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Rehabilitation Act - Call It Aid, Call It Help, but Don't Call It Federal Financial Assistance: *Shotz v. American Airlines, Inc.*

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REHABILITATION ACT—CALL IT AID, CALL IT HELP, BUT DON'T CALL IT "FEDERAL FINANCIAL ASSISTANCE": *SHOTZ V. AMERICAN AIRLINES, INC.*

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DOES THE GOVERNMENT provide federal financial assistance when it showers millions of dollars on a company struggling to stay in business? While the answer may seem like an obvious "yes," the Eleventh Circuit twisted words and precedent to answer "no" in *Shotz v. American Airlines, Inc.*,[1] where it ruled that American Airlines, Inc. ("American") and nine other defendants were not subject to the anti-discrimination measures of the Rehabilitation Act of 1973[2] ("Rehabilitation Act"), despite having collectively received $3.7 billion in federal grants.[3] The court held that an entity receives "Federal financial assistance"[4] within the meaning of the Rehabilitation Act only when it is the intent of Congress to provide a subsidy.[5] Furthermore, the court found that the grants and loan guarantees provided to private airline companies by the Air Transportation Safety and System Stabilization Act[6] ("Stabilization Act"), passed in response to the terror attacks of September 11, 2001, were compensation, not subsidies, and therefore the aid did not oblige the airlines to comply with the Rehabilitation Act.[7] Despite the Eleventh Circuit's strenuous assertions to the contrary, their ruling is flawed

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[1] 420 F.3d 1332 (11th Cir. 2005).

[2] 29 U.S.C. §§ 701-796 (2000).

[3] Amended Complaint ¶ 7, Shotz v. Am. Airlines, Inc., 323 F. Supp. 2d 1315 (S.D. Fla. 2004) (No. 04-20372-CIV) [hereinafter Complaint].

[4] 29 U.S.C. § 794(a) (2000).

[5] *Shotz*, 420 F.3d at 1335.

[6] Pub. L. No. 107-42, 115 Stat. 230 (2001) (codified at 49 U.S.C. § 40101 (2005)) [hereinafter Stabilization Act].

[7] *Shotz*, 420 F.3d at 1336.

because it ignores the plain text of the two statutes and Congress' intent.

In January 2004, Lynda Enders flew on American from Austin, Texas, to Orlando, Florida, with a layover in Dallas/Ft. Worth, Texas.[8] Ms. Enders has partial paralysis of the left side of her body, caused by a stroke in 1967, and she uses an electric scooter and a service dog to assist her in walking.[9] Ms. Enders alleged that American violated her rights by discriminating against her and subjecting her to inferior treatment because of her disability.[10] Specifically, Ms. Enders alleged, *inter alia*, that American disassembled her electric scooter, refused to assist her in boarding, forced her to walk to her connecting gate, refused to assist her with her luggage, and damaged her electric scooter.[11] Ms. Enders further alleged that aircraft operated by American did not comply with federal requirements for accessible aisle seats, movable aisle armrests, accessible lavatories, and accessible bulkhead rows.[12]

Enders joined seventeen other individuals with disabilities in a putative class action lawsuit charging American Airlines and nine other air carriers with violating the Rehabilitation Act.[13] The plaintiffs alleged that the air carriers were subject to the Rehabilitation Act, which applies only to programs and services receiving "Federal financial assistance," because the air carriers accepted cash payments and loan guarantees provided under the Stabilization Act.[14] The defendant air carriers responded with a joint motion to dismiss under Federal Rule of Civil Procedure 12(b)(1) (lack of subject matter jurisdiction) and 12(b)(6)

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[8] Complaint ¶ 42, Shotz v. Am. Airlines, Inc., 323 F. Supp. 2d 1315 (S.D. Fla. 2004) (No. 04-20372-CIV).

[9] *Id.* ¶ 15.

[10] *Id.* ¶ 51.

[11] *Id.* ¶ 53.

