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UNFAIR TREATMENT FOR EXPERIENCED PILOTS—HOW THE NINTH CIRCUIT PROMOTED AGE DISCRIMINATION

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IN *WEILAND V. AMERICAN AIRLINES, INC.*, the Ninth Circuit held that a sixty-year-old American Airlines pilot was not entitled to the protection offered by the Fair Treatment for Experienced Pilots Act (FTEPA).[1] By doing so, the majority inadvertently, yet conspicuously, sanctioned age bias, contrary to the goal of anti-discrimination laws. The majority in this case improperly construed one of the two exceptions prescribed by the FTEPA that should have allowed for retroactive application of the extended retirement age for pilots.[2] Rather than dismissing Weiland's case, the Ninth Circuit should have reversed the district court and remanded for further proceedings in order to align with the spirit of the newly-enacted FTEPA.

The plaintiff in this case, Henry Weiland, sued his employer, American Airlines, after it refused to reinstate him following passage of the FTEPA.[3] Henry Weiland turned sixty on December 7, 2007, a mere six days before the FTEPA was signed, which abrogated the former "Age 60 Rule."[4] As mandated by the Age 60 Rule at the time, American Airlines removed Weiland from active duty of operating aircraft on his sixtieth birthday.[5] American Airlines, in response to Weiland's request for reinstatement, informed him that the FTEPA could not retroactively apply to him because he did not meet the requirements for exemption

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1 Weiland v. Am. Airlines, Inc., 778 F.3d 1112, 1113 (9th Cir. 2015).

2 *See* 49 U.S.C. § 44729(e)(1)(A) (2012); *id.* at 1116 (Reinhardt, J., dissenting).

3 *Weiland*, 778 F.3d at 1114.

4 *Id.* at 1113; *see* 14 C.F.R. § 121.383(c) (2007).

5 *Weiland*, 778 F.3d at 1114; *see* 14 C.F.R. § 121.383(c) (2007).

from the rule.[6] Instead, Weiland was assigned to the position of check airman on December 7, 2007.[7] As a check airman, his duties included "evaluating pilots in land-based simulators and in the air during cockpit 'line checks,' and piloting aircraft."[8]

Weiland filed his complaint in the U.S. District Court for the Central District of California.[9] However, finding his arguments unpersuasive, the court granted American Airlines' motion to dismiss, and Weiland timely appealed.[10] The Ninth Circuit "reluctantly" affirmed,[11] agreeing with the district court and holding that "[b]ecause Weiland did not qualify for an exception to the FTEPA's non-retroactivity provision, its abrogation of the FAA's Age 60 Rule was inapplicable to Weiland, who turned 60 on December 7, 2007."[12]

Prior to December 13, 2007, the Federal Aviation Administration's (FAA) Age 60 Rule governed the retirement age for "Part 121" pilots.[13] The Age 60 Rule "required Part 121 air carriers to cease scheduling pilots from operating aircraft when they turned 60."[14] Subsequently, President George W. Bush signed the FTEPA, which pushed the age in which pilots were required to stop flying back to 65.[15] However, Congress explicitly included a non-retroactivity provision, with only two exceptions, that stated the following:

> No person who has attained 60 years of age before the date of enactment of this section may serve as a pilot for an air carrier engaged in covered operations unless—(A) such person is in the employment of that air carrier in such operations on such date of enactment as a required flight deck crew member; or (B) such person is newly hired by an air carrier as a pilot on or after such

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[6] *Weiland*, 778 F.3d at 1114.

[7] *Id.* at 1113.

[8] *Id.*

[9] *Id.* at 1114.

[10] *Id.*

[11] *Id.* at 1115.

[12] *Id.*

[13] *Id.* at 1113; *see* Part 121 Pilot Age Limit, 74 Fed. Reg. 34,229, 34,229, 34,234 (July 15, 2009). A Part 121 air carrier is "each person operating or intending to operate civil aircraft—(1) [a]s an air carrier or commercial operator, or both, in air commerce; or (2) [w]hen common carriage is not involved, in operations of U.S.-registered civil airplanes with a seat configuration of 20 or more passengers, or a maximum payload capacity of 6,000 pounds or more." 14 C.F.R. § 119.1(a)(1)–(2) (2007).

[14] *Weiland*, 778 F.3d at 1113; *see* Part 121 Pilot Age Limit, 74 Fed. Reg. at 34,229.

[15] 49 U.S.C. § 44729(a) (2012).

