

Client Bulletin

March 2007

Denied Boarding - Striking A Balance Between Security And Civil Rights

A typical denied boarding claim includes allegations of racial, national origin or religious discrimination based upon the airline's refusal to transport a passenger. Denied boarding cases illustrate the air carrier's daily challenge to strike the correct balance between the commitment to protect individual civil rights and ensuring the security of the national air transportation system.

Recently, a federal jury in Boston awarded a plaintiff \$400,000 in compensatory and punitive damages, finding that the carrier discriminated against the plaintiff because of his race or national origin after he was denied boarding at Logan International Airport because of security concerns and then denied reboarding even after he had been cleared by local police.ⁱ

Plaintiff, who was born in Portugal and is a U.S. citizen, was taken into custody along with two Middle Eastern passengers who were seated beside him. Plaintiff did not know the men, who were Israelis, but thought he was taken into custody with the men because he looked like them. After the local police interrogated plaintiff and the other men, they determined that none of the men were a security threat.

Relevant Federal Statutes and Regulations. Several federal statutes and regulations provide the legal framework for discrimination based denied boarding claims.

Pursuant to 49 U.S.C. §40127(a) “[a]n air carrier or foreign air carrier may not subject a person in air transportation to discrimination on the basis of race, color, national origin, religion, sex or ancestry.” Pursuant to 49 U.S.C. §44902(b), a carrier may properly refuse to transport a passenger that presents a safety or security risk. Section 44902(b) authorizes an airline to “refuse

to transport a passenger or property the carrier decided is, or might be, inimical to safety.” It is this provision that provides the carrier with the authority to refuse to transport a passenger because of safety or security reasons made by any airline staff designated by the carrier as having that authority.

Under FAA regulations, specifically 14 C.F.R. 91.3, the pilot in command of the aircraft is the final authority as to the operation of that aircraft, including any decision to refuse to transport a passenger. Although §44902(b) and the FAA regulations give airline personnel broad discretion, this discretion is not absolute.ⁱⁱ Consequently, air carrier personnel have the authority to deny boarding to any individual deemed to be a safety or security risk. The reasons for determining that an individual is unsafe for travel or a security risk must be justified. The Department of Transportation (DOT) has recommended the use of a “but/for” test to assist air carrier personnel in providing justification for their actions. Airline employees are instructed to focus on specific behaviors and evaluate suspicious passengers by asking themselves: “but for this person's perceived race, ethnic heritage or religious orientation, would I have subjected this individual to additional safety or security scrutiny?”

Arbitrary and Capricious Standard. Similar to the DOT's recommended “but/for” test, courts have used the “arbitrary and capricious” standard when analyzing alleged violations of civil rights. The ultimate determination by a carrier to deny boarding or to refuse transporting an individual cannot give rise to a claim for damages, unless the carrier's decision was arbitrary and capricious.ⁱⁱⁱ

The analysis of whether an airline has properly exercised its discretion in removing a passenger is based upon the facts and circumstances known to the decision-maker at the time he or she made the decision.^{iv} “The decision is not to be tested by other facts later disclosed by hindsight.”^v Thus, the standard for reviewing a carrier's

decision is an objective one and the carrier's discretion is protected so long as their employees acted in good faith and the denied boarding decision was rational.^{vi} Furthermore, "the objective assessment of a carrier's decision must take into account all the circumstances surrounding the decision, including the (perhaps limited) facts known at the time; the time constraints under which the decision is made; and, not least, the general security climate in which events unfold."^{vii}

Two examples of courts interpreting the "arbitrary and capricious" standard follow.

(1) In *Al-Qudhai'een v. America West Airlines, Inc.* two Saudi Arabian passengers brought an action against American West and its pilots/flight attendants, alleging civil rights violations and other causes of action after a pilot removed them from the airplane and requested that law enforcement officers search their baggage.^{viii} The court held that the Captain's decision to remove the two passengers was reasonable because he based his decision on a number of reports that: (1) plaintiffs disobeyed flight attendant's instructions and changed seats without permission; (2) plaintiff Al-Qudhai'een entered the first class area and proceeded to walk toward the cockpit without obtaining permission; (3) plaintiff Al-Qudhai'een appeared to be anxious when he asked a flight attendant questions regarding the flight and became irritated and uneasy when informed that it would be stopping in Columbus, Ohio; (4) flight attendant considered plaintiff Al-Qudhai'een's questions about whether the plane they were currently on would also be the one that would travel on to Washington, D.C. to be uncommon for a passenger.^{ix}

Given these incidents, and taking into account all of the circumstances known to the American West Captain, the court found that it was reasonable for him to remove the plaintiffs from the plane. It is worth noting that the factors relied upon for the Captain's decision to remove plaintiff Al-Qudhai'een, were considered sufficient to also remove plaintiff Al-Shalawi, because the two were traveling together.