[12] *Id.* ¶ 53 (KKK)-(PPP). Because bulkhead rows have no seats in front of them, they provide more space for passengers with disabilities and their service animals. Enders alleged that American replaced regulation-compliant aircraft with aircraft having emergency exits at the bulkhead rows, thereby restricting these commodious seats to non-disabled passengers. *Id.* ¶ 53 (NNN).

[13] Shotz v. Am. Airlines, Inc., 420 F.3d 1332, 1334 (11th Cir. 2005).

[14] *Id.* Plaintiffs later conceded that Department of Transportation regulations exempted the loan guarantees from consideration as "Federal financial assistance." *See* Defendant's Reply Memorandum in Support of Their Joint Motion to Dismiss at 5, Shotz v. Am. Airlines, Inc., 323 F. Supp. 2d 1315 (S.D. Fla. 2004) (No. 04-20372-CIV); *see also* 49 C.F.R. § 27.5 (2006) ("Federal financial assistance means any grant, loan, contract (*other than . . . a contract of insurance or guaranty*).") (emphasis added).

(failure to state a claim upon which relief may be granted).[15] The air carriers argued that cash payments received under the Stabilization Act were not "Federal financial assistance," and, therefore, the Rehabilitation Act was inapplicable to them.[16] The trial court agreed and granted the defendants' motion to dismiss the case,[17] and the plaintiffs appealed to the Eleventh Circuit.[18]

The Eleventh Circuit faced the question of whether the defendant airlines were subject to the anti-discrimination provisions of the Rehabilitation Act by virtue of having accepted billions of dollars from the federal government as compensation for lost income due to the September 11 terror attacks.[19] In finding that the airlines were not subject to the Rehabilitation Act, the Eleventh Circuit relied principally on two prior cases that addressed the issue of when federal money triggers the Rehabilitation Act: *Jacobson v. Delta Airlines, Inc.*[20] and *DeVargas v. Mason & Hanger-Silas Mason Co.*[21]

The courts in *Jacobson* and *DeVargas* divided federal money into two categories: subsidies, which trigger the provisions of the Rehabilitation Act, and compensation, which does not.[22] Citing the repeated use of the words *compensate* and *compensation* in the Stabilization Act and its implementing regulations, the Eleventh Circuit found that Congress' unambiguous intent was to compensate air carriers, not to provide them with a subsidy.[23] In response to the plaintiffs' contention that the funds were not compensation because the federal government received nothing in return, the Eleventh Circuit affirmed the district court's statement that "whether [d]efendants performed services in this case in exchange for funds they received is irrelevant."[24] The court was similarly dismissive of the idea that the word *assistance* has a

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[15] Defendants' Memorandum in Support of Their Joint Motion to Dismiss at 3, Shotz v. Am. Airlines, Inc., 323 F. Supp. 2d 1315 (S.D. Fla. 2004) (No. 04-20372-CIV).

[16] *Shotz*, 420 F.3d at 1334.

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] 742 F.2d 1202 (9th Cir. 1984).

[21] 911 F.2d 1377 (10th Cir. 1990).

[22] *DeVargas*, 911 F.2d at 1382; *Jacobson*, 742 F.2d at 1210.

[23] *Shotz*, 420 F.3d at 1336; *see also* Stabilization Act § 101; 14 C.F.R. §§ 330.1, 330.9, 330.11 (2005).

[24] *Shotz*, 420 F.3d at 1338 (quoting Shotz v. Am. Airlines, Inc., 323 F. Supp. 2d 1315, 1319 (S.D. Fla. 2004)).

common meaning in both the Rehabilitation Act and the Stabilization Act, calling the argument "without merit."[25] Fixating on Congress' use of the word *compensate*, the court ruled that the defendants were not subject to the Rehabilitation Act.[26]

Admittedly, *Jacobson* and *DeVargas* were important precedents for this decsision, and a brief review of their facts is instructive.[27] In *Jacobson*, the Ninth Circuit held that payments to Delta Airlines for transporting mail did not include a subsidy and therefore were not "Federal financial assistance."[28] Although the court could have determined the presence of a subsidy by comparing the payments to the fair market value of the services rendered, the Ninth Circuit eschewed this approach as unnecessarily complex and burdensome for the courts because the fair market value would fluctuate, and the applicability of the civil rights provisions might change at any time.[29] The Ninth Circuit adopted what it considered a better approach: inquiring "whether the government intended to provide assistance or merely to compensate."[30]

