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The Americans with Disabilities Act as It Relates to Employment in the Aviation Industry: Navigating through Uncontrolled Airspace

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THE AMERICANS WITH DISABILITIES ACT AS IT RELATES TO EMPLOYMENT IN THE AVIATION INDUSTRY: NAVIGATING THROUGH UNCONTROLLED AIRSPACE

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THE AMERICANS With Disabilities Act[1] (ADA) was signed into law by President Bush on July 26, 1990, and constituted a sweeping change in the protection of rights of individuals with disabilities from discrimination in the employment and labor arenas. The need for the ADA is best explained in light of the Rehabilitation Act of 1973,[2] which mandated equal access to employment opportunities for disabled individuals only when federally funded programs were involved.[3] Because the Rehabilitation Act in effect excluded all individuals in the private employment and labor spectrums (i.e., non-federally funded programs), the ADA was passed to protect private sector individuals against disability discrimination,[4] whether the disability is a physical or mental impairment that substantially limits a person's major life activities, or a "perceived" impairment.[5] Thus, an employer, employment agency, labor organization, or joint labor-management committee is precluded from discriminating against a qualified individual with a disability in the hiring process or during an employee's tenure with that organization.[6]

I. THE ADA AS IT RELATES TO THE AVIATION INDUSTRY

The ADA, as it applies to the aviation industry, is still in its infant stages. While the ADA is limited in its application to the aviation industry,[7] employees and prospective employees have utilized the ADA to pursue hiring discrimination claims and

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[1] 42 U.S.C. §§ 12101-12213 (1994).

[2] 29 U.S.C. §§ 701-797b (1988 & Supp. 1993).

[3] *Id.* § 794.

[4] *See* Little v. Lycoming County, 912 F. Supp. 809, 818 (M.D. Pa. 1996), *aff'd*, 101 F.3d 691 (1996).

[5] *See* 42 U.S.C. § 12102(2).

[6] *See id.* §§ 12111, 12112.

[7] The application of the ADA to the aviation industry is generally limited to Title I of the Act, codified in Subchapter I of 42 U.S.C. § 12101. Title II of the ADA-Public Services, codified in Subchapter II of 42 U.S.C. § 12101, protects only against exclusion from participation in or denial of benefits of the services, programs, or activities of a public entity, and against discrimination from a public entity. *See* 42 U.S.C. § 12132. Congress specifically excluded the airline industry from application of Title III of the ADA-Public Accommodations and Services Operated By Private Entities, codified in Subchapter III of 42 U.S.C. § 12101. H.R. REP. NO. 101-485, pt. 1, at 36 (1990), *reprinted in* 1990 U.S.C.C.A.N. 267, 280. However, the ADA may apply to shuttle services operated by commercial airlines. *See id.*

general disability discrimination claims.[8] ADA claims in the aviation industry are still a new phenomenon being explored and discovered through case law and the judiciary. This Article highlights some of the areas in which the ADA has been applied to the airline industry. This Article is not a comprehensive overview of all situations in which the ADA might be applied to the aviation industry, but rather highlights court decisions on ADA claims that involve and directly affect the aviation industry.

II. GENERAL MECHANICS OF THE ADA

The general outline of the ADA under Title 1 is as follows:

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ADA Section	Section Description
§ 12101	General purpose of the ADA.
§ 12102	Definitions of the ADA, wherein "Disability" is defined in § 12102(2).
§ 12111	ADA definition of "qualified individual with a disability," "reasonable accommodation," and "undue hardship" as to a reasonable accommodation.
§ 12112	General "discrimination" definition provided along with a construction section. Medical examinations and inquiries are also covered in this section.
§ 12113	Defenses of ADA are outlined.
§ 12114	ADA and illegal use of drugs and alcohol are outlined.
§ 12117	Enforcement, remedies and procedures are outlined.

In order for an employee or a prospective employee to find protection under the ADA, that individual must be "a qualified individual with a disability."[9] The following sections outline the burdens of proof of the aggrieved employee as well as the defendant employer in an ADA claim.

[8] There has even been an article written as to how the ADA impacts flight attendants and the shoes they wear. *See* Marc Linder, *Smart Women, Stupid Shoes, and Cynical Employers: The Unlawfulness and Adverse Health Consequences of Sexually Discriminatory Workplace Footwear Requirements for Female Employees*, 22 J. CORP. L. 295 (1997).