> date of enactment without credit or prior seniority or prior longevity for benefits or other terms related to length of service prior to the date of rehire under any labor agreement or employment policies of the air carrier.[16]

The court only discussed the former exception.[17] Since Weiland reached the age of sixty just six days before enactment of the FTEPA, to receive protection he needed to prove that he fit into this category.[18]

In this case of first impression in the Ninth Circuit, the majority interpreted this non-retroactivity rule, starting by breaking it down into three elements: "(1) 'in the employment of that air carrier,' (2) 'in such operations,' and (3) 'as a required flight deck crew member.'"[19] Since Weiland clearly satisfied the first element, the majority, after defining "employment," focused on the second and third.[20] Regarding the second element, the majority found that the term "such operations" related back to "covered operations" as defined by 49 U.S.C. § 44729(b)[21] and that Weiland failed to meet this requirement because his employer complied, as it was required, with the very regulation the FTEPA abrogated.[22] Consequently, who would ever satisfy this element? Turning to the final element, the majority concluded that Weiland also failed this test.[23] To resolve this question, the majority looked to a case from the D.C. Circuit.[24] In *Emory v. United Air Lines, Inc.*, the court held that the only persons who could have satisfied this element were those "serving as [required flight deck crew members] in a secondary, non-piloting capacity on December 13, 2007," which the plaintiff pilots in

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[16] *Id.* § 44729(e)(1).

[17] *Weiland*, 778 F.3d at 1113 ("Only the first exception is at issue in this appeal . . . .").

[18] *Id.* at 1114.

[19] *Id.*

[20] *Id.* (defining employment as "receiving compensation in return for work").

[21] *Id.* at 1114–15 (The majority conveniently and unhelpfully states the definition as "operations under part 121 of title 14, Code of Federal Regulations."). However, the dissent provides a clearer understanding. *See infra* text accompanying notes 47–52.

[22] *Weiland*, 778 F.3d at 1115 (finding that "Weiland could not have been lawfully engaged in any such operations on December 13, 2007 . . . because he was ineligible to do so under the FAA's Age 60 Rule when he turned 60 on December 7.").

[23] *Id.*

[24] *Id.*; *see* Emory v. United Air Lines, Inc., 720 F.3d 915, 926 (D.C. Cir. 2013).

that case were not.[25] However, the *Emory* case is distinguishable from the present case: those pilots were not reassigned to positions as check airmen.[26] In fact, the court in *Emory* even suggested that check airmen or flight engineers could qualify as required flight deck crew members, however it failed to take a formal stance.[27] So, without a clear definition of "required flight deck crew member," the question is appropriate for repeating: who would ever satisfy this element?

The majority in *Weiland* attempted to answer these questions in an inconspicuous footnote.[28] It found that the exception applied to two categories of people: (1) "pilots who turned 60 on December 13, 2007; and (2) "check airmen who did not have to be active pilots" under their collective bargaining agreement.[29] The majority found support for the latter category in a case out of the D.C. District Court.[30] In that case, *Brooks v. Air Line Pilots Association*, the court dismissed the complaint for lack of ripeness but first recognized that Continental Airlines (Continental), the employer, interpreted "the language of the statute to allow flight instructors and check airmen to be treated as 'required flight deck members.'"[31] A close reading of the *Brooks* case discloses that the *Weiland* majority somewhat misconstrued the proposition it set out in its second applicable category. The collective bargaining agreement did not govern the validity of the § 44729(e)(1)(A) exception; the airliner did.[32] In fact, the Air Line Pilots Association International (ALPA), charged with the sole representation of its pilot-members' interests, attempted to challenge Continental's interpretation of the FTEPA.[33] Therefore, under the court's reading, it appears that employers are free to dictate when, and for whom, the exception applies, essentially condoning age discrimination.

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[25] *Emory*, 720 F.3d at 927 (finding that "over-60 persons were barred from piloting Part 121 flights under the Age 60 Rule").

[26] *Id.*

[27] *Id.* at 927 n.21.

[28] *See Weiland*, 778 F.3d at 1115 n.2.

[29] *Id.*

[30] *Id.*; *see* Brooks v. Air Line Pilots Ass'n, Int'l, 630 F. Supp. 2d 52, 54 (D.D.C. 2009).

[31] *Brooks*, 630 F. Supp. 2d at 54. However, the court does not provide a definition for "required flight deck member" as it was not requested by the parties.

[32] *See id.*

[33] *Id.* at 53.

