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## Assuring Safer Skies?: A Survey of Aeromedical Issues Post-Germanwings

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**ASSURING SAFER SKIES?: A SURVEY OF AEROMEDICAL  
ISSUES POST-GERMANWINGS**

JENNIFER M. CLARK\*

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I. INTRODUCTION

**I**N THIS AGE of increasing commercial aviation activity, making the world smaller for every person who has a few hundred dollars (or another country's equivalent) to purchase a plane ticket, the revelation that Andreas Lubitz most likely intentionally crashed the Airbus 320 Germanwings flight 4U 9525 carry-

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ing 150 passengers into the French Alps<sup>1</sup> was shocking and, frankly, terrifying. On March 24, 2015, the flight from Düsseldorf, Germany, to Barcelona, Spain, likely began the same as any other European regional flight. The passengers arrived at the airport for their flight, some earlier than necessary, others maybe running late. They waited in line to have their persons and baggage checked for any potential security threats. Some bags were likely double-checked because a passenger may have forgotten to remove a bottle of water or other liquid from the bag before placing it on the belt for the x-ray machine. These passengers had no idea that one of the pilots, in whom they would be placing their trust to provide them safe transport, was seriously emotionally and mentally disturbed to the point that he intended to commit mass murder and suicide on that flight.<sup>2</sup> To alleviate our personal safety concerns and make us feel good about continuing to travel on commercial airlines, we all would like to think that there is something that should or could have been done to prevent this tragedy. We look to the regulations in place, trying to find any possible amendment that could prevent this from happening again in the future. Governmental taskforces and safety committees make recommendations, and we all feel better that we have done everything we can to prevent another such tragedy. The question remains, though, after all that effort, have we actually accomplished anything that will make any of us safer from the plans of someone like Andreas Lubitz?

According to the investigation by Bureau d'Enquêtes et d'Analyses (BEA Preliminary Report),<sup>3</sup> the co-pilot on flight 4U

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<sup>1</sup> *Germanwings Crash: Co-Pilot Lubitz Practised Rapid Descent*, BBC NEWS (May 6, 2015), <http://www.bbc.com/news/world-europe-32604552> [<https://perma.cc/YB7M-M9YY>].

<sup>2</sup> *Id.*

<sup>3</sup> BUREAU D'ENQUÊTES ET D'ANALYSES, PRELIMINARY REPORT: ACCIDENT ON 24 MARCH 2015, at 2 (2015) [hereinafter BEA PRELIMINARY REPORT]. The Final Report was published in March 2016, after preparation of this article but before publication. The Bureau d'Enquêtes et d'Analyses (BEA) is the French agency for investigating aviation safety, similar to the National Transportation Safety Board (NTSB) in the United States, which views its role as "determin[ing] the probable cause of accidents and develop[ing] recommendations that *will* prevent future accidents or reduce their effects in terms of injury, loss of life, or damage to property." NTSB, NATIONAL TRANSPORTATION SAFETY BOARD FISCAL YEAR 2015 PERFORMANCE AND ACCOUNTABILITY REPORT 5 (2015). The NTSB further boasts 14,300 safety recommendations following at least 143,000 aviation accident recommendations and thousands of non-aviation accident investigations since 1967. *Id.* The NTSB's budget for fiscal year 2015 was \$104 million, and the requested

9525, Lubitz, was left alone in the cockpit while the pilot went back to the main cabin.<sup>4</sup> During that time, Lubitz changed the selected altitude from 38,000 feet to 100 feet, which led to a steady descent.<sup>5</sup> Also during that time, Lubitz increased and decreased the airspeed multiple times.<sup>6</sup> Multiple air traffic controllers attempted to contact the plane to figure out the reason for the erratic inputs, but received no response.<sup>7</sup> Then the pilot returned, requested entry to the cockpit multiple times and, receiving no response, possibly attempted to break down the impenetrable door.<sup>8</sup> The plane crashed into the side of a mountain, killing everyone on board—144 passengers and six crew members.<sup>9</sup>

When the cockpit voice recorder was located and reviewed by investigators, they determined this was most likely an intentional act.<sup>10</sup> As further support for this theory, investigators revealed that Lubitz had practiced for this on an earlier flight the same day.<sup>11</sup> While the pilot was out of the cockpit, Lubitz had made similar odd maneuvers, including decreasing the altitude setting on the autopilot system to 100 feet and increasing and decreasing the airspeed.<sup>12</sup> As the investigation continued, more facts about Lubitz's medical history came to light. He had been treated for depression for several years.<sup>13</sup> He was denied a medical certificate twice during training as a result of his mental health examination.<sup>14</sup> Subsequently, when he obtained a medical certificate, it contained a special condition requiring specific regular medical examinations and for the Aviation Medical Examiner (AME) to contact the licensing authority before issuing a renewal.<sup>15</sup>

Following the crash, a significant amount of information regarding Lubitz's medical and psychological history has come to

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budget for fiscal year 2016 is \$105.2 million to support 423 full-time equivalent employees. *Id.*

<sup>4</sup> BEA PRELIMINARY REPORT, *supra* note 3, at 8.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 7–9.

<sup>8</sup> *Id.* at 8–9.

<sup>9</sup> *Id.* at 9.

<sup>10</sup> *Id.* at 29.

<sup>11</sup> *Id.* at 22–23.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 13.

<sup>14</sup> *Id.* at 12–13.