[9] 42 U.S.C. § 12112(a) (1994); *see also* Benson v. Northwest Airlines, Inc., 62 F.3d 1108, 1111-12 (8th Cir. 1995).

A. EMPLOYEE'S BURDEN OF PROOF

The aggrieved employee must establish the following:

1. That he or she is qualified to perform the essential functions of the job, with or without reasonable accommodation (which he/she must describe).[10]

2. That the employee suffers from a "disability" under the ADA, specifically:

   a. "[A] physical or mental impairment that substantially limits one or more of the *major life activities* of such individual;

   b. A record of such an impairment; or

   c. Being *regarded* as having such an impairment."[11]

3. That he or she has suffered adverse employment action because of his or her disability.[12]

4. That the employer failed to provide a "reasonable accommodation" to the aggrieved employee.[13]

5. "If the employer shows that the employee cannot perform the essential functions of the job even with reasonable accommodation the employee must rebut that showing with evidence of individual capabilities."[14]

B. EMPLOYER/DEFENDANT AIRLINE OR CARRIER'S BURDEN OF PROOF

If the employer disputes that the employee can perform the "essential functions" of the job, the employer must put on some evidence of those *essential job functions,* providing the court with information that determines what those essential functions ultimately are, even though the employee retains the burden of

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[10] *See* 42 U.S.C. § 12111(8); *see also* 29 C.F.R. § 1630.2(o) (1997). Consideration is given to the employer's judgment as to "what functions of a job are essential." 42 U.S.C. § 12111(8). Determining if an individual is qualified involves a two prong test: (1) Whether the individual meets the necessary prerequisites for the job, such as education, experience, training and the like; and (2) whether the individual can perform the essential job functions, with or without reasonable accommodations. *See* 29 C.F.R. § 1630.2(m) (1997); *see also* Betty Southard Murphy, *The Americans With Disabilities Act: How It Affects the Airline and Railroad Industries,* C823 ALI-ABA 523, 526 (1993).

[11] 42 U.S.C. § 12102(2) (emphasis added).

[12] *See* 42 U.S.C. § 12112; *see also* Sutton v. United Air Lines, Inc., 130 F.3d 893, 897 (10th Cir. 1997), *cert. granted,* No. 97-1943, 1999 WL 5326 (U.S. 1999).

[13] 42 U.S.C. § 12111(9); *see Benson,* 62 F.3d at 1112.

[14] *Benson,* 62 F.3d at 1112.

proof of persuading the trier of fact that he or she can perform the essential functions.[15]

Once an employee establishes that a "reasonable accommodation" is possible, the burden shifts to the employer to present evidence that the "reasonable accommodation" is not possible.[16]

Thus, if an individual proves that he or she has a "qualified disability," and that individual possesses the requisite job-related skills and meets the requisite job requirements, with or without reasonable accommodations, that individual is protected from employment discrimination under the ADA.[17]

C. Key Words as to the Mechanical Operation of the ADA

There are some key phrases as to the mechanical workings of the ADA, especially as it relates to the airline industry. Some of the key phrases are "major life activity," "disability," "reasonable accommodation," and "essential functions." The parts that follow discuss how courts have applied these key phrases in aviation cases and in cases which will have a direct impact on the industry.

1. *What is a "Disability" as it Relates to Vision Cases in ADA Aviation Claims?*

There have been a few cases concerning employees and potential employees attempting to classify vision as a *perceived* disability affecting a major life activity. The first vision case, *MacDonald v. Delta Air Lines, Inc.*, involved a fifty-two year old aircraft mechanic, MacDonald, who sued Delta Air Lines claiming that his impaired vision was a disability, which limited his ability to perform the major life activity of working.[18] MacDon-

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[15] *See* 42 U.S.C. § 12111(8); *see also* 29 C.F.R. § 1630.2(n)(3)(iv) (1998) (providing that evidence of whether a particular function is essential includes the consequences of not requiring the incumbent to perform the function).

[16] 42 U.S.C. § 12111(9); *see Benson*, 62 F.3d at 1112.

[17] As a condition to recovery under the ADA, a claim must be filed with the Equal Employment Opportunity Commission (EEOC) and a right-to-sue letter must be issued prior to filing the ADA claim in federal court and within the prescribed time limitations set forth under 42 U.S.C. § 2000e-5. *See* Kent v. Director, Mo. Dep't. of Elementary & Secondary Educ. & Div. of Vocational Rehabilitation, 792 F. Supp. 59, 62 (E.D. Mo. 1992).

