantive changes in the language of the ACAA portion of the FAA, 108 Stat. at 1141:

> 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.

49 U.S.C. 41705 (1995). Congress amended the ACAA in 2000, redesignating Section 41705 as 41705(a) and extending the coverage of the ACAA to foreign air carriers. Congress also added Subsection (c), requiring DOT to investigate each complaint that an airline had discriminated because of disability, to publish the complaint data, review the data and report annually to Congress on the results, and to implement a plan to provide technical assistance. 49 U.S.C. 41705(c).

DISCUSSION

I. AN AIR CARRIER MAY CHOOSE NOT TO PROVIDE PASSENGERS WITH MEDICAL OXYGEN WITHOUT SHOWING THAT PROVIDING IT WOULD BE AN UNDUE HARDSHIP OR FUNDAMENTAL ALTERATION.

The district court correctly found that neither the ACAA nor its regulations require an air carrier to provide supplemental medical oxygen for use by a passenger. The district court correctly noted that while 14 C.F.R. Part 382 imposes several requirements on air carriers regarding persons with disabilities, and "specifically provides that air carriers must ensure that individuals with a disability are provided certain services and equipment," nothing in Part 382 requires an air carrier to provide medical oxygen for use by a passenger. *Boswell* v. *SkyWest*, 217 F. Supp.2d 1212, 1220 (D. Utah 2002).

Oxygen is a hazardous material that will act as an accelerant in a fire. The safety of passengers requires, therefore, that oxygen on airplanes be carefully controlled. The Administrator thus *strictly* regulates the transportation, storage, and use of oxygen, giving careful consideration to the aircraft's capabilities and flight environment. See, *e.g.*, 14 C.F.R. 121.327 (supplemental oxygen requirements for pressurized cabins in certain reciprocating engine airplanes); 14 C.F.R. 121.333 (supplemental oxygen requirements for emergency descent and first aid for certain turbine engine airplanes); 14 C.F.R. 121.574 (oxygen for medical use by passengers on airplanes certified for certain uses); 14 C.F.R. 135.91 (the same for aircraft certified for different uses); 14 C.F.R. 135.157 (oxygen equipment requirements for airplanes certified for commuter or on-demand

operations); 49 C.F.R. 175.10(b) (requirements for transportation of cylinders containing medical oxygen for a passenger needing it for personal use at destination).[1]

As the district court determined, no ACAA regulation requires air carriers to accommodate persons with a breathing disability by routinely providing medical oxygen. Oxygen cylinders for emergency use are carried on many flights, and DOT regulations explicitly require them on flights that operate above 25,000 feet "[f]or first aid treatment of occupants who for physiological reasons might require undiluted oxygen following descent from cabin pressure altitudes above flight level 250." 14 C.F.R. 121.333(e)(3). The ACAA regulations do permit an air carrier that *chooses* to provide medical oxygen to "require up to 48 hours advance notice and one-hour advance check-in concerning a qualified individual with a disability who wishes to receive * * * (1) Medical oxygen for the use on board the aircraft, *if this service is available on the flight*." 14 C.F.R. 382.33(b) (emphasis added). The district court correctly found that this Section "strongly suggests that an air carrier is not required to provide oxygen." *Boswell*, 217 F. Supp.2d at 1221. While the Administrator has promulgated detailed and technical regulations that must be followed by an air carrier that chooses to provide medical oxygen, see 14 C.F.R. 121.574 (copy attached), no air carrier is required to provide this service.[2]

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[1] Since the ValuJet crash in Florida on May 11, 1996, passenger carriers have been prohibited from carrying oxygen generators as cargo. See 49 C.F.R. 171.11(d)(15). That disaster underscores the importance of strict safety regulations regarding oxygen on aircraft.

[2] As a result of advances in technology, the Office of the Secretary (OST), the Federal Aviation Administration, the Research and Special Programs Administration (RSPA), the Transportation Security Administration (TSA), and the National Council on

In 1998, the Secretary amended the ACAA regulations, adding the regulation upon which Ms. Boswell relies, 14 C.F.R. 382.7(c). That regulation provides:

> Carriers shall, in addition to meeting the other requirements of this part, modify policies, practices, or facilities as needed to ensure nondiscrimination, consistent with the standards of section 504 of the Rehabilitation Act, as amended. Carriers are not required to make modifications that would constitute an undue burden or would fundamentally alter their program.