<sup>15</sup> *Id.*

light. It seems he started to experience vision problems in December 2014.<sup>16</sup> He saw an ophthalmologist, who found nothing wrong, then followed up with many other eye specialists who also found nothing wrong with his eyesight.<sup>17</sup> A psychiatrist he saw in January 2015 diagnosed him with depression, prescribed a strong antidepressant, and encouraged him to write in a “happiness diary.”<sup>18</sup> In the diary, Lubitz discussed that he was experiencing insomnia.<sup>19</sup> Lubitz was subsequently diagnosed with hypochondriacal disorder, and records from February 2015 indicated he denied suicidal thoughts.<sup>20</sup> By March, his doctor apparently became increasingly concerned about his mental health and gave him a note excusing him from work from March 12–30, 2015.<sup>21</sup> It seems the note was never given to his employer.<sup>22</sup> Further, it appears that none of the doctors advised the airline of their concerns regarding Lubitz’s condition but relied on Lubitz to self-report.<sup>23</sup> Based on the reports, it seems that he was afraid he was losing his eyesight and that he would no longer be able to fly.<sup>24</sup>

The BEA’s Preliminary Report further notes that, since 1980, only six instances of crashes likely caused by intentional actions of the flight crew have been found in the International Civil Aviation Organization (ICAO) and BEA databases.<sup>25</sup> The most

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<sup>16</sup> Justin Huggler, *Germanwings Pilot Andreas Lubitz Kept Diary That Shows His Descent Into Depression*, THE TELEGRAPH (Sept. 21, 2015), <http://www.telegraph.co.uk/news/worldnews/germanwings-plane-crash/11880154/Germanwings-pilot-Andreas-Lubitz-kept-diary-that-shows-his-descent-into-depression.html> [https://perma.cc/2VY4-GHJL].

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* It appears that Lubitz tore up the note rather than giving it to his employer. See Ben Knight et al., *Germanwings Co-Pilot Andreas Lubitz Wanted to Make Everyone Remember Him*, THE GUARDIAN (Mar. 27, 2015), <https://www.theguardian.com/world/2015/mar/27/germanwings-co-pilot-andreas-lubitzs-background-under-scrutiny> [https://perma.cc/8VWX-9E3A]. He also had told a former girlfriend, a flight attendant, “One day I will do something that will change the whole system, and then all will know my name and remember it.” *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> See Huggler, *supra* note 16.

<sup>25</sup> BEA PRELIMINARY REPORT, *supra* note 3, at 26. The flights referenced are: September 2, 1982, Japan Airlines, DC-8, with 24 fatalities; August 21, 1994, Royal Air Maroc, ATR42, with 44 fatalities; December 19, 1997, Silk Air, B737, with 104 fatalities; October 11, 1999, Air Botswana, ATR42, with 1 fatality; October 31, 1999, EgyptAir, B767, with 217 fatalities; and November 29, 2013, Linhas Aéreas de Moçambique (Mozambique Airlines), ERJ190, with 33 fatalities. *Id.*

deadly of the crashes noted, the EgyptAir crash into the North Atlantic Ocean in 1999 that killed 217 on board, was summarized as follows:

The [air]plane was in cruise at flight level 330 with a flight crew consisting of a Captain, a duty co-pilot[,] and a relief co-pilot. The duty co-pilot left the cockpit, and the relief co-pilot took his place in the right seat. Eight minutes later, the Captain left the cockpit in turn, leaving the relief co-pilot alone. The autopilot was then disengaged and nose-down inputs were recorded on the FDR. The [air]plane descended. The engines were shut down. The Captain returned to the cockpit and tried to take back control of the [air]plane. The Captain repeatedly asked the co-pilot to help him to pitch up the [air]plane (“pull with me”)[,] but the latter continued to command the elevator to pitch nose down. The [air]plane regained altitude before descending again. It collided with the surface of the ocean. The reasons that led the co-pilot to take these actions could not be determined.<sup>26</sup>

There are two significant issues to note from this description of the EgyptAir crash: first, the captain was not locked out of the cockpit but was still unable to prevent the crash; second, even more than fifteen years after the accident, it remains unclear why the co-pilot decided to crash the aircraft into the ocean.<sup>27</sup>

## II. AEROMEDICAL REGULATIONS

This section addresses and compares only aeromedical regulations established by the Federal Aviation Administration (FAA) and the European Aviation Safety Agency (EASA). The purpose of the comparison is to analyze the regulations in place in Europe at the time of the Germanwings crash, as well as those in the United States, in an effort to note any potential holes in the regulations that might allow another similar incident to occur. To the contrary, additional analysis is provided from the perspective of pilots who feel they are already overly regulated and monitored by the FAA and EASA as well as their employers (for commercial pilots).

### A. UNITED STATES

Pursuant to the Federal Aviation Regulation (FAR) Part 61, in particular, there are three categories of medical certificates.<sup>28</sup> A

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<sup>26</sup> *Id.* at 27.

<sup>27</sup> *Id.*

<sup>28</sup> Certification: Pilots, Flight Instructors, and Ground Instructors, 14 C.F.R. § 61.23(a) (2016).

first-class medical certificate, which is required for airline pilots, expires twelve months after the date of examination for pilots under age forty or six months after the date of examination for pilots over forty at the time of the most recent examination.<sup>29</sup> When conducting operations not requiring an airline transport pilot certificate, a medical certificate is valid for longer periods of time, although each category requires increased frequency of examination for pilots over age forty.<sup>30</sup> Pilots operating light-sport aircraft are not required to obtain an FAA medical certificate and, instead, can use a valid U.S. driver's license as a medical certificate, unless the pilot "know[s] or ha[s] reason to know of any medical condition that would make that person unable to operate a light-sport aircraft in a safe manner."<sup>31</sup> This option is not available if the most recent FAA medical exam has resulted in a denial of a medical certificate.<sup>32</sup>

FARs regarding disqualifying mental conditions are fairly comprehensive, particularly with regard to the requirements for a First-Class Medical Certificate.<sup>33</sup> According to the FARs:

Mental standards<sup>34</sup> for a first-class airman medical certificate are:

- (a) No established medical history or clinical diagnosis of any of the following:
  - (1) A personality disorder that is severe enough to have repeatedly manifested itself by overt acts.
  - (2) A psychosis. As used in this section, "psychosis" refers to a mental disorder in which:
    - (i) The individual has manifested delusions, hallucinations, grossly bizarre or disorganized behavior, or other commonly accepted symptoms of this condition; or
    - (ii) The individual may reasonably be expected to manifest delusions, hallucinations, grossly bizarre or disorganized behavior, or other commonly accepted symptoms of this condition.

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<sup>29</sup> *Id.* § 61.23(d).

<sup>30</sup> *See id.*

<sup>31</sup> *Id.* § 61.23(c)(2)(iv). This is often interpreted by pilots as a rather subjective standard. A pilot who wishes to continue flying but anticipates not being able to pass a medical exam may choose not to apply and simply limit operations to light-sport aircraft. While such an interpretation of this FAR was likely not intended, it is generally considered unlikely to result in any negative enforcement action against a pilot operating under this interpretation.