[18] 94 F.3d 1437, 1445 (10th Cir. 1996). To support his claim of disability, MacDonald relied on his testimony that he informed Delta of his belief that he "had a cataract," which prevented him from performing his job, as well as evidence that he failed a physical due to his impaired vision. *See id.*

ald's job duties included "meeting arriving flights, checking with the crew to identify any mechanical problems, and preparing flights for timely departure."[19] Delta cited MacDonald for failing to meet an assigned flight, as well as past disciplinary problems, and asked for MacDonald's resignation.[20] MacDonald filed an ADA claim against Delta, alleging that Delta knew of his vision problems, causing Delta to regard him as having a "'physical . . . impairment that substantially limit[ed]' his ability to perform the duties of an airplane mechanic."[21]

The Tenth Circuit held that MacDonald failed to establish a "disability" under the ADA because he did not show that Delta regarded his vision problems as "substantially limiting" his ability to perform his job duties as an airplane mechanic.[22] In reaching this conclusion, the *MacDonald* court focused on the terms "major life activities" and "substantially limits" in dismissing MacDonald's ADA claim. The court noted that although major life activities are not defined in the ADA, the ADA's implementing regulations define major life activities as "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working."[23]

While MacDonald asserted that "working" was the major life activity substantially limited,[24] the court did not find, under the facts presented, that his ability to work was substantially limited.[25] The court noted that although "substantially limiting" is not defined under the ADA, the court relied on three major factors listed in the EEOC regulations[26] that should be considered in determining whether an individual is substantially limited in a major life activity.[27] The three factors identified in the regulations are:

(1) The nature and severity of the impairment;

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[19] *Id.* at 1439.

[20] *See id.* at 1440.

[21] *Id.* at 1443.

[22] *See id.* at 1446. MacDonald presented no evidence that Delta treated or regarded him any differently as a result of the alleged knowledge of his vision problems. *See id.* Although Delta refused to allow MacDonald to taxi aircraft as a result of failing his physical, the court concluded that refusing to allow MacDonald to taxi aircraft is not enough to qualify as regarding him as having a disability. *See id.*

[23] *Id.* at 1444; *see also* 29 C.F.R. § 1630.2(i) (1998).

[24] *See MacDonald*, 94 F.3d at 1444.

[25] *See id.* at 1445.

[26] *See* 29 C.F.R. § 1630 (1998).

[27] *See MacDonald*, 94 F.3d at 1444.

(2) The duration or expected duration of the impairment; and

(3) The permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment.[28]

The *MacDonald* court found that a substantial limitation from the major life activity of working requires more than a limitation preventing performance of a single or particular job, but requires a limitation preventing performance of a "class of jobs" or a broad range of jobs.[29] MacDonald would have had to show that he was regarded as substantially limited from performing a broad range of jobs or a class of jobs by Delta to constitute the substantial limitation from the major life activity of working.[30] The court found that MacDonald failed to make such a showing because MacDonald's preclusion from taxiing aircraft due to his vision impairment did not encompass a broad range of jobs or various classes of jobs, but instead a single particular job function of an airline mechanic.[31]

In the similar case of *Sutton v. United Air Lines, Inc.*, the Tenth Circuit explored commercial airline pilots' claims that uncorrected vision disqualified them from pilot positions with United and that such a disqualification constituted a "disability" under the ADA.[32] The *Sutton* plaintiffs, twin sisters, applied for commercial airline pilot positions with United in 1992.[33] The plaintiffs each had uncorrected vision of 20/200 in the right eye and 20/400 in the left eye, which disqualified them from pilot positions with United.[34] The *Sutton* court explored to what extent the impairment of vision must "substantially" limit a major life activity in order for a plaintiff to show that he or she suffers from a disability.[35]

The plaintiffs claimed that seeing was the "major life activity" that was substantially limited.[36] In determining what constitutes a substantial limitation of a major life activity, the *Sutton*

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[28] 29 C.F.R. § 1630.2(j)(2).

[29] *See MacDonald*, 94 F.3d at 1444-45; *see also* 29 C.F.R. § 1630.2(j)(3)(I).

[30] *See MacDonald*, 94 F.3d at 1445.

[31] *See id.* at 1445-46. MacDonald admitted that passing the taxi physical was not a necessary part of being an aircraft mechanic. *See id.* at 1455.