While payments for carrying the mail were compensation, dicta in *Jacobson* indicated that federal grants made to encourage air carriers to provide services to small communities did constitute "Federal financial assistance."[31] The court stated that because the Rehabilitation Act applies only to programs and services receiving federal money, "Delta's receipt of such payments at most subjects only the small community service program to the civil rights laws."[32]

In *DeVargas*, the government expected to save approximately $3.5 million by replacing government guards with private employees and after a competitive bidding process awarded the contract to the lowest bidder.[33] Not wanting to "scrutinize the fair market value of every transaction as if [they] were article III

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[25] *Id.*

[26] *Id.* at 1336.

[27] It is notable that the Eleventh Circuit did not discuss the facts of *Jacobson* and *DeVargas*. Any such discussion would have revealed that the court was applying those precedents far out of context. *See infra* notes 45-46 and accompanying text.

[28] Jacobson v. Delta Airlines, Inc., 742 F.2d 1202, 1209-10 (9th Cir. 1984).

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] DeVargas v. Mason & Hanger-Silas Mason Co., 911 F.2d 1377, 1382 (10th Cir. 1990).

accountants,"[34] the Tenth Circuit followed *Jacobson* and looked to the government's intent in paying the contractor.[35] Payments made under the contract were compensation, as the government entered into the contract in circumstances showing that "there was no governmental intent to give [the contractor] a subsidy."[36]

With these precedents in mind, we turn back to *Shotz*. Proper statutory construction always begins with the plain text of the statute.[37] The Eleventh Circuit effectively skipped this step, noting only that the Rehabilitation Act does not define "Federal financial assistance."[38] The court then adopted the *DeVargas* definition of assistance as "a subsidy" and carried out its analysis as if the Rehabilitation Act used the word *subsidy*.[39] But the Rehabilitation Act applies when an entity receives "Federal financial *assistance*,"[40] not a federal subsidy. Congress provided funds in the Stabilization Act to *assist* the struggling airline industry in an attempt to avert massive bankruptcies.[41] The Stabilization Act itself refers to the federal grants as "assistance" in a later section.[42] Both supporters and detractors of the Stabilization Act characterized the bill as "federal assistance"[43] and "financial assistance"[44] to the airlines. Thus, the funds given under the Stabilization Act fall within the plain meaning of "Federal financial assistance," and the Rehabilitation Act should have applied to the recipients of those funds.

Not only did the Eleventh Circuit fail to analyze the statutory text before adopting another court's interpretation, but it also failed to appreciate the reasoning behind the compensation/subsidy distinction. *Jacobson* looked to whether Congress in-

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[34] *Id.*

[35] *Id.*

[36] *Id.* at 1382-83.

[37] Perrin v. United States, 444 U.S. 37, 42 (1979).

[38] Shotz v. Am. Airlines, Inc., 420 F.3d 1332, 1335 (11th Cir. 2005).

[39] *See id.* Indeed, the Eleventh Circuit was fond of editing Congress' works so as to avoid dealing the plain text of statutes, at one point quoting the Rehabilitation Act for the phrase "federal financial *aid*." *See id.* at 1338 (emphasis added).

[40] *See* 29 U.S.C. § 794(a) (2000) (emphasis added).

[41] *See* Stabilization Act Preamble ("An Act To preserve the continued viability of the United States air transportation system.").

[42] Stabilization Act § 106(a) (ordering the president to report to Congress on "the amounts of assistance provided . . . to each air carrier").

[43] 147 CONG. REC. H5912 (2001) (statement of Rep. Reyes).