<sup>32</sup> *Id.* § 61.23(c)(2)(ii)–(iii).

<sup>33</sup> *See* Medical Standards and Certification, 14 C.F.R. § 67 (2016).

<sup>34</sup> The exact same standard is set forth for second-class and third-class airman medical certificates in 14 C.F.R. § 67.207 and 14 C.F.R. § 67.307, respectively.

- (3) A bipolar disorder.
- (4) Substance dependence, except where there is established clinical evidence, satisfactory to the Federal Air Surgeon, of recovery, including sustained total abstinence from the substance(s) for not less than the preceding 2 years. As used in this section—
  - (i) “Substance” includes: Alcohol; other sedatives and hypnotics; anxiolytics; opioids; central nervous system stimulants such as cocaine, amphetamines, and similarly acting sympathomimetics; hallucinogens; phencyclidine or similarly acting arylcyclohexylamines; cannabis; inhalants; and other psychoactive drugs and chemicals; and
  - (ii) “Substance dependence” means a condition in which a person is dependent on a substance, other than tobacco or ordinary xanthine-containing (e.g., caffeine) beverages, as evidenced by—
    - (A) Increased tolerance;
    - (B) Manifestation of withdrawal symptoms;
    - (C) Impaired control of use; or
    - (D) Continued use despite damage to physical health or impairment of social, personal, or occupational functioning.
- (b) No substance abuse within the preceding 2 years defined as:
  - (1) Use of a substance in a situation in which that use was physically hazardous, if there has been at any other time an instance of the use of a substance also in a situation in which that use was physically hazardous;
  - (2) A verified positive drug test result, an alcohol test result of 0.04 or greater alcohol concentration, or a refusal to submit to a drug or alcohol test required by the U.S. Department of Transportation or an agency of the U.S. Department of Transportation; or
  - (3) Misuse of a substance that the Federal Air Surgeon, based on case history and appropriate, qualified medical judgment relating to the substance involved, finds—
    - (i) Makes the person unable to safely perform the duties or exercise the privileges of the airman certificate applied for or held; or
    - (ii) May reasonably be expected, for the maximum duration of the airman medical certificate applied for or held, to make the person unable to perform those duties or exercise those privileges.
- (c) No other personality disorder, neurosis, or other mental condition that the Federal Air Surgeon, based on the case history and appropriate, qualified medical judgment relating to the condition involved, finds—



- (1) Makes the person unable to safely perform the duties or exercise the privileges of the airman certificate applied for or held; or
- (2) May reasonably be expected, for the maximum duration of the airman medical certificate applied for or held, to make the person unable to perform those duties or exercise those privileges.<sup>35</sup>

With regard to each class, AME guidance indicates that pilots should have “[n]o diagnosis of psychosis, or bipolar disorder, or severe personality disorders.”<sup>36</sup> Further, disqualifying conditions related to mental health include: psychosis, bipolar disorder, personality disorder “severe enough to have repeatedly manifested itself by overt acts,” substance dependence, substance abuse, disturbance of consciousness “without satisfactory explanation of cause,” and “[t]ransient loss of control of nervous system function(s) without satisfactory explanation of cause.”<sup>37</sup> The Guide for Aviation Medical Examiners (the Guide) provides a procedure for permitting special issuance at the discretion of the Federal Air Surgeon, and in certain cases, with the assistance of the AME, for various disqualifying conditions.<sup>38</sup> A special issuance may be provided even with major depressive disorder, dysthymic disorder, adjustment disorder with depressed mood, or a non-depression related condition for which a selective serotonin reuptake inhibitor (SSRI) is used.<sup>39</sup> For these conditions, the applicant is not acceptable for a special issuance if there is any history or symptoms of psychosis, suicidal ideation, electroconvulsive therapy, treatment with multiple SSRIs concurrently, or multi-agent drug protocol use.<sup>40</sup>

According to the Guide, “[t]he FAA does not expect the [AME] to perform a formal psychiatric examination. However, the [AME] should form a general impression of the emotional stability and mental state of the applicant.”<sup>41</sup> The Guide further notes the importance of protecting applicants from having to disclose sensitive personal information to a governmental entity without a significant relation to the interest of aviation safety.<sup>42</sup>

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<sup>35</sup> 14 C.F.R. § 67.107.

<sup>36</sup> FED. AVIATION ADMIN., *Synopsis of Medical Standards, in FAA GUIDE FOR AVIATION MEDICAL EXAMINERS* 361 (2016).

<sup>37</sup> *Id.* at 152.

<sup>38</sup> *Id.* at 10, 13.

<sup>39</sup> *Id.* at 155.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 152.

<sup>42</sup> *Id.*

The Guide further explains how the AME may be advised of potential issues with mental health based on answers an applicant provides to general questions about the applicant's background, occupation, reasons for seeking a medical certificate, and simple conversational techniques of getting to know the applicant.<sup>43</sup> If the AME suspects any issues, the AME is instructed to either deny or defer issuance of a medical certificate, noting the issues on a specific line of the examination report.<sup>44</sup> If the application is deferred, the AME is instructed to report the significant findings to the FAA.<sup>45</sup> The FAA will then request further evaluation and information from the applicant.<sup>46</sup> For instance, the FAA may require the applicant to submit a report from a mental health specialist.<sup>47</sup> Deferral of a medical certificate does not constitute a denial that would prevent a pilot from using a valid state driver's license as a medical certificate for operation of a light-sport aircraft pursuant to FAR 61.23(c).<sup>48</sup>

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<sup>43</sup> *Id.* at 152–53. The Guide notes, “The use of a psychotropic drug is disqualifying for aeromedical certification purposes.” *Id.* at 154. Drugs specifically noted as disqualifying include, “all sedatives, tranquilizers, antipsychotic drugs, antidepressant drugs [including SSRIs], analeptics, anxiolytics, and hallucinogens.” *Id.*

<sup>44</sup> *Id.* at 154.

<sup>45</sup> *Id.*

<sup>46</sup> The FAA requires complete cooperation of Airmen with regard to investigation of potential issues noted in the medical examination:

Medical records.