[32] 130 F.3d 893 (10th Cir. 1997), *cert. granted*, 142 L. Ed. 2d 28 (1999).

[33] *Id.* at 895.

[34] *See id.* United required pilot applicants to have uncorrected vision of 20/100 or better in each eye. Plaintiffs' corrected vision was 20/20 in both eyes. *Id.*

[35] *Id.* at 900.

[36] *See id.* at 895.

court reviewed the EEOC regulations implementing the ADA and definitions therein, as well as the EEOC Interpretive Guidance on Title I of the ADA (EEOC Interpretive Guidance).[37] The EEOC Interpretive Guidance states "[t]he existence of an *impairment* is to be determined without regard to mitigating measures such as medicines, or assistive or prosthetic devices."[38] The *Sutton* court noted a split of authority among courts as to the EEOC Interpretive Guidance determination that the disability inquiry should be made without regard to mitigating or corrective measures, such as glasses or contact lenses, in defining "substantially limiting" a "major life activity."[39] The *Sutton* court rejected the EEOC Interpretive Guidance regarding corrective measures as being in direct conflict with statutory language requiring a "substantial limitation of the major life activity of seeing" and viewed the plaintiffs' impairment of vision in its *corrected state.*[40] Because the plaintiffs did not dispute that their *corrected* vision was 20/20 or better, they did not suffer under a "disability" as required by the ADA.[41]

A minor impairment in vision may not be considered a disability for a pilot. The EEOC Interpretive Guidance provides as an example that "an individual who cannot be a commercial airline pilot because of a minor vision impairment, but who can be a commercial airline co-pilot or a pilot for a courier service, would not be substantially limited in the major activity of working."[42]

2. *What is an "Essential Function" as it Relates to a Qualified Individual with a Disability?*

Another prerequisite to ADA protection that an employee or a potential employee must satisfy is that he or she can perform an "essential function" of the employment position.[43] In *Moritz v. Frontier Airlines, Inc.*, a Frontier ticket counter and gate employee, diagnosed with multiple sclerosis, filed a claim against Frontier asserting that she resigned her position due to the dis-

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[37] *See id.* at 900-01; *see also* 29 C.F.R. pt. 1630, app. (1998).

[38] 29 C.F.R. pt. 1630, app., § 1630.2(h) para. 2 (emphasis added).

[39] *Sutton*, 130 F.3d at 901, nn.7-8.

[40] *Id.* at 902. The court noted that the EEOC Interpretive Guide is entitled to some consideration in the court's analysis, but does not carry the force of law. *See id.* at 899 n.3.

[41] *See id.* at 902-03.

[42] 29 C.F.R. pt. 1630, app., § 1630.2(j) para. 12 (1998).

[43] *See* 42 U.S.C. § 12111(8) (1994).

crimination she encountered in performing gate duties for Frontier Airlines, in violation of the ADA.[44] The *Moritz* court focused on the issue of whether the plaintiff was able to perform the essential functions of her job, with or without reasonable accommodation.[45] The court defined an essential function to mean "the fundamental job duties of the employment position the individual with a disability holds or desires," not including the "marginal functions of the position."[46] The *Moritz* court held that the plaintiff could not perform the "essential functions" of her station agent job, which included the gate agent responsibilities of assisting passengers to and from the gate area.[47] In making its determination, the court considered that Frontier was a start up airline with a limited budget for staffing, that the airline considered the responsibility of passenger assistance an essential function to the gate agent's job, and that Frontier could not reasonably accommodate Moritz in light of her disability.[48] The *Moritz* court found that Frontier was not obligated to (1) reallocate the essential function of the gate agent position to another Frontier employee, (2) revise its bidding system as to seniority regarding the reassignment of job duties with Frontier employees, or (3) hire additional employees to reasonably accommodate plaintiff Moritz.[49]

As noted in Part II of this Article, the employee has the burden of producing some evidence that he or she can perform the job duties assigned to that employee despite the disability. If the employee puts forth this type of evidence, then the burden of proof shifts to the employer to produce some evidence of the essential functions of the job position (i.e., that it is unable to provide the employee with a reasonable accommodation).[50] Essential job functions are identified by determining, among other things, the duties encompassed within the performance of the job, whether the employees in that position are required to perform that job function, whether removing the function would fundamentally change the job, whether there are a limited number of employees available to perform the job or can be assigned to do the job function, whether the job function is

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[44] 147 F.3d 784, 785-86 (8th Cir. 1998).

