

**DOT's Enforcement of Anti-Discrimination Laws in Commercial Aviation
(June 2021)**

Among its many responsibilities, such as setting national aviation policy and air carrier licensing, the U.S. Department of Transportation ("DOT") is also tasked with enforcing several anti-discrimination statutes applicable to air travel. For example, the Air Carrier Access Act (49 U.S.C. § 41705) has prohibited air carriers from discriminating against individuals with disabilities for over 25 years. This article focuses on two other anti-discrimination statutes that DOT is responsible for enforcing. Under DOT's statutory authority related to these anti-discrimination statutes, DOT has the authority to investigate, and if a violation is found, assess civil penalties against carriers for violations. The current maximum civil penalty for violations of anti-discrimination statutes is \$35,188 per violation.¹ Therefore it is important for carriers to understand how DOT interprets its authority, as well as how DOT investigates and approaches allegedly discriminatory conduct. DOT is expected to have a renewed focus on enforcement of these statutes under the Biden administration. Indeed, in an apparently unpublicized move, DOT has already updated its guidance to airline personnel concerning anti-discrimination training, clarifying the interpretation of one statute.

DOT's authority to investigate and penalize alleged discriminatory actions by U.S. and foreign air carriers primarily is found in 49 U.S.C. § 40127(a) which prohibits carriers from discriminating against passengers on the basis of "race, color, national origin, religion, sex, or ancestry." Furthermore, and far more broadly, 49 U.S.C. § 41310(a) prohibits carriers from subjecting "a person, place, port, or type of traffic in foreign air transportation to unreasonable discrimination."

For carriers, it can be difficult to balance the anti-discrimination requirements of sections 40127 and 41310 and safety and security-related requirements; this may be a greater conundrum for foreign carriers which must observe requirements of both their homelands and the U.S. Decisions to deny transportation to a passenger must be lawful, but DOT will scrutinize those actions more closely than actions related to customer service. This is because air carriers are considered common carriers under U.S. law, and, as such, (i) have an obligation to



The firm's practice encompasses virtually every aspect of aviation law, including advising domestic and foreign airlines on compliance with the DOT's regulations and policies concerning nondiscrimination in air travel. For further information regarding the matters discussed in this article, please contact any of the following attorneys:

David M. Endersbee
(202) 973-7935
dendersbee@kmazuckert.com

Barbara M. Marrin
(202) 973-7961
bmarrin@kmazuckert.com

KMA Zuckert LLC
888 17th Street, NW, Suite 700
Washington, D.C. 20006
Telephone: (202) 298-8660
Fax: (202) 342-0683
www.kmazuckert.com

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DOT's Enforcement of Anti-Discrimination Laws

Page 2 of 5

carry members of the public who meet the requirements for transport and (ii) owe their passengers the utmost standard of care.² Therefore, decisions to deny transportation receive extra scrutiny from regulators, especially if it appears that the only basis for the denial was because of a passenger's perceived characteristics related to a protected class.

DOT Investigation Process

Importantly, DOT investigates every discrimination complaint it receives. DOT receives complaints in two primary ways: (i) through the informal complaint process where passengers can submit complaints directly to DOT through an online portal and (ii) through the formal complaint process. Formal complaints are filed in DOT's public docket and have formalized procedural steps for respondent carriers to follow. At present most formal complaints concern the availability of refunds during the COVID-19 pandemic. But prior to the pandemic, passengers who felt that they were discriminated against often used this process to initiate DOT investigations.³ The informal complaint process is the most widely used complaint process. Of these informal complaints, DOT typically receives about 100 complaints that it classifies as non-disability discrimination complaints each year,⁴ making this an active area of investigation.

When a passenger files an informal discrimination complaint, DOT provides the carrier with an opportunity to respond. After reviewing the carrier response, DOT then determines whether there is a potential violation. The results of these investigations are rarely made public unless DOT issues a public notice or order in the case.

Over the past 20 years, DOT has issued at least 10 discrimination-related consent orders and one public letter that shed some light on how DOT investigates these claims as well as how DOT penalizes carriers for violations. In all the consent orders, the alleged violation involved a refusal to transport or a denied boarding. Therefore, while allegations of discrimination may cover other carrier conduct, to date DOT has shown that it is unlikely to pursue a civil penalty or public enforcement action absent a refusal to transport.

How does DOT determine if there is a violation of an anti-discrimination law?

First and foremost, the anti-discrimination laws are not intended to supersede or take the place of laws permitting pilots-in-command to make safety and security decisions for flights. Section 44902(b) of Title 14 allows carriers to refuse transportation to persons whose transportation might be "inimical to safety." TSA regulations require carriers to refuse transportation to passengers who do not consent to a search of their person or property. And the Federal Aviation Regulations vests final authority in the operation of the aircraft with the pilot-in-command.