(a) Whenever the Administrator finds that additional medical information or history is necessary to determine whether you meet the medical standards required to hold a medical certificate, you must:

- (1) Furnish that information to the FAA; or
- (2) Authorize any clinic, hospital, physician, or other person to release to the FAA all available information or records concerning that history.

(b) If you fail to provide the requested medical information or history or to authorize its release, the FAA may suspend, modify, or revoke your medical certificate or, in the case of an applicant, deny the application for a medical certificate.

(c) If your medical certificate is suspended, modified, or revoked under paragraph (b) of this section, that suspension or modification remains in effect until you provide the requested information, history, or authorization to the FAA and until the FAA determines that you meet the medical standards set forth in this part.

Medical Standards and Certification, 14 C.F.R. § 67.413 (2016).

<sup>47</sup> *Id.*

<sup>48</sup> See Certification: Pilots, Flight Instructors, and Ground Instructors, 14 C.F.R. § 61.23(c)(2)(ii)–(iii) (2016).

## B. EMPLOYMENT CONCERNS

Airlines in the United States must operate within the FARs while finding a balance with general laws protecting employees from discrimination and laws protecting the privacy of employees' medical conditions.<sup>49</sup> Within the U.S. legal system, airlines are targets for not only employment law disputes, but also tort litigation initiated by passengers.<sup>50</sup> Because airlines will ultimately be held liable for any injuries to passengers caused by the negligent or intentional acts of pilots and crew employed by the airline,<sup>51</sup> the airlines have a strong argument in favor of elevating safety concerns over employees' privacy and discrimination concerns.

1. *Regulatory and Statutory Framework Governing Airlines' Powers to Implement Safety Standards and Include Personnel Requirements*

In general, airlines have a fair amount of latitude with regard to formulation and enforcement of safety policies and procedures, including assessment of their pilots' fitness to fly.<sup>52</sup> It is accepted that airlines, not courts, possess requisite expertise to determine how best to safely operate, and airlines operate at great leeway and discretion in determining that manner.<sup>53</sup> For example, as federal law clearly places the responsibility upon an airline to determine whether a pilot possesses the judgment to serve as Pilot-in-Command, an arbitrator exceeded his responsibility where he ordered retraining and requalification opportunity for a pilot who had been demoted by his air carrier employer for repeated errors of judgment.<sup>54</sup> Importantly, the FAA regulations set forth "minimum" standards that may be exceeded by airlines if they feel it necessary for safety purposes.<sup>55</sup> Specifically, 49 U.S.C. § 44701(b)(1) provides that "[t]he Administrator may prescribe minimum safety standards for . . . an

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<sup>49</sup> See generally 14 C.F.R. § 67; see also 42 U.S.C. § 12112 (2008).

<sup>50</sup> See Wilbur J. Russ, *Tort Liability of Air Carriers to their Passengers*, 39 CALIF. L. REV. 541 (1951).

<sup>51</sup> See *id.*

<sup>52</sup> See *Johnson v. Am. Airlines, Inc.*, 745 F.2d 988, 993 (5th Cir. 1984).

<sup>53</sup> *Id.* (quoting *Murnane v. Am. Airlines, Inc.*, 667 F.2d 98, 101 (D.C. Cir. 1981) ("[T]he airline industry must be accorded great leeway and discretion in determining the manner in which it may be operated *most safely*.")).

<sup>54</sup> *World Airways, Inc. v Int'l Brotherhood of Teamsters*, 578 F.2d 800, 800 (9th Cir. 1978).

<sup>55</sup> 49 U.S.C. § 44701(b) (2016).

air carrier to whom a certificate is issued under section 44705 of this title.”<sup>56</sup>

However, absent preemption by FAA regulations, air carriers are still largely bound by laws of general applicability. As such, because emotional and mental conditions can, in some instances, be considered a disability, an airline employer must also consider the requirements of the Americans with Disabilities Act (ADA)<sup>57</sup> when dealing with personnel mental health issues. In relevant part, the ADA provides that a covered employer shall not discriminate against a qualified individual with a disability because of the disability of such individual.<sup>58</sup> “Discrimination” under the ADA encompasses not only adverse employment action with regard to hiring, advancement, training, compensation, discharge, or other terms and conditions of employment, but also failure to make reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless the employer can demonstrate that the accommodation would impose an undue hardship on the operation of the business.<sup>59</sup>

In the first instance, it is important to note that courts recognize a few circumstances in which employers need not engage in any accommodation, such as threats of violence,<sup>60</sup> or illegal conduct.<sup>61</sup> As such, an airline may take action against a pilot, whether disabled or not, who threatens violence, has committed an illegal activity, or poses a “direct threat.”<sup>62</sup> The focus of this section is on more nebulous situations.

Under the evidentiary framework developed in *McDonnell Douglas Corp. v. Green*<sup>63</sup> for claims of discriminatory treatment in employment, a plaintiff must first establish a prima facie case of discrimination. To make out a prima facie case under the ADA, the plaintiff bears the burden of showing three things: (1) that he has a disability; (2) that he is a qualified individual; and (3) that he was subjected to unlawful discrimination because of his

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<sup>56</sup> *Id.*

<sup>57</sup> 42 U.S.C. § 12112 (2008).

<sup>58</sup> *Id.* § 12112(a).

<sup>59</sup> *Id.* § 12112(b).

<sup>60</sup> *Palmer v. Circuit Court*, 117 F.3d 351, 351 (7th Cir. 1997).

<sup>61</sup> *Harris v. Polk County*, 103 F.3d 696, 696 (8th Cir. 1996).

<sup>62</sup> 42 U.S.C. § 12182(b)(3) (2012).