[45] *Id.* at 787.

[46] *Id.*; *see also* 29 C.F.R. § 1630.2(n)(1).

[47] *Moritz*, 147 F.3d at 787-88.

[48] *See id.*

[49] *Id.* at 788.

[50] *See* Benson v. Northwest Airlines, Inc., 62 F.3d 1108, 1112-14 (8th Cir. 1995).

highly specialized, and whether the individual was hired for his or her special expertise or abilities.[51] Evidence of essential job functions may include the carrier's judgment, written job descriptions prepared for the advertisement, interviewing, or posting of job applications, the amount of time spent performing the job function, the consequences of not requiring a person in this job to perform the function, work experience of past employees performing the job, current work experience of employees in similar job positions, the nature of the work operation and the carrier's organizational structure.[52]

3. What are "Reasonable Accommodations" Under the ADA?

The ADA defines "reasonable accommodation" to include altering existing facilities used by disabled employees to make them accessible and useable in addition to job restructuring, part-time or modified work schedules, reassignment of employees to vacant positions, modification of equipment, devices, or training, the provision of qualified readers or interpreters, and other similar or reasonable accommodations.[53]

Also noted in section 12111 is that the employer is exempt from providing a reasonable accommodation if it would cause "undue hardship" on the employer.[54] Undue hardship is defined in 42 U.S.C. § 12111(10) as "an action requiring significant difficulty or expense," and is accompanied by many factors to consider in determining whether an undue hardship would be imposed on a covered entity in providing "reasonable accommodations" to disabled employees.[55]

The courts have defined what constitutes "reasonable accommodations" under the ADA in relation to the airline industry. For example, in *Whillock v. Delta Air Lines, Inc.*, an airline reservation sales agent suffering from Multiple Chemical Sensitivity Syndrome sued Delta under the ADA claiming, in part, that she was entitled to relief because Delta refused to allow her to per-

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[51] *See* Murphy, *supra* note 10, at 526.

[52] *See id.* at 526-27; *see also* 29 C.F.R. § 1630.2(n)(2) (1998).

[53] *See* 42 U.S.C. § 12111(9) (1994); *see also* Murphy, *supra* note 10, at 528.

[54] 42 U.S.C. § 12111(10)(A) (1994).

[55] *Id.*; *see also* John A. Conway, Comment, *The Americans With Disabilities Act: New Challenges in Air Line Hiring Practices*, 59 J. AIR L. & COM., 945, 955-58 (1994). The factors to be considered generally include the nature and cost of accommodation, the financial resources of the facility and covered entity, other economic impact caused by the accommodation, and the type of operation of the covered entity. *See* 42 U.S.C. § 12111(10)(B) (1994).

form her reservation sales agent duties from home.[56] The *Whillock* court held as a matter of law that under the facts of the case, the proposed accommodation of allowing plaintiff to work at home as a reservation sales agent was not a reasonable accommodation.[57] The Eighth Circuit, in *Benson v. Northwest Airlines, Inc.*, held that although job restructuring of marginal job functions can constitute a "reasonable accommodation" under the ADA, an employer is not required to reallocate the *essential* functions of a job that a qualified individual must perform.[58] The Eleventh Circuit, in *Terrell v. USAir*, has further defined "reasonable accommodation" in holding that the ADA does not require an employer to promote a disabled employee as an accommodation, nor must an employer reassign the employee to an occupied position, or create a new position to accommodate the disabled worker.[59]

Although the ADA does discuss in the employer's obligation to reassign a disabled employee to a vacant position, the Seventh Circuit has noted that "neither the statute nor the regulations provide much guidance for determining under what circumstances and to what extent an employer may be obligated to reassign a disabled employee."[60] The EEOC Interpretive Guidance provides a more detailed narrative as to reassignment.[61] The EEOC Interpretive Guidance provides that employers should reassign the individual to an equivalent position (in terms of pay, status, et cetera) if the individual was qualified and if the position is vacant within a reasonable amount of time.[62]

A more difficult issue is whether an employer may be obligated to reassign an employee incapable of performing the essential functions of her current job, but capable of performing the functions of a *reassigned* position as a reasonable accommo-

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[56] 926 F. Supp. 1555, 1561 & 1565-66 (N.D. 1995), *aff'd*, 86 F.3d 1171 (11th Cir. 1996).