Ms. Boswell incorrectly argues that this regulation requires an air carrier either to provide medical oxygen as requested by a passenger or to demonstrate that to provide medical oxygen would constitute an undue burden or fundamentally alter its program.

The district court correctly recognized that

> it is a "fundamental tenet of statutory construction that a court should not construe a general statute to eviscerate a statute of specific effect." To agree with Boswell's argument that Section 382.7 requires SkyWest to comply with Section 504, the Court would have to interpret the general language of section 382.7 as trumping Section 121.574, which specifically allows air carriers the discretion of whether or not to provide medical oxygen. The Court declines to adopt this approach because Boswell's reading of this general regulation conflicts with both the specific regulations in section 121.574 and the statute that the regulation implements. If Section 382.7 in fact affirmatively obligates airlines to provide medical oxygen to passengers, then the discretionary language in section 121.574 (an airline "*may* allow a passenger" to operate oxygen provided by the airline) simply makes no sense.

Boswell, 217 F. Supp.2d at 1222 (emphasis in original).

Moreover, when he amended Section 382.7, the Secretary stated:

Disability (NCD) have begun exploring whether safe alternatives exist for accommodating passenger needs in regard to use of oxygen. For example, the Department is presently examining whether it should permit passengers who require supplemental oxygen therapy during commercial flights to carry on and use their personal portable concentrator units that separate oxygen from atmospheric air.

> [Section 382.7(c)] is not intended to replace the rulemaking process with respect to across-the-board changes in carrier policies and practices. For example, the Department does not intend, in implementing and enforcing this provision, to address industry-wide *issues like on-board oxygen use by passengers* * * *. The provision is intended to deal with accommodations that take the form of case-by-case exceptions to otherwise reasonable general policies or practices of carriers.

63 Fed. Reg. 10528, 10530 (Mar. 4, 1998) (emphasis added). The Secretary thus distinguished between requests for individual exceptions to otherwise reasonable policies, for which the undue-burden or fundamental-alteration test would apply on a case-by-case basis, and "across-the-board" industry-wide issues where the Secretary's rulemaking could alter or change an air carrier's policy. In the latter situations, the case-by-case application of the undue-burden test would simply be inappropriate, and when he adopted this regulation, the Secretary expressly noted that "on-board oxygen use by passengers" was one of the latter category of issues. Because Congress has delegated to the Secretary the responsibility of promulgating regulations in this area, his interpretation of what the ACAA requires is entitled to substantial deference. *Chevron U.S.A. Inc.* v. *Natural Res. Defense Council, Inc.*, 467 U.S. 837, 842 (1984).

The Secretary carefully balanced the safety of all passengers, the requirements of the ACAA, and the burden on air carriers of accommodating persons with a disability in promulgating the ACAA regulations.[3] The Secretary has decided that the balance of

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[3] The Secretary continues to review this balance. Indeed, the Secretary through his Office of the General Counsel and with the assistance of the NCD has established a workgroup, consisting of the agencies with regulatory jurisdiction over these issues, discussed in note 2 above, to evaluate the changing technology and safety and security issues.

competing needs does not militate in favor of commanding all air carriers to undergo the cost and burden of meeting the regulatory requirements imposed by the Administrator's regulations that would ensure safe handling of this hazardous substance.