<sup>63</sup> 411 U.S. 792 (1973).

disability.<sup>64</sup> The burden then shifts to the employer to articulate a legitimate nondiscriminatory reason for the employment action.<sup>65</sup> If the employer meets this burden, then the presumption of intentional discrimination disappears, but the plaintiff can still prove disparate treatment by, for instance, offering evidence demonstrating that the employer's explanation is pretextual.<sup>66</sup>

Under the ADA, a person is considered disabled if he: (1) suffers from "a physical or mental impairment that substantially limits one or more major life activities"; (2) has "a record of such impairment"; or (3) is "regarded as having such an impairment."<sup>67</sup> The regulations promulgated under the ADA deal extensively with the meaning of disability. As to the concept of substantial limitation, the regulations indicate that in deciding whether a particular condition is substantially limiting, the court should interpret the term broadly and in an individualized manner.<sup>68</sup> Additionally, the regulations note that with regard to claims that a condition is a disability because it substantially limits the life activity of working, the term "substantially limits" means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills, and abilities.<sup>69</sup> The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.<sup>70</sup>

Finally, the regulations set out three factors which the court may consider in looking at the question of whether a plaintiff is substantially limited from working.<sup>71</sup>

In determining whether an individual is substantially limited in a major life activity, it may be useful . . . to consider . . . the condition under which the individual performs the major life activity; the manner in which the individual performs the major life activity; [and] the duration of time it takes the individual to perform the major life activity, or for which the individual can perform the major life activity.<sup>72</sup>

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<sup>64</sup> *Id.* at 802.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> 42 U.S.C. § 12102(2) (2012).

<sup>68</sup> Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, 29 C.F.R. § 1630.2(j) (2016).

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* § 1630.2(j)(3)(ii).

The ADA sets forth a detailed framework that provides that an employer may require a medical examination after an offer of employment is made and condition the offer on the results of the examination, which is of particular concern for pilots undergoing psychological testing.<sup>73</sup> Thus, employers may require a psychological examination and even withdraw an offer of employment so long as its decision is job-related and consistent with a business necessity and no reasonable accommodation will enable the employee to perform the essential functions of the job.<sup>74</sup> Indeed, the Equal Employment Opportunity Commission (EEOC) specifically recognizes that:

[I]n many industries, such as air transportation . . . , applicants for certain positions are chosen on the basis of many factors including physical and psychological criteria, some of which may be identified as a result of post-offer medical examinations given prior to entry on duty. Only those employees who meet the employer's physical and psychological criteria for the job, with or without reasonable accommodation, will be qualified to receive confirmed offers of employment and begin working.<sup>75</sup>

## 2. *Psychological Screening in Addition to Requirements of FAA Certification*

As a practical matter, many airlines do evaluate pilot candidates based on examination over and above the FAA medical certification.<sup>76</sup> Case law and pilot forums providing insight into employer hiring processes suggest that at least one major carrier required a battery of standardized tests (to include the Minnesota Multiphasic Personality Test, the Shipley Institute for Living Test, the Wesman verbal and math tests, and mechanical, spatial, and abstract Differential Aptitude Tests) administered by industrial psychologists.<sup>77</sup> However, as full-scale psychometric screening costs between \$2,500 and \$3,500 and requires six hours per person,<sup>78</sup> after a pilot begins flying, the airline is unlikely to test again unless and until an issue manifests itself.

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<sup>73</sup> 42 U.S.C. § 12112(d)(3) (2008).

<sup>74</sup> Interpretive Guidance on Title I of the Americans with Disabilities Act, 29 C.F.R. pt. 1630 app. § 1630.14(b) (2016).

<sup>75</sup> *Id.*

<sup>76</sup> *Puhy v. Delta Air Lines, Inc.*, 833 F. Supp. 1577, 1578 (N.D. Ga. 1993).

<sup>77</sup> *Id.*

<sup>78</sup> Alison Griswold, *Could Better Psychological Testing Prevent a Tragedy Like the Germanwings Crash? Probably Not*, SLATE (Mar. 27, 2015), [http://www.slate.com/articles/health\\_and\\_science/medical\\_examiner/2015/03/germanw-](http://www.slate.com/articles/health_and_science/medical_examiner/2015/03/germanw-)

### 3. *Testing and Discipline Upon Discovery of Psychological Concern*

The case of *Witter v. Delta Airlines*<sup>79</sup> is illustrative of the issues that a court may consider if a pilot is grounded for mental health reasons and pursues an ADA claim. Plaintiff Witter, a Delta pilot, was involved in a domestic dispute with his wife wherein he threatened to commit suicide.<sup>80</sup> As a result of this incident, plaintiff was incarcerated, sent for psychiatric evaluation, and then transferred to another hospital at Delta's request.<sup>81</sup> Afterward, "plaintiff voluntarily grounded himself because he believed that he was not medically fit to fly."<sup>82</sup> He also found an AME who diagnosed him with bipolar disorder (the decision suggests, but does not make explicit, that the diagnosis may have been to help Witter so that his medical certification would be denied, making him eligible for disability benefits).<sup>83</sup> Subsequently, Witter was seen by an FAA psychiatrist, who determined that while he had a "characterological problem that might be considered a personality disorder," he should nonetheless be issued Class I Medical Certification" on the condition that he submit semi-annual updated psychiatric reports.<sup>84</sup> Upon presentation of the certificate to Delta's Chief Pilot in Atlanta, Delta decided that the plaintiff should be further evaluated by a senior AME who also was board certified in aerospace medicine.<sup>85</sup> This AME later submitted a report to Delta concluding that the plaintiff suffered from an Adjustment Disorder with Mixed Emotional Features but was qualified to fly.<sup>86</sup>

Later that year, the plaintiff had a conflict with crew members that resulted in the crew refusing to follow his instructions.<sup>87</sup> He was further evaluated, diagnosed with Narcissistic Personality Disorder and possible Cyclothymia,<sup>88</sup> and grounded as a result.<sup>89</sup> The FAA convened a panel of six psychiatrists to review his

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ings\_crash\_airlines\_screen\_pilots\_for\_physical\_and\_mental\_health.html [https://perma.cc/LTF4-T7BR].

<sup>79</sup> 966 F. Supp. 1193, 1198–99 (N.D. Ga. 1997).