[57] *Id.* at 1565. The court found that even if the plaintiff was correct that the only accommodation that would satisfy her disability was to work at home, the court must determine if that accommodation is reasonable, regardless of whether it is the only accommodation possible. *See id.*

[58] 62 F.3d 1108, 1112-13 (11th Cir. 1995).

[59] 132 F.3d 621, 626-27 (11th Cir. 1998) (stating that the "intent of the ADA is that an employer needs only to provide meaningful equal employment opportunities").

[60] Gile v. United Airlines, Inc. 95 F.3d 493, 497 (7th Cir. 1996) (referring to 42 U.S.C. § 12111(9)(B) (1994)).

[61] *See* 29 C.F.R. pt. 1630, app., § 1630.2(o) para. 9 (1998).

[62] *See id.*; *see also Gile*, 95 F.3d at 497.

dation. This difficulty is reflected in the split of authority as to this issue.[63] The Seventh Circuit, in *Gile*, held that the EEOC Interpretive Guidance, in addition to the decisions of a majority of the courts to address this issue, *may require* an employer to reassign a disabled employee to a different position as a "reasonable accommodation" where the employee can no longer perform the essential functions of his/her current position.[64]

This requirement has its limits, however. The *Gile* court recognized that an employer is not obligated to provide the employee the accommodation he or she requests or prefers.[65] Furthermore, the *Gile* court recognized that if an employee is provided a transfer as a reasonable accommodation, and the employee then refuses that transfer, the employer cannot be liable under the ADA for failing to reasonably accommodate the employee.[66] The *Gile* case is an important and instructive opinion for the airline industry to consider in reviewing employees' ADA cases when the employee cannot perform his or her current essential job functions.

III. HIRING PRACTICES IN THE AVIATION INDUSTRY AS THEY RELATE TO THE ADA

With the passage of the ADA, the airlines will be required to adhere to significant changes regarding the hiring practices of airline employees, especially pilots and flight engineers. This part addresses the hiring changes under the ADA as they relate to the cockpit crew.

Before the passage of the ADA in 1990, airlines routinely established additional hiring criteria and medical qualifications for their candidate pilots in addition to the requirements set by the FAA.[67] For example, in *Robinson v. American Airlines, Inc.*, American employed a three-phase process in which to consider new pilots for hire.[68] The phases consisted of (1) a personal interview and preliminary medical examination, (2) a comprehensive medical examination and a personality test, and (3) flight

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[63] *See Gile*, 95 F.3d at 498 (noting that the courts that have addressed the question have not necessarily reached the same conclusion). *Compare* Myers v. Hose, 50 F.3d 278 (4th Cir. 1995), *with* Shiring v. Runyon, 90 F.3d 827 (3d Cir. 1996).

[64] *Id.* at 498-99.

[65] *Id.* at 499.

[66] *Id.*

[67] *See* Conway, *supra* note 55, at 970.

[68] 908 F.2d 1020, 1022 (D.C. Cir. 1990).

simulator evaluations accompanied by an interview with retired American captains.[69]

Under the ADA, however, airlines are prohibited from requiring a pre-employment medical examination or asking pilot applicants whether they suffer from a disability, unless inquiries pertain to an applicant's job-related functions.[70] Thus, air carriers under the ADA should limit pre-employment testing to areas such as flying skills and other non-medical job requirements.[71]

After the airline or air carrier offers the pilot candidate an employment position, the airline or air carrier may require a medical examination.[72] However, the employment offer may be conditioned upon the result of the medical examination.[73] The airline must uniformly require all entering pilot applicants to undergo a medical examination, regardless of disability, after an offer of employment has been made to the job applicant.[74] The airline must perform case by case reviews of the circumstances pertaining to each pilot applicant, document significant medical risks as to each pilot applicant to evaluate the applicant's medical and mental conditions, and determine if a "reasonable accommodation" will reduce the direct threat posed by the disability.[75] Although not specifically mentioned within 42 U.S.C. § 12112(d)(2)(B), a carrier may require a medical exam or conduct a medical inquiry that is job related and consistent with a business necessity.[76]

IV. WEIGHT-BASED ADA CLAIMS AND FLIGHT ATTENDANTS

For years, airlines mandated certain weight requirements for their flight attendants, primarily to ensure that the flight attendants met current advertising campaigns relating to the attendants' "sex object image," or the requisite appearance in uniform image subscribed to by the airline industry.[77] Prior to the pas-

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[69] *See id.*

[70] *See* 42 U.S.C. § 12112(d)(2) (1994); 29 C.F.R. §§ 1630.123(a), 1630.14(a) (1998); *see also* Conway, *supra* note 55, at 970-77.