[44] *Id.* at H5913 (statement of Sen. Bentsen); *id.* (statement of Rep. Waxman); *see also id.* at H5910 (Sen. Kilpatrick voting against what she termed a "financial assistance package").

tended to subsidize the airline only because the more direct method of determining whether the defendant received federal financial assistance—comparing the federal payments to the market value of the services provided—was judicially unwieldy, and the result would fluctuate with market forces.[45] There is no difficulty determining the value of the services provided to the government in the present case, nor is there any fluctuation in value over time; no services were rendered to the government, and therefore, the market value is zero. The payments in this case are like the payments made in *Jacobson* to encourage the provision of air service to small communities, payments that the Ninth Circuit indicated would trigger the Rehabilitation Act.[46]

Even if the Eleventh Circuit was correct to ignore the statutory text and to focus on the compensation/subsidy distinction, the Rehabilitation Act still should have applied because the payments were in fact subsidies. A subsidy is "[a] grant, usually made by the government, to any enterprise whose promotion is considered to be in the public interest."[47] No bright line divides compensation from subsidy, and indeed a single payment could be both.[48] Unlike in *DeVargas*, the government did not use any competitive bidding process to ensure that it gave out no more than necessary. Indeed, there was nothing to bid on. The government had no obligation to make up any income lost because of the September 11 terror attacks, and it did not for most businesses affected by September 11. The Stabilization Act gave the airlines a new right to payment for those losses because Congress believed that promoting the companies was in the public interest. The form and substance of the payments meet the plain definition of a subsidy, and thus, even under the rubric of *Jacobson* and *DeVargas*, the Rehabilitation Act should have applied.

Finally, the Eleventh Circuit failed to consider the intent of Congress in enacting the Rehabilitation Act. The Rehabilitation Act's goal is "providing individuals with disabilities with the tools necessary to . . . achieve . . . full inclusion and integration in

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[45] *See* Jacobson v. Delta Airlines, Inc., 742 F.2d 1202, 1210 (9th Cir. 1984).

[46] See *supra* notes 31-32 and accompanying text.

[47] BLACK'S LAW DICTIONARY 1469 (8th ed. 2004); *see also id.* at 719 (defining *grant* as "[a]n agreement that creates a right of any description other than the one held by the grantor").

[48] *See Jacobson*, 742 F.2d at 1210 (referencing a government chart showing "whether or not each such air carrier receives a section 406 subsidy" as part of its payment for transporting mail).

society."[49] Congress enacted the Rehabilitation Act to enforce "the policy of the United States that all programs, projects, and activities receiving assistance . . . be carried out in a manner consistent with the principles of . . . inclusion, integration, and full participation of the individuals [with disabilities]."[50] In short, Congress did not want to force taxpayers to fund programs that discriminated against them. By ruling that the defendant airlines can use federal funding to finance operations that discriminate against taxpayers with disabilities, the court ignores Congress' intent in passing the Rehabilitation Act.

Had the Eleventh Circuit made a factual comparison between *Shotz* and the cases it cited, the court would have had difficulty reaching its conclusion. Instead, the court ignored the text of the Rehabilitation Act, focused on a single word in the Stabilization Act, and summarily concluded that Congress did not subsidize the airline industry. Perhaps the court's best argument for affirming dismissal was that it would have been inconsistent for Congress, in extending billions of dollars of aid to the airlines, simultaneously to open them up to billions of dollars of new litigation.[51] But the Rehabilitation Act makes no exceptions for situations where it would be expensive or politically unpopular to enforce its provisions, and the defendant airlines were free to decline the funds. Four years after the events of September 11, 2001, the airline industry remains in poor financial condition.[52] The court may have felt that it had no politically viable option except to affirm, but politics provide no excuse for suspending the ordinary and routine decision-making process.

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[49] 29 U.S.C. § 701(a)(6)(B) (2000).

[50] *Id.* § 701(c).

[51] Shotz v. Am. Airlines, Inc., 420 F.3d 1332, 1337 (11th Cir. 2005).

[52] *See, e.g.*, Micheline Maynard et al., *Bankruptcy for 2: Storm Broke The Camel's Back; Delta's Filing Was Not Unexpected, But Northwest Had Hoped to Hold Out*, N.Y. TIMES, Sept. 15, 2005, at C1.


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