Recognizing that federal law permits carriers to refuse transportation to persons when there is a safety and security concern, a review of DOT enforcement actions concerning discrimination shows that DOT is more likely to take action when (i) the carrier's action to deny transportation is not reasonable, taking into account the totality of the circumstances, and (ii) the carrier does not follow its own established safety and security procedures for addressing safety or security concerns.

After the September 11th terrorist attacks, DOT received an influx of discrimination complaints from travelers alleging discrimination based on their perceived national origin or religion. In the immediate aftermath, DOT issued a notice to carriers reminding them of their obligations under the federal anti-discrimination statutes.⁵ DOT followed this notice with guidance documents related to discrimination, advising carriers that "all available facts and circumstances be taken into account in identifying persons or property that may be a safety or security risk."⁶ Despite these actions, DOT continued to receive complaints related to alleged discriminatory treatment. In response, DOT opened wide-ranging investigations into the practices and policies of major U.S. carriers, finding in several instances that carrier conduct may have amounted to violations of the discrimination prohibition. DOT addressed these issues through public cease and desist orders, but instead of assessing civil penalties, the orders required the carriers to spend sizable sums to

DOT's Enforcement of Anti-Discrimination Laws

Page 3 of 5

develop training programs related to discrimination and procedures to address how carrier personnel handle such situations.⁷

Following those orders, DOT has taken public enforcement action, finding violations and assessing penalties in situations where carrier personnel failed to follow established procedures for addressing potential safety and security concerns. For example, in one case, a passenger alerted a flight attendant to what, in that passenger's estimation, was suspicious activity by a couple who were perceived to be Muslim.⁸ The flight attendant observed the behavior of the couple and reported it to the pilot. After consideration, the pilot decided to have a corporate security staff member observe their behavior. However, the pilot decided to deplane the couple before the supervisor even had an opportunity to interview them. Although the couple displayed no "red flags," the pilot refused to re-board the passengers and did not let the supervisor conduct an independent evaluation, in contravention of the carrier's established policy. DOT found the decision to deny transportation, which did not align with the carrier's policy, constituted discrimination because in the circumstances presented it appeared that "but for" the couples' perceived religion, the pilot would not have removed them. Although DOT recognized that the pilot-in-command ultimately does have the final say on who they decide to transport, such decisions, if based on a discriminatory reason, are violations of the statutes.

DOT put it more plainly in a case involving the removal of two religious leaders from a regional carrier flight being operated as a codeshare flight for a mainline carrier.⁹ Due to passenger concern and unrest, the pilot requested the removal of the religious leaders and rescreening. Law enforcement officials and the mainline carrier's security personnel determined that there was no security threat. DOT found the carrier's failure to re-board the passengers to be a violation of the anti-discrimination statutes. In summarizing its finding, DOT provided this valuable guidance to carriers: "Once an individual who has been removed from an aircraft because of security concerns has been found to not be a security threat, the carrier must allow that individual to re-board the same aircraft and take his/her flight so long as the aircraft has not yet departed unless a valid safety or security concern exists."¹⁰

Recent Developments

After President Biden's January 2021 inauguration, one of his first executive actions was to affirm, via Executive Order, that federal prohibitions on discriminations based on sex apply to discrimination based on gender identity or sexual orientation.¹¹ The Executive Order cited the recent decision in the Supreme Court case of *Bostock v. Clayton County*, which found that a law prohibiting employment discrimination on the basis of sex also applies to claims of discrimination on the basis of gender identity and sexual orientation.¹² In May 2021, without any apparent publicity, DOT updated its guidance document to airline personnel related to discrimination to specify that Section 40127 covers discrimination related to gender identity and sexual orientation.¹³

This document provides guidance to airline personnel and advises carriers to use the "BE FAIR" model (an acronym of enumerated best practices) for addressing scenarios that may present concerns related to safety and security and members of protected classes. The BE FAIR model recommends airline personnel approach problems by being comprehensive in their evaluation of available facts; ensure effective communication with passengers and with other coworkers; follow established policies and procedures as well as regulatory requirements; assess each situation individually; inquire about any potential threat; and, resolve and remedy the situation. This guidance document illustrates DOT's main focus in its discrimination cases – to ensure that carrier decisions are reasonable, based on all available facts, and follow established procedures. DOT often uses the "but for" test, meaning "but for" the passenger's perceived characteristics, would the passenger have been treated the way that the passenger alleges.

DOT's Enforcement of Anti-Discrimination Laws

Page 4 of 5

What can carriers do to ensure compliance?