[71] *See* Conway, *supra* note 55, at 976.

[72] *See* 42 U.S.C. § 12112(d)(2)(A), (d)(3); 29 C.F.R. § 1630.14(b).

[73] *See* 42 U.S.C. § 12112(d)(3); 29 C.F.R. § 1630.14(b).

[74] *See* 42 U.S.C. § 12112(d)(3)(B) (medical information to be kept confidential).

[75] *See* 42 U.S.C. § 12111(8); Conway, *supra* note 55, at 974-75.

[76] *See* 29 C.F.R. § 1630.14; *see also* Murphy, *supra* note 10, at 528.

[77] Dennis M. Lynch, *The Heavy Issue: Weight-Based Discrimination in the Airline Industry*, 62 J. AIR L. & COM. 203, 208-09 (1996). *See generally* Linder, *supra* note 8,

sage of the ADA, flight attendants rebelled against airline weight requirements by filing suit under Title VII of the Civil Rights Act of 1964.[78] Title VII suits generally were not successful, and airline weight requirements for flight attendants were upheld as valid grooming standards for the airline industry.[79]

With the passage of the ADA in 1990, flight attendants could look to the ADA to challenge the weight requirement. In *Cook v. State of Rhode Island, Department of Mental Health, Retardation, and Hospitals*, a non-airline case, the First Circuit defined obesity as a disability.[80] In that case, the plaintiff challenged the denial of her application for a federally funded position with the State of Rhode Island Department of Mental Health, Retardation, and Hospitals Unit.[81] The critical holding in *Cook* was that the plaintiff's condition of *morbid obesity* was classified as a "perceived disability," which substantially limited the major life activity of working under the Rehabilitation Act.[82] Although not decided under the ADA, courts may look to *Cook* as authority in future ADA weight discrimination cases because the ADA was modeled after the Rehabilitation Act.[83]

Since *Cook*, there has been only one reported weight disability case filed against an airline, and it was not even an ADA case.[84] In *Delta Air Lines v. New York State Division of Human Rights*, the New York Court of Appeals held that under the New York Human Rights Act, weight in and of itself does not constitute a "disability" to qualify for protection from discrimination under the New York Human Rights Act.[85]

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at 305-08. For an example of a dispute arising from a flight attendant's suspension for failing to meet flight attendant weight requirements, see *Underwood v. Trans World Airlines, Inc.*, 710 F. Supp. 78 (S.D.N.Y. 1989).

[78] *See* Lynch, *supra* note 77, at 209-15. Title VII prohibits discrimination based on race, color, religion, sex, or national origin. *See* 42 U.S.C. § 2000e-2 (1994).

[79] *See* Lynch, *supra* note 77, at 214-15.

[80] 10 F.3d 17 (1st Cir. 1993).

[81] *See id.* at 21. The claim was brought under the Rehabilitation Act of 1973. *See id.* at 22.

[82] *Id.* at 24-26 (each case must be reviewed and determined on its own facts).

[83] *See* Lynch, *supra* note 77, at 229 n.168.

[84] *See* Delta Air Lines v. New York State Div. of Human Rights, 689 N.E.2d 898 (N.Y. 1997). The case was brought under the New York Human Rights Act, which provides that it "shall be an unlawful discriminatory practice . . . [f]or an employer . . . because of . . . *disability* . . . to refuse to hire or employ or to bar or to discharge from employment such individual." *Id.* at 901.

[85] *Id.* at 902. *See generally* Underwood v. Trans World Airlines, Inc., 710 F. Supp. 78, 83-84 (S.D.N.Y. 1989) (holding overweight condition distinguishable from obese condition and not a disability under the New York Human Rights Law).