The *Weiland* dissent took issue with the way the majority interpreted the exception prescribed in § 44729(e)(1)(A).[34] Judge Reinhardt committed to the stance that "Weiland was . . . 'in the employment of [an air carrier engaged in covered operations] on such date of enactment as a required flight deck crew member.' He need[ed] no more to prevail."[35] Like the majority, Judge Reinhardt agreed that "such operations" was synonymous with "covered operations" referred to in § 44729(e)(1).[36] However, he disagreed as to the term's definition and to its modifying word.[37] While the majority assumed without any analysis that "such operations" modified "person,"[38] Judge Reinhardt proffered that "such operations" modified "air carrier."[39] This notion was explored in *Emory*, but it was ultimately rejected by the court.[40] However, the court did find some merit in the plaintiff's arguments, which were rather persuasive and are further bolstered by Judge Reinhardt's revelations in *Weiland*.[41] Following the "last antecedent rule," the court noted that '"a limiting clause or phrase . . . should ordinarily be read as modifying only the noun or phrase that it immediately follows.'"[42] In that case, Judge Reinhardt's conclusion clearly followed.[43] However, the court in *Emory* concluded that the last antecedent rule was outweighed by a preference to avoid redundancy.[44]

The *Weiland* dissent, on the other hand, offered more support for the construction that "such operations" modified "air carrier."[45] In the FTEPA, Congress defined covered operations as

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[34] *Weiland*, 778 F.3d at 1115 (Reinhardt, J., dissenting) ("Statutory construction is frequently not easy. For that reason I set forth the sentence we are construing at the top of this dissent.").

[35] *Id.* at 1115–16.

[36] *Id.* at 1116.

[37] *See id.*

[38] *See id.* at 1115 (majority opinion).

[39] *Id.* at 1116 (Reinhardt, J., dissenting).

[40] *See* Emory v. United Air Lines, Inc., 720 F.3d 915, 927 (D.C. Cir. 2013) (holding that "the 'in such operations' language of § 44729(e)(1)(A) modifies 'Such person.'").

[41] *See Weiland*, 778 F.3d at 1116 (Reinhardt, J., dissenting); *id.* at 926.

[42] *Emory*, 720 F.3d at 926 (quoting Barnhart v. Thomas, 540 U.S. 20, 26 (2003)).

[43] *See Weiland*, 778 F.3d at 1116 (Reinhardt, J., dissenting); *see also id.*

[44] *Emory*, 720 F.3d at 926 ("Logically, we think, one must read § 44729(e)(1)(A)'s use of '*that* air carrier' as a reference back to § 44729(e)(1)'s 'air carrier engaged in covered operation' language. So understood, it would be redundant to . . . apply 'in such operations' to the already qualified '*that* air carrier' as opposed to 'Such persons.'").

[45] *See Weiland*, 778 F.3d at 1116 (Reinhardt, J., dissenting).

"operations under part 121 of title 14, Code of Federal Regulations."[46] Unlike the other cases discussing this notion, the *Weiland* dissent addressed and interpreted the definition.[47] Judge Reinhardt found that "[p]art 121 operations are the 'operations of each person who holds or is required to hold an Air Carrier Certificate or Operating Certificate under part 119.'"[48] He further explained that these certificates are not held by pilots but rather the airlines employing the pilots.[49] Therefore, it logically follows that part 121 operations applied to American Airlines as the employer.[50] Part 119 of the Code of Federal Regulations also supported this conclusion by defining the scope of part 121 operations as applying '"to each person operating or intending to operate civil aircraft . . . [a]s an air carrier or commercial operator, or both in air commerce.'"[51] Again, the airline holds this responsibility, not the pilot.[52] It is clear that simple statutory construction results in an outcome contrary to the majority holding.

Furthermore, if "in such operations" did refer to "person," the dissent noted that the statute made no mention as to how the pilot was required to engage in "such operations" to qualify for the exception.[53] It merely required "employment . . . as a required flight deck crew member[.]"[54] There are several explanations for why Congress chose not to include a "lawfulness" requirement in the FTEPA.[55] As the dissent pointed out, "there are many reasons why an otherwise qualified pilot in the employment of an airline may not be able to lawfully operate a commercial aircraft on a given day."[56] A flightcrew member may not pilot a plane or report for flight duty without sufficient rest.[57] Furthermore, a flightcrew member may not be assigned to a flight if his or her total flight time will surpass either "(1) 100 hours in any 672 consecutive hours or (2) 1,000 hours in

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[46] 49 U.S.C. § 44729(b) (2012).

[47] *See Weiland*, 778 F.3d at 1116 (Reinhardt, J., dissenting).

[48] *See id.* (quoting 14 C.F.R. § 121.1(a)).