<sup>80</sup> *Id.* at 1195.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 1196.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> A condition similar to bipolar disorder but with less severe mood swings. See *Cyclothemia*, MAYO CLINIC (June 4, 2015), <http://www.mayoclinic.org/diseases->

case.<sup>90</sup> The FAA panel found that plaintiff should not be certified, but the “NTSB overturned the FAA’s decision and restored [p]laintiff’s Class I Medical Certification.”<sup>91</sup> Delta, however, refused to reinstate the plaintiff to flight status without further medical evaluation.<sup>92</sup>

Plaintiff subsequently filed suit, alleging violations of the ADA based upon the airline’s refusal to reinstate him to flight status.<sup>93</sup> Particularly, “Plaintiff claim[ed] that he [was] disabled for purposes of the statute because he suffers from a mental impairment that substantially limits his major life activity of working.”<sup>94</sup>

The court granted Delta’s motion for summary judgment, holding that plaintiff did not establish that he was “disabled” under the ADA.<sup>95</sup> Applying the regulations discussed above, the court found that “[p]laintiff [was] not substantially limited in the life activity of working.”<sup>96</sup> Of note, his “psychological condition [did] not appear to be exceptionally severe as it only appear[ed] to be a serious condition when plaintiff is under stress.”<sup>97</sup> Additionally, “the long-term impact of [p]laintiff’s psychological condition [did] not appear great as the NTSB has found that his Class I Medical Certification should be returned.”<sup>98</sup> Furthermore, plaintiff, a resident of the metropolitan Atlanta area, lived in a community with substantial job opportunities.<sup>99</sup>

Nor did his condition “disqualify him completely from the class of jobs that utilize similar training, skills, knowledge, and ability.”<sup>100</sup> Although the plaintiff could not pilot an aircraft due to the loss of his Class I Medical Certification, Delta employed pilots in management, flight training, and administrative positions.<sup>101</sup> Finally, while his condition may have made it impossible

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conditions/cyclothymia/basics/definition/con-20028763 [https://perma.cc/GQ5G-SL3Q].

<sup>89</sup> *Witter*, 966 F. Supp. at 1197.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 1195.

<sup>94</sup> *Id.* at 1198.

<sup>95</sup> *Id.* at 1199.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*



for him to fly a commercial aircraft, plaintiff did not even argue that he was in any way impaired from holding any other job.<sup>102</sup>

While the court did not reach the other elements of his prima facie case, much less undertake the *McDonnell Douglas* burden-shifting analysis, it is unlikely that plaintiff could have established that he was a qualified individual subjected to unlawful discrimination because of his disability, as required to make his prima facie ADA case.<sup>103</sup> Specifically, the testing after the incidents with his wife and co-workers is unlikely to be found an adverse employment action as needed for a finding that an employee has been subjected to discrimination.<sup>104</sup> This is because after an employee has been hired and has begun working, the ADA provides that an employer “shall not require a medical examination . . . unless such examination . . . is shown to be job-related and consistent with business necessity.”<sup>105</sup> The court “may uphold an employer’s request for a medical examination whenever the employer has an honest belief rooted in particularized facts that an employee may not be able to perform the essential functions of his job.”<sup>106</sup>

As the FAA has mandated that pilots must not have any mental or personality disorder that would render them “unable to safely perform the duties or exercise the privileges of the airman certificate applied for or held,” it is arguably obvious that psychological testing for a pilot exhibiting behavior that made the airline honestly believe that he or she may not be able to do the job is both warranted and defensible against ADA claims.<sup>107</sup> Although there are no reported decisions to this point, *Sullivan v. River Valley School District*, a case involving the testing of a school superintendent, who had verbal outbursts, shoved papers into the faces of colleagues, and disclosed confidential student information, held that there was not an adverse employment action and that suspending the superintendent for refusing to comply was not retaliatory.<sup>108</sup>

As for the “qualified individual” status of the plaintiff in *Witter*, or another pilot like him who has been determined not to have

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<sup>102</sup> *Id.*

<sup>103</sup> *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

<sup>104</sup> *See id.*

<sup>105</sup> 42 U.S.C. § 12112(d)(4)(A) (2008).

<sup>106</sup> *Sullivan v. River Valley Sch. Dist.*, 197 F.3d 804, 813 (6th Cir. 1999).

<sup>107</sup> *Id.*; *see* Medical Standards and Certification, 14 C.F.R. § 67.107(b)(3)(i) (2016).

<sup>108</sup> *Sullivan*, 197 F.3d at 814.

an absolutely disqualifying condition but whom the airline believes should be grounded, an employee is not a qualified individual under the ADA if he poses “a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation.”<sup>109</sup> An employer need not make any accommodation that would constitute an undue hardship.<sup>110</sup>

Importantly, where the employee’s essential job functions necessarily implicate the safety of others, an employee must demonstrate that she can perform those functions in a way that does not endanger others.<sup>111</sup> In *McKenzie v. Benton*,<sup>112</sup> the court found that the employee, a sheriff’s deputy with post-traumatic stress disorder and a history of self-inflicted wounds and shooting her father’s grave bore the burden of proving that she was not a “direct threat” to others.<sup>113</sup> The *McKenzie* court also noted that the ADA provides that “the term ‘qualification standards’ may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace.”<sup>114</sup> Accordingly, as a practical matter it may be difficult for a pilot diagnosed with a mental or emotional disorder to demonstrate that he or she is “qualified.”

However, to balance safety concerns with risk management from the ADA claim perspective, best practices in a gray area may be to consider, if possible, an accommodation in the form of allowance of time for medical care.<sup>115</sup> The airline also may wish to consider whether the pilot is suitable for a non-flying position in training or management, although making a reason-

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<sup>109</sup> Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, 29 C.F.R. § 1630.2(r) (2016). In some cases, the employer bears the burden of making an assessment of risk based on medical or other objective evidence and the determination that a significant risk exists must be objectively reasonable. *Id.* To determine whether a risk is significant, the employer must consider: “(1) the duration of the risk; (2) the nature and severity of the potential harm; (3) the likelihood that the potential harm will occur; and (4) the imminence of the potential harm.” *Id.* The direct threat defense must be based on a reasonable medical judgment that relies on the most current medical knowledge and/or the best available objective evidence, and upon an expressly individualized assessment of the individual’s present ability to safely perform the essential functions of the job. *Id.*

<sup>110</sup> 42 U.S.C. § 12112(b)(5)(A).

<sup>111</sup> 388 F.3d 1342, 1342 (10th Cir. 2004).

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 1355.