Likewise, the EEOC Interpretive Guidance provides that "except in rare circumstances, obesity is not considered a disabling impairment."[86] In *Fredregill v. Nationwide Agribusiness Insurance Co.*, a non-aviation case, the court followed the EEOC Interpretive Guidance and stated that obesity alone is *generally* not a disability, but may be the product or cause of a psychological disorder or condition, and may statutorily meet the definition of a disability as stated in the EEOC Regulations and Interpretive Guidance.[87]

From the little precedent available, it appears that there may be an ADA argument for flight attendants to challenge airline weight requirements; however, these challenges will be very fact specific, and, most likely, overweight but non-obese flight attendants will not be afforded protection under the ADA. Only obese or morbidly obese flight attendants will have a fighting chance for ADA protection if their claim is plead correctly and if the facts merit such protection.[88]

Finally, the airlines continue to have statutory defenses that the weight requirements are job related and necessary due to safety concerns of the workplace, and that no reasonable accommodation can be afforded flight attendants because of these safety concerns.[89] With these defenses, airlines will likely revise airline service or policy manuals in an effort to evidence the necessity of weight restrictions for safety.[90] The manuals will more likely cite safety and health reasons for the flight attendant weight requirements so that flight attendants can perform emergency evacuation and safety procedures, while grooming and aesthetic reasons for the weight requirements will more than likely be abandoned.

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[86] 29 C.F.R. pt. 1630, app., § 1630.2(j) ¶ 4 (1998).

[87] 992 F. Supp. 1082, 1088-89 (S.D. Iowa 1997) (holding that the plaintiff failed to provide sufficient evidence to allow the fact finder to conclude that he had a disability). The court stated that the disability determination is based on the particular facts of each case. *See id.* at 1089.

[88] *See* Lynch, *supra* note 77, at 231-33. Even though obese individuals may be protected under the ADA, airlines have strong arguments in denying employment to obese individuals. *See id.* at 233.

[89] *See* 42 U.S.C. § 12113(a)-(b)(1994).

[90] By revising airline service and policy manuals to reflect safety concerns as the primary reason for weight requirements rather than for grooming or aesthetic reasons, airlines would be better prepared to counter an argument by ADA plaintiffs that the airlines maintain the weight requirements purely for aesthetic reasons.

V. PSYCHOLOGICAL DISABILITIES IN THE AVIATION INDUSTRY UNDER THE ADA

The ADA specifically defines a "disability" to include "mental impairment" that substantially limits one or more of the major life activities of an individual.[91] There are a few reported cases addressing mental, emotional, or psychological disabilities as they relate to an ADA claim. In one of those few cases, *Witter v. Delta Air Lines, Inc.*, a Delta pilot diagnosed with bipolar disorder, Narcissistic Personality Disorder, and possible Cyclothymia, was permanently grounded by Delta due to several psychological or behavioral incidences related to the pilot's personal life and his duties as a Delta pilot.[92] The primary issue in *Witter* was whether his mental/psychological impairment constituted a "disability" under the "regarded as" prong of 42 U.S.C. § 12102(2).[93] The *Witter* court refused to find the pilot's impairment a disability under the ADA because the pilot failed to produce evidence that Delta regarded him as being significantly restricted in his ability to perform the major life activity of working, and that working encompassed not only piloting, but also non-piloting jobs at Delta.[94]

In addition to pilots' psychological disability claims under the ADA, there have been two decisions involving a flight attendant and a reservations agent's ADA claims as to psychological disabilities.[95] In both cases, the plaintiffs' claims were dismissed under the ADA because the individuals were "qualified individuals with a disability" under the ADA.[96]

VI. CONCLUSION

As time passes, the airline industry will need to become more knowledgeable and aware of ADA provisions because they will affect many facets of the industry. For example, procedural and operational manuals will need to reflect the ADA provisions because these manuals will be Exhibit "A" in employees' discrimi-

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[91] 42 U.S.C. § 12102(2) (1994).

[92] 138 F.3d 1366, 1367-68 (11th Cir. 1998).

[93] *Id.* at 1370.

[94] *Id.* at 1370-71.

[95] *See* Keoughan v. Delta Airlines, Inc., 113 F.3d 1246 (10th Cir. 1997); Scott v. American Airlines, Inc., No. 3:95-CV-1393-R, 1997 WL 278129 (N.D. Tex. May 15, 1997).

[96] *See generally* Harriet E. Cooperman, *Dealing with Psychological Disabilities Under the ADA*, THE BRIEF, Summer 1998, at 33-39 (discussing what constitutes a mental disability and when individuals are protected under the ADA).

nation claims as they relate to disabilities or perceived disabilities. We will likely see more employee ADA claims as they relate to day-to-day airline business and incorporate areas other than those listed in this Article. This knowledge and awareness will have an impact on how air carriers hire and work with employees with disabilities. Airlines already have or are in the process of making these changes.