II. THE ACAA DOES NOT CREATE A PRIVATE CAUSE OF ACTION.

No private cause of action can be inferred from the ACAA. The Eleventh Circuit in *Love* v. *Delta Airlines,* 310 F.3d 1347 (11th Cir. 2002), correctly analyzed the current Supreme Court case law regarding implied causes of action in concluding that no such right of action could be inferred from the ACCA. This Court has applied a similar analysis to that used by the Eleventh Circuit in determining whether a private right of action exists under the Anti-Head Tax Act, 49 U.S.C. 40116, another aviation-related statute. See *Southwest Air Ambulance, Inc.* v. *City of Las Cruces*, 268 F.3d 1162, 1170 (10th Cir. 2001).[4]

A. Federal Causes Of Action Can Only Be Created By Congress.

This question cannot be answered by simply deciding whether the ACAA and its regulations create legal obligations that an airline like SkyWest must follow. Obviously they do. Rather, the question is whether a private individual has an implied cause of action in federal district court to attack SkyWest's supposed breach of those obligations. Congress can create such causes of action, but federal courts cannot. See *Alexander* v. *Sandoval*, 532 U.S. 275, 287 (2001) ("Raising up causes of action where a statute has not

[4] The Fifth and Eighth Circuits previously held that such a cause of action could be inferred from the ACAA. See *Tallarico* v. *Trans World Airlines, Inc.*, 881 F.2d 566, 568-570 (8th Cir. 1989); *Shinault* v. *American Airlines, Inc.*, 936 F.2d 796, 800-801 (5th Cir. 1991). But those court had applied an analysis that the Supreme Court has since rejected.

created them may be a proper function for common-law courts, but not for federal tribunals.") (internal quotation marks omitted). Because the ACAA does not expressly provide a private cause of action, such an action exists only if it can properly be inferred from the ACAA.

For a period of time, the Supreme Court broadly construed the remedies that could be inferred from statutes. In cases such as *J. I. Case Co.* v. *Borak*, 377 U.S. 426 (1964), and *Wyandotte Transportation Co.* v. *United States*, 389 U.S. 191 (1967), the Court inferred causes of action where such a remedy furthered the congressional purpose and where such a remedy was not expressly prohibited. The Supreme Court substantially altered its approach in *Cort* v. *Ash*, 422 U.S. 66, 78 (1975), where it identified four factors to determine whether to imply a private cause of action. In the years following its decision in *Cort*, the Supreme Court consistently refined its analysis to emphasize the second *Cort* factor — congressional intent. See, *e.g.*, *Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 578 (1979); *Thompson* v. *Thompson*, 484 U.S. 174, 179 (1988).

In *Sandoval*, the Court expressed this principle unequivocally: "[P]rivate rights of action to enforce federal law must be created by Congress." 532 U.S. at 286. **And "[s]tatutory intent on [a private right of action] is determinative. Without it, 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." *Id*. at 286-287 (citations omitted)**. The Eleventh Circuit in *Love* correctly noted that "*Sandoval* also clearly delimits the sources that are relevant to our search for legislative intent." 310 F.3d at 1352. "First and foremost, we look to the statutory text for rights-creating language."

Ibid. (internal quotation marks omitted). "Second, we examine the statutory structure" to determine if it "provides a discernable enforcement mechanism." *Id.* at 1353. Statutes that expressly provide enforcement mechanisms strongly suggest that mechanisms not provided were not intended. "Third, if — and *only* if — the statutory text and structure have not conclusively resolved whether a private right of action should be implied, we turn to legislative history and context within which a statute was passed." *Ibid.* (emphasis in original).

B. The Second *Sandoval* Factor Is Dispositive Here.

The Court in *Love* found that the ACAA's statutory text and statutory and regulatory structure "create[d] an elaborate and comprehensive enforcement scheme that belies any congressional intent to create a private remedy." 310 F.3d at 1354. *Love* correctly found this factor dispositive. "The express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others." *Sandoval*, 532 U.S. at 290.

Love noted first that the ACAA requires DOT to investigate each complaint of disability discrimination, publish these complaint data, review these data, and report annually to Congress on the results. 310 F.3d at 1354 (citing 49 U.S.C. 41705(c)). A person with a disability who believes he or she is the victim of discrimination by an airline may file a complaint with DOT. As the court stated in *Love*, after notice and hearing, DOT may issue an order compelling the air carrier's compliance with the ACAA, may revoke the carrier's certificate, may impose a fine (up to $10,000 for each violation), and may initiate an action in federal district court or request the Department of