<sup>115</sup> 42 U.S.C. § 12111(9) (2012).

able accommodation does not require that the employee be promoted.<sup>116</sup>

### C. EUROPE

Aviation safety within the European Union is overseen by EASA, which, incidentally, is headquartered in Cologne, Germany.<sup>117</sup> Additionally, within Germany, the Luftfahrt-Bundesamt (LBA) has been tasked with the goal of “avert[ing] hazards to the safety of aviation as well as to public safety and order” since 1954.<sup>118</sup>

#### 1. Pre-Crash Regulations

European regulations regarding medical certification appear to be less specific and perhaps more susceptible to differing interpretations than the FARs, particularly with regard to establishing disqualifying conditions relative to mental health.<sup>119</sup> It is noteworthy that the first real substantive statement in the European Regulations, following the general definitions of terms, mandates protection of the pilot’s medical confidentiality.<sup>120</sup> Additionally, the AME is instructed that he or she must advise the pilot of the potential consequences of failing to report medical issues truthfully.<sup>121</sup>

##### MED.A.025 Obligations of AeMC, AME, GMP and OHMP

- (a) When conducting medical examinations and/or assessments, AeMC, AME, GMP and OHMP shall:
  - (1) ensure that communication with the person can be established without language barriers;
  - (2) make the person aware of the consequences of providing incomplete, inaccurate or false statements on their medical history.

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<sup>116</sup> *Id.*

<sup>117</sup> *The Agency Facts and Figures*, EASA, <https://www.easa.europa.eu/the-agency/the-agency> [<https://perma.cc/EX4X-9Q9Y>].

<sup>118</sup> *The History of the Luftfahrt-Bundesamt (Federal Aviation Office)*, LBA (Feb. 10, 2011), [http://www.lba.de/EN/LBA/History/History\\_node.html](http://www.lba.de/EN/LBA/History/History_node.html) [<https://perma.cc/Q6LS-4EQM>].

<sup>119</sup> FED. AVIATION ADMIN., *Psychiatric*, in FAA GUIDE FOR AVIATION MEDICAL EXAMINERS 151 (2016).

<sup>120</sup> Commission Regulation 1178/2011 of Nov. 3 2011, Laying Down Technical Requirements and Administrative Procedures Related to Civil Aviation Aircrew Pursuant to Regulation (EC) 216/2008 of the European Parliament and of the Council, annex IV, 2011 O.J. (L 311) 174 [hereinafter EASA Piloting Regulations] (“All persons involved in medical examination, assessment and certification shall ensure that medical confidentiality is respected at all times.”).

<sup>121</sup> *Id.* at 175.

- (b) After completion of the aero-medical examinations and/or assessment, the AeMC, AME, GMP and OHMP shall:
  - (1) advise the person whether fit, unfit or referred to the licensing authority, AeMC or AME as applicable;
  - (2) inform the person of any limitation that may restrict flight training or the privileges of the license, or cabin crew attestation as applicable;
  - (3) if the person has been assessed as unfit, inform him/her of his/her right of a secondary review; and
  - (4) in the case of applicants for a medical certificate, submit without delay a signed, or electronically authenticated, report to include the assessment result and a copy of the medical certificate to the licensing authority.<sup>122</sup>

As stated previously, Lubitz was denied a medical certificate twice during his training, in April and July of 2009 and, subsequently, when his certificate was issued only two weeks after the second denial, it contained restrictions, as contemplated in the above-quoted regulation.<sup>123</sup> The investigation by BEA revealed that the denials were related to his diagnosis and treatment for depression.<sup>124</sup> With regard to mental health, EASA Regulations provide as follows:

MED.B.055 Psychiatry

- (a) Applicants shall have no established medical history or clinical diagnosis of any psychiatric disease or disability, condition or disorder, acute or chronic, congenital or acquired, which is likely to interfere with the safe exercise of the privileges of the applicable licence(s).
- (b) Applicants with a mental or behavi[o]ral disorder due to alcohol or other use or abuse of psychotropic substances shall be assessed as unfit pending recovery and freedom from substance use and subject to satisfactory psychiatric evaluation after successful treatment. Applicants for a Class 1 medical certificate shall be referred to the licensing authority. Fitness of Class 2 applicants shall be assessed in consultation with the licensing authority.
- (c) Applicants with a psychiatric condition such as:
  - (1) mood disorder;
  - (2) neurotic disorder;
  - (3) personality disorder;
  - (4) mental or behavi[o]ral disorder;

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<sup>122</sup> *Id.*

<sup>123</sup> BEA PRELIMINARY REPORT, *supra* note 3, at 13.

<sup>124</sup> *Id.*

shall undergo satisfactory psychiatric evaluation before a fit assessment can be made.

- (d) Applicants with a history of a single or repeated acts of deliberate self-harm shall be assessed as unfit. Applicants shall undergo satisfactory psychiatric evaluation before a fit assessment can be considered.
- (e) Aero-medical assessment:
  - (1) applicants for a Class 1 medical certificate with one of the conditions detailed in (b), (c) or (d) above shall be referred to the licensing authority;
  - (2) fitness of Class 2 applicants with one of the conditions detailed in (b), (c) or (d) above shall be assessed in consultation with the licensing authority.
- (f) Applicants with an established history or clinical diagnosis of schizophrenia, schizotypal or delusional disorder shall be assessed as unfit.<sup>125</sup>

#### MED.B.055 Psychology

- (a) Applicants shall have no established psychological deficiencies, which are likely to interfere with the safe exercise of the privileges of the applicable licen[s]e(s).
- (b) A psychological evaluation may be required as part of, or complementary to, a specialist psychiatric or neurological examination.<sup>126</sup>

The disqualifying conditions under EASA's regulations seem to rely quite extensively on the forthrightness of the individual pilot seeking a medical certificate. The standards appear to be relatively subjective compared to those set forth in the FAA regulations discussed above.<sup>127</sup> For example, the EASA regulations do not address disqualification for chemical dependence.<sup>128</sup> However, it should be noted that despite the greater specificity set forth in the FAA regulations, it seems the FAA also issued a first class medical certificate to Lubitz after initially denying his application.<sup>129</sup>

<sup>125</sup> EASA Piloting Regulations, *supra* note 120, at 185.