Carriers should already have established training and policies to address discrimination. As part of the FAA Reauthorization Act of 2018, Congress directed the Government Accountability Office (“GAO”) to review U.S. carrier programs on racial, ethnic and religious non-discrimination.¹⁴ The FAA Reauthorization Act of 2018 also required DOT to “develop and disseminate leading nondiscrimination training practices.”¹⁵ DOT has not yet done so, but the GAO developed considerations for carrier training programs, and recommended that such trainings include topics related to implicit bias, stereotype threat, racial anxiety, and cultural competence.

Training should include not only topics such as carrier policies to assess safety and security concerns, but also cultural differences or customs (such as diversity, racism, or anti-bias training), particularly for carriers with international service. Using the BE FAIR model, described above, is a good road map to compliance. The steps in the BE FAIR model exemplify how DOT approaches allegations of discrimination, meaning DOT looks at the totality of the circumstances that lead to a carrier decision. If a carrier uses an approach to passenger issues that allows personnel to assess and approach the situation with clear and effective communication, it may lessen the chance for a discrimination complaint (to say nothing of a highly aggrieved passenger and negative publicity). Carriers should also develop policies for recording and memorializing incidents related to challenging passenger interactions. By documenting incidents, including crew statements, the carrier will have reliable contemporaneous reports to rely on in defending itself against claims of discrimination.

Additionally, carriers should ensure that all training materials conform to DOT guidance. For example, with DOT's recent update to its guidance to airline personnel, carriers should ensure that their personnel understand that discrimination based on gender identity or sexual orientation is prohibited. Refusal to transport is the most serious action a carrier can take against a passenger. Carriers must ensure that their personnel understand the procedures and steps to follow before a passenger is denied transportation for a safety or security reason. Finally, we recommend that decisions to deny transportation be made with input from supervisors as well as crew. Ultimately the pilot-in-command does have the final decisional authority, but their decision should be made with as much input as possible so that they can independently assess the situation, separate from the passenger's perceived characteristics (and the perception/discomfort of other passengers) and based on objective criteria.

Carriers are advised to ensure their training programs are reviewed by counsel to ensure they conform with their legal obligations to conduct operations in a non-discriminatory manner.

¹ 49 U.S.C. § 46301.

² See *Eid v. Alaska Airlines, Inc.*, 621 F.3d 858, 865-66 (9th Cir. 2010).

³ See, e.g., Third Party Complaint of Jonathan Parker v. Saudi Arabian Airlines, Docket DOT-OST-2015-0093 (Apr. 28, 2015).

⁴ Complaint statistics are published by the DOT in the monthly *Air Travel Consumer Report* available at <https://www.transportation.gov/individuals/aviation-consumer-protection/air-travel-consumer-reports>. For the calendar year 2019, DOT received 107 non-disability discrimination complaints. In 2020, due the COVID-19 pandemic and significantly curtailed passenger traffic, DOT received 48 non-disability discrimination complaints.

⁵ See Letter of Norman Strickman, Assistant Director for Aviation Consumer Protection, to Major Airlines (Sept. 21, 2011) (available at <https://www.transportation.gov/sites/dot.dev/files/docs/20010921.pdf>).

DOT's Enforcement of Anti-Discrimination Laws

Page 5 of 5

⁶ See Guidance for Screeners and Other Security Personnel (Nov. 16, 2001) (available at <https://www.transportation.gov/sites/dot.dev/files/docs/20011116.pdf>).

⁷ See, e.g., American Airlines, Inc. Violations of 49 U.S.C. §§ 40127, 41310, 41702 and 41712, Consent Order, Docket DOT-OST-2003-15046 (Feb. 27, 2004).

⁸ Delta Air Lines, Inc. Violations of 49 U.S.C. §§ 40127(a) and 41310, Consent Order, Docket DOT-OST-2020-0001, Order 2020-1-9 (Jan. 24, 2020).

⁹ Atlantic Southeast Airlines, Inc., Compliance with 49 U.S.C. §§ 40127(a), 41702, 41310, and 41712, Consent Order, Docket DOT-OST-2012-002, Order 2012-5-2 (May 2, 2012).

¹⁰ *Id.*

¹¹ Executive Order 13988, Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation (Jan. 20, 2021).

¹² *Bostock v. Clayton County*, 590 U.S. ___ (2020).

¹³ Guidance for Airline Personnel on Non-discrimination in Air Travel (last updated May 10, 2021) (available at <https://www.transportation.gov/sites/dot.gov/files/2021-05/Guidance%20for%20Airline%20Personnel%20on%20Non-discrimination%20in%20Air%20Travel%205-10-2021.pdf>).

¹⁴ Airline Consumer Protections: Information on Selected Airlines' Non-Discrimination Training Programs, GAO-19-654R (Aug. 22, 2019) (available at <https://www.gao.gov/assets/gao-19-654r.pdf>).

¹⁵ *Id.*