

# Client Bulletin

February 2008

## **First Circuit Agrees with Pilot that Passenger Posed a Safety Risk and Removal and Subsequent Denied Re-Booking Justified**

In a reversal of a \$400,000 jury verdict against the airline, the First Circuit Court of Appeals has vindicated a Captain's decision to remove and the subsequent decision to deny re-booking of a passenger based on the Captain's belief that the passenger posed a risk to aviation safety. In his discrimination lawsuit, plaintiff alleged that his removal and denied re-booking was due to his race and national origin (plaintiff is an American citizen of Portuguese descent). *Cerqueira v. American Airlines*, 2008 WL 104105 (1st Cir. 2008). After a trial in federal district court, a jury awarded plaintiff \$130,000 in compensatory damages and \$270,000 in punitive damages. The district court denied the airline's post-trial motions for a directed verdict and new trial and awarded attorney's fees to plaintiff.

In reversing the jury verdict and award of fees, the Court of Appeals described how plaintiff's behavior and statements before and during the boarding of the flight aroused the suspicions of the Captain, the flight attendants, and other passengers. Prior to the flight departing from Boston to Fort Lauderdale, the Captain had what he described as "one of the most odd exchanges that I've ever had" with a passenger who later was determined to be traveling the plaintiff. This incident led the Captain to inquire about the passenger once on board and led to several flight attendants reporting other suspicious and troubling behavior by plaintiff and his two seatmates.

Specifically, one of the flight attendants reported that the plaintiff had been "very hostile" towards her prior to boarding. She also reported that plaintiff had spent an unusual amount of time in the restroom immediately after boarding (which is a cause for concern because it is considered an insecure area in which a bomb may be placed). Other flight attendants observed plaintiff and his two seatmates, all of whom were seated in the same emergency exit row, laughing and making suspicious comments during the safety briefing. Their behavior had caused concern among other passengers. It also was reported that plaintiff exhibited unusual interest in flight attendant duties, conduct which also triggers safety concerns.

The Captain, who had worked at American since 1986, decided that based on his own observations and that of the cabin crew, there was sufficient cause to keep the aircraft at the gate and to further investigate. After delaying departure, he called the airline's operations department to give them a full report on his security concerns. The Captain then decided to remove the three men seated together from the plane for further questioning by State Police. After the men were removed, a passenger on the plane reported that one of the three men had box cutters confiscated from him at the TSA security checkpoint (a report which ultimately proved mistaken). The Captain reported this personally to the head of the TSA at Logan. During the questioning of the men by the State Police, the Captain communicated his continuing concerns to the airline operations control manager, who decided to deny re-booking to the plaintiff. At trial, the Captain also testified that he never saw the plaintiff, nor was he aware of the plaintiff's appearance.

On appeal, American argued that there was reversible error in the district court's failure to instruct the jury on the statutory permission granted to airlines in the Federal Aviation Act, 49 U.S.C. § 44902(b), to refuse to transport a passenger "the carrier decides is, or might be, inimical to safety." American also argued that the verdict was not supported by the evidence and that the punitive damages award was unreasonable.

At the outset, the Court of Appeals pointed out that even though the Federal Aviation Act has a general prohibition on race and national origin discrimination, the highest priority is air safety. As a result, a carrier's refusal to transport a passenger whom it believes might be inimical to safety can give rise to liability only if the decision was arbitrary and capricious in accordance with the standard set forth by the Second Circuit Court of Appeals in *Williams v. Trans World Airlines*, 509 F. 2d 942, 948 (2d Cir. 1975).

The Court of Appeals further explained that the review of a decision to refuse transport is restricted to what information was "actually known by the decision maker at the time of the decision." Because the decision must be made in an expedient manner, and it is the Captain who bears the ultimate responsibility of ensuring the safety of the aircraft, the Court pointed out that there is no obligation on the part of the Captain to make a thorough inquiry into the information received, the sources of that information, or to engage in an investigation. "Thus, even mistaken decisions are protected as long as they are not arbitrary or capricious," said the Court of Appeals. Finally, the Court pointed out that the jury instructions given were based on the incorrect assumption that Title VII employment discrimination instructions were appropriate when the issue was whether the plaintiff had met his burden to show the decision not to transport was arbitrary and capricious.

Based on these findings, the First Circuit reversed and remanded the action to the district court with instructions to enter judgment for the airline.



If you have any questions or would like further information concerning discrimination in boarding issues, please contact:

Katherine B. Posner, Esq.  
Anthony U. Battista, Esq.  
Lili Beneda, Esq.  
Condon & Forsyth LLP  
Times Square Tower  
7 Times Square  
New York, NY 10036  
Tel: (212) 490-9100  
Fax: (212) 370-4453  
E-mail:  
[kposner@condonlaw.com](mailto:kposner@condonlaw.com)  
[abattista@condonlaw.com](mailto:abattista@condonlaw.com)  
[lbeneda@condonlaw.com](mailto:lbeneda@condonlaw.com)