(2) In *Dasrath v. Continental Airlines, Inc.*, the New Jersey district court reconsidered defendant's motion for summary judgment holding that the Captain's decision to remove

plaintiff from a Continental flight was reasonable under the circumstances and that a jury would be compelled to find that security considerations were the sole reason for the Captain's decision to remove plaintiff.^x

Plaintiff, a U.S. Citizen born in Guyana and with a dark complexion was removed from a flight departing from Newark Airport along with two other men (Edgardo Cureg and Saraleesan Nadarajah, also of dark complexion). Plaintiff was not traveling with Cureg or Nadarajah, nor did plaintiff know either individual before this incident. Prior to boarding the plane, a passenger in the waiting area, complained to a gate agent that men were acting suspiciously.^{xi} Apparently, they were "talking on cell phones" and pretending not to know each other.^{xii} There is some dispute if one of these men included plaintiff.

Because Nadarajah was using Cureg's cell phone when the flight began to board, they agreed that the phone would be returned to Cureg when Nadarajah passed through first class upon boarding. Plaintiff and Cureg took their assigned seats in the first class section. As Nadarajah boarded the plane, he stopped and exchanged words with Cureg and returned the cell phone.^{xiii}

Nadarajah proceeded to the coach section and was then observed acting anxiously; repeatedly going into his carry-on luggage which he stored in a different section other than where he was sitting. The flight attendant alerted the Captain of Nadarajah's actions who also observed him and categorized him as being suspicious.^{xiv} Testimony from several other passengers revealed that Nadarajah was shaking and perspiring.^{xv} When the Captain announced that the flight was being delayed Nadarajah walked from the rear of the plane to the first class section and began speaking with Cureg. Plaintiff testified that he never moved from his assigned seat and he never spoke to Cureg or to Nadarajah at any time. Witness accounts differ as the Captain believed that all three gentlemen were engaged in conversation on the plane after he announced the delay.^{xvi}

A fellow passenger, while speaking with the Captain, may have pointed toward plaintiff and told the Captain that "those brown skin men are behaving suspiciously." Continental disputed

that the passenger used the phrase “brown skin men” but agrees that the passenger pointed to the plaintiff while speaking with the Captain.^{xvii} The Captain then exited the aircraft to check the flight information on the three men, at which point he decided to remove all three men from the flight.

The court explained that these events occurred less than three months after the events of September 11, 2001 and only one week after Richard Reid’s failed attempt to destroy an American Airlines airplane with a shoe bomb.^{xviii} Additionally, the court noted that the Captain never identified the three removed passengers by their race; he identified them by their seat numbers or by where they were located in the plane. If the crew members or passengers spoke of the three men it was seldom by race, and when it was, it was purely for identification purposes.^{xix}

Conclusion. Undoubtedly, historical milestone events, such as the September 11 terrorist attacks, tend to test the balance between security and freedom. As such, the aviation industry must strive to maintain the balance of providing a safe and secure air transportation system that is free from discrimination. As one of the primary players in trying to strike this balance, air carriers must provide careful attention and training to all personnel to ensure that the reasonableness of actions taken by airline personnel when faced with a difficult denied boarding situation does not lead to claims of discrimination.

If you have any questions or would like further information for training purposes please contact:

Christopher R. Christensen, Esq.
 Jean Cooper Rose, Esq.
 Condon & Forsyth LLP
 7 Times Square
 New York, New York 10036
 Tel: (212) 894-6720
 Fax: (212) 370-4453
 Email:
cchristensen@condonlaw.com
jrose@condonlaw.com

ⁱ Shelley Murphy, Boston Globe, Jan. 16, 2007.
ⁱⁱ Al-Qudhai’een v. America West Airlines, Inc., 267 F.Supp.2d 841, 846 (S.D. Ohio 2003).
ⁱⁱⁱ Williams v. TransWorld Airlines, 509 F.2d 942, 948 (2d Cir. 1975); Schaeffer v. Cavallero, 54 F.Supp.2d 350, 351 (S.D.N.Y. 1999); Al-Qudhai’een, 267 F.Supp.2d at 846; Dasrath v. Continental Airlines, Inc., 2006 WL 372980 (D.N.J. 2006).
^{iv} See Christel v. AMR Corp., 222 F.Supp.2d 335, 340 (E.D.N.Y. 2002) citing Norman v. TransWorld Airlines, Inc., 2000 WL 1480367 *3 (S.D.N.Y. 2000).
^v Id. (citations omitted.)
^{vi} Dasrath, 2006 WL 372980 (D.N.J. 2006).
^{vii} Id.
^{viii} Al-Qudhai’een, 267 F.Supp.2d at 846.
^{ix} Id. at 847.
^x Dasrath v. Continental Airlines, Inc., 2006 WL 3759715 (D.N.J. 2006).
^{xi} Id. at *5-6.
^{xii} Id. at *5.
^{xiii} Id. at *4.
^{xiv} Id. at *6-7.
^{xv} Id. at 9-10.
^{xvi} Id. at 7.
^{xvii} Id. at *4.
^{xviii} Id. at *15.
^{xix} Id.