Justice to do so. 310 F.3d at 1354-1356. DOT may also achieve compliance with provisions of the ACAA through DOT consent orders. Furthermore, DOT regulations require each air carrier to establish procedures to resolve ACAA complaints. 310 F.3d at 1355. But perhaps most importantly, *Love* recognized that the ACAA created a right for private persons to obtain relief in court. A person with a substantial interest in the enforcement proceeding may seek, in the appropriate court of appeals, review of the decision DOT reached in an enforcement action. 310 F.3d at 1356 (citing 49 U.S.C. 46110(a)). *Love* correctly noted that "[t]he fact that Congress has expressly provided private litigants with one right of action — the right to review of administrative action in the courts of appeals — powerfully suggests that Congress did not intend to provide other private rights of action." 310 F.3d at 1357. Relying on the language of *Sandoval*, the court held that Congress's providing these express enforcement mechanisms created a strong inference that Congress intended to preclude a private right of action. 310 F.3d at 1357.

Congress placed the ACAA within the Secretary's comprehensive administrative enforcement mechanism that adjudicates disputes under the aviation statutes the agency administers. Indeed, this Court relied upon this mechanism when it held that another part of the FAA, the Anti-Head Tax Act (AHTA), 49 U.S.C. 40116, does not provide a private right of action to enforce its provisions. *Southwest Air Ambulance, Inc.* v. *City of Las Cruces*, 268 F.3d 1162 (10th Cir. 2001). This Court held that "[w]e are persuaded that the fact that Congress provided a means by which violations of the AHTA are 'fully enforceable through a general regulatory scheme' indicates that the weight of the

evidence of congressional intent is against the suggestion that Congress intended to create a private right of action in the AHTA. *Id.* at 1170 (citations omitted). As with the AHTA, Congress's placement of the ACAA within an established administrative enforcement mechanism strongly "suggests that Congress intended to preclude others." *Sandoval*, 532 U.S. at 290.

C. The Other *Sandoval* Factors Do Not Alter The Strong Suggestion Of The Second Factor.

The Eleventh Circuit seems to have assumed without significant discussion that the ACAA included "rights-creating language." See *Love*, 310 F.3d at 1358 (in reviewing the history of the adoption of the ACAA, the court concluded that Congress "passed the ACAA to protect disabled individuals"). But the Court concluded that the strong contrary suggestion from the second factor overcame other factors indicating an intent to create a private right. *Id*. at 1357. This Court, like the Eleventh Circuit, need not resolve whether the ACAA used "rights creating language" because whatever private rights are created by Section 41705(a) are enforced by expressly-provided remedies that do not include a private right of action.

With regard to the third *Sandoval* factor — the legal context of enactment — the Eleventh Circuit in *Love* recognized that Congress enacted the ACAA in response to the Court's decision in *United States Department of Transportation* v. *Paralyzed Veterans of America*, 477 U.S. 597 (1986), but the court found this context to militate *against* finding a private cause of action. The Court stated that Congress, when it created the ACAA, could have afforded protection to persons with a disability by creating a private right of

action, but "instead opted to create an elaborate administrative enforcement scheme." *Love*, 310 F.3d at 1358. Thus, this aspect of the third factor strongly cuts against finding an implied cause of action in district court.[5]

[5] As is clearly demonstrated in this case, the regulations that the Secretary has promulgated regarding accommodating passengers with disabilities can be extensive and technical, and in promulgating them the Secretary balances the competing needs of safety, access, and security. And they must be continually reevaluated with changing technology. Congress has delegated this responsibility to the Secretary because of his expertise in this area. The difficulty in promulgating appropriate rules in this complex and technical area may be seen as another factor weighing against an inference that Congress intended a substantial role for federal courts in the rule-making process.

CONCLUSION

The ACAA and its implementing regulations currently permit SkyWest to choose not to provide passengers with medical oxygen, and it need not show that doing so would be an undue burden or fundamental alteration. Moreover, there is no private right of action to enforce the requirements of the ACAA in federal district court.

Respectfully Submitted,

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I hereby certify that on the 24th day of November, 2003, two copies of the foregoing Brief of the United States Department of Transportation as Amicus Curiae were mailed first class, postage prepaid, to the following counsel of record:

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