[49] *See id.*

[50] *See id.*

[51] *Id.* (quoting 14 C.F.R. § 119.1(a)(1)).

[52] *Id.*

[53] *Id.*; *see* 49 U.S.C. § 44729(e)(1)(A) (2012).

[54] 49 U.S.C. § 44729(e)(1)(A); *see Weiland*, 778 F.3d at 1116 (Reinhardt, J., dissenting).

[55] *See Weiland*, 778 F.3d at 1116 Reinhardt, J., dissenting).

[56] *Id.*

[57] *Id.*; 14 C.F.R. § 117.5 (2014).

any 365 consecutive calendar day period."[58] Flightcrew members are required to engage in a rest period and must not be assigned or accept an assignment during said rest period.[59] Finally, a crewmember may not work within a certain time after consuming alcohol or impairing drugs.[60] In each of these examples, the person is still employed by the airline but just inhibited from performing his or her duties due to a lawful constraint. Therefore, as the dissent mentioned, the majority's logic was flawed.[61] The majority wrote words into the statute that did not exist and, further, that Congress did not intend.

The *Weiland* majority, and the dissent, left the public without a clear understanding of what constitutes a "required flight deck crew member." What is clear, however, is that Mr. Weiland did fit the mold. The majority appeared to gloss over the fact that Weiland was reassigned to a position as a check airman, with duties including "piloting aircraft."[62] Both this case and the *Emory* case agreed that a pilot undoubtedly qualified as a required flight deck crew member.[63] However, the majority assumed that Weiland's inactive status immediately disqualified him from the exemption, but it failed to analyze whether his role as check airman made him eligible, which was considered as a possibility in *Emory*.[64] Rather, the majority concluded that since the Age 60 Rule required Weiland's removal from pilot status, he could not possibly qualify as a required flight deck crew member.[65] If this is an appropriate interpretation, then what was Congress's intention when it drafted an exception to the non-retroactivity provision in the FTEPA? With the way the majority interpreted the

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[58] *Weiland*, 778 F.3d at 1116 (Reinhardt, J., dissenting); 14 C.F.R. § 117.23(b)(1), (2).

[59] *Weiland*, 778 F.3d at 1116 (Reinhardt, J., dissenting); 14 C.F.R. § 117.25.

[60] *Weiland*, 778 F.3d at 1116 (Reinhardt, J., dissenting); 14 C.F.R. § 91.17 ("No person may act or attempt to act as a crewmember of a civil aircraft—(1) Within 8 hours after the consumption of any alcoholic beverage; (2) While under the influence of alcohol; (3) While using any drug that affects the person's faculties in any way contrary to safety . . . .").

[61] *Weiland*, 778 F.3d at 1116 (Reinhardt, J., dissenting) ("[U]nder the majority's logic, someone who would otherwise qualify for the exception but who happened to be on his 'required rest period' on December 13, 2007 would not qualify because . . . he 'could not have been lawfully engaged in any such operations on December 13, 2007.").

[62] *Id.* at 1113 (majority opinion).

[63] *See id.* at 1115; Emory v. United Air Lines, Inc., 720 F.3d 915, 926 (D.C. Cir. 2013).

[64] *See Weiland*, 778 F.3d at 1115; *Emory*, 720 F.3d at 927 n.21.

[65] *Weiland*, 778 F.3d at 1115.

language, the only exemptible persons were those that turned sixty on December 13, 2007, the day the FTEPA was enacted.[66] If Congress intended for that to be the only scenario in which § 44729(e)(1)(A) applied, then it would have written the exception accordingly. The mere fact that Congress more broadly drafted the exception shows that the majority's narrow interpretation was contrary to legislative intent.

By failing to properly construe § 44729(e)(1)(A), the Ninth Circuit transformed a congressional act into an obsolete, unworkable provision. It acknowledged only two narrow categories of people who qualify for the non-retroactivity exception, one of which was not supported by the very authority the court cited. That merely leaves pilots who turned sixty on the day of enactment with any type of relief. However, the Ninth Circuit's interpretation protects one other class of sixty-year-old pilots: those the airline chooses to keep around for another five years. This result holds very clear consequences: Airlines in the Ninth Circuit are permitted to discriminate based on age by choosing whether to continue the employment of an older pilot or trade him in for a newer model. While it may seem as though this issue is moot (every pilot who turned sixty on December 13, 2007 is now over the age of sixty-five and well into retirement), the unfairly treated pilots should still have the option to seek relief for wages they lost when forced to retire five years premature.

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[66] *See id.*; *see also supra* text accompanying notes 29–33.