<sup>126</sup> *Id.* at 186.

<sup>127</sup> FED. AVIATION ADMIN., *Psychiatric*, *supra* note 119, at 151–52.

<sup>128</sup> *Id.*

<sup>129</sup> Victoria Bryan & David Morgan, *Germanwings Pilot was Briefly Refused Medical Certificate in U.S.*, REUTERS (Apr. 30, 2015), <http://www.reuters.com/article/us-france-crash-faa-idUSKBN0NL24P20150430> [<https://perma.cc/KP79-57Y3>]; AIRMAN MEDXPRESS EXAM SUBMITTAL PROCESS FOR DIWS EXAM (MID) NUMBER: 200004752955 (2010) [hereinafter FAA AIRMAN MEDICAL FILE], [http://www.faa.gov/foia/electronic\\_reading\\_room/pilot\\_records/media/lubitz.pdf](http://www.faa.gov/foia/electronic_reading_room/pilot_records/media/lubitz.pdf) [<https://perma.cc/7HAE-XWH7>]. Lubitz's Airman Medical File includes the following correspondence: (1) July 8, 2010, letter requesting Lubitz submit a report from

## 2. Post-Crash Response

In its Preliminary Report of the Germanwings crash investigation, BEA noted that EASA issued a Safety Information Bulletin (SIB n. 2015–14) just three days after the crash, recommending that operators establish standards requiring no less than two crew members remain in the cockpit at all times.<sup>130</sup> On October 17, 2015, EASA published its “Action Plan for the Implementation of the Germanwings Task Force Recommendations.”<sup>131</sup> In that Action Plan, EASA noted the following recommendations from its Germanwings Task Force:

1. Implementation of a “2-persons-in-the-cockpit” requirement.<sup>132</sup>
2. Psychological Evaluation of all airline pilots “as part of training or before entering service.”<sup>133</sup> Within this recommendation, the task force further recommended that “[t]he psychological part of the initial and recurrent aeromedical assessment and the related training for aero-medical examiners should be strengthened.”<sup>134</sup>
3. Mandated random drug and alcohol testing in the case of “initial Class 1 medical assessment or when employed by an airline, post-incident/accident, with due cause, and . . . after a positive test result.”<sup>135</sup>

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his physician with specific details regarding his history of reactive depression; (2) July 10, 2009, letter from physician (translated from German to English on July 27, 2010), which notes the “severe depressive episode without psychotic symptoms [is] in complete remission.”; February 23, 2010, Certificate from his treating psychotherapist, which states Lubitz “was under my psychotherapeutic treatment from January to October 2009. Mr. Lubitz’s high motivation and active participation contributed to the successful completion of the treatment, after the management of symptoms.” See FAA AIRMAN MEDICAL FILE, *supra*. On July 28, 2010, the FAA issued Lubitz a third-class medical certificate, cautioning: “Because of your history of reactive depression, operation of aircraft is prohibited at any time new symptoms or adverse changes occur or any time medication and/or treatment is required.” *Id.*

<sup>130</sup> BEA PRELIMINARY REPORT, *supra* note 3, at 27.

<sup>131</sup> EASA, ACTION PLAN FOR THE IMPLEMENTATION OF THE GERMANWINGS TASK FORCE RECOMMENDATIONS, VERSION 1-7 OCTOBER 2015 1 (2015) [hereinafter ACTION PLAN].

<sup>132</sup> *Id.* at 3. Note this Rule was established in the United States in FAA guidelines regarding Procedures for Opening, Closing, and Locking Flight Deck Doors shortly after the attacks of Sept. 11, 2001. FED. AVIATION ADMIN., *3-47 Procedures for Opening, Closing, and Locking Flight Deck Doors*, in 3 GENERAL TECHNICAL ADMINISTRATION (2016).

<sup>133</sup> ACTION PLAN, *supra* note 131, at 3.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

4. More oversight of aero[ ]medical examiners and fostering a network of peer support.<sup>136</sup>
5. Creation of a “European aeromedical data repository as a first step to facilitate the sharing of aeromedical information and tackle the issue of pilot non-declaration.”<sup>137</sup> EASA suggests that this repository in addition to revised national regulations will “ensure that an appropriate balance is found between patient confidentiality and the protection of public safety.”<sup>138</sup> EASA further offers to “lead the project to deliver the necessary software tool” for the repository.<sup>139</sup>
6. “[I]mplementation of pilot support and reporting systems, linked to the employer Safety Management System within the framework of a non-punitive work environment and without compromising Just Culture principles.”<sup>140</sup>

The recommendations that have been set forth by the EASA Task Force do not seem particularly likely to prevent another incident like the Germanwings crash from occurring in the future. While implementation of the 2-persons-in-the-cockpit rule seems to be a logical step toward prevention, access to the cockpit did not prevent the 1999 EgyptAir crash referenced in the BEA Preliminary Report.<sup>141</sup> The remaining recommendations would not have prevented the Germanwings crash either. Lufthansa and Germanwings were aware of Lubitz’s history of depression and need to be monitored closely.<sup>142</sup> However, it seems they failed to ensure that Lubitz’s condition was closely monitored, and they were likely prevented from communicating directly with Lubitz’s doctors by German and European privacy laws.<sup>143</sup> None of the recommended actions in the plan set forth above deal with the problem of inaccessible medical information and the reliance on self-reporting of mental health issues.

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<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> See BEA PRELIMINARY REPORT, *supra* note 3, at 27.

<sup>142</sup> See, e.g., *Lufthansa Says It Was Not Obligated to Report Pilot’s Medical Records*, AL JAZEERA AM. (Apr. 6, 2015), <http://america.aljazeera.com/articles/2015/4/6/lufthansa-not-obligated-to-report-pilots-record.html> [https://perma.cc/4L89-QBCT].

<sup>143</sup> See *id.* (“Privacy is fiercely guarded in Germany, a reaction to the mass surveillance carried out by the Gestapo in the Nazi era and the Stasi in post-war communist East Germany. Under German law, employers cannot access employees’ medical records and sick notes excusing a person from work do not specify their medical condition.”).

However, the stated importance of pilot privacy<sup>144</sup> is not an overstatement. Pilots are already subjected to more strict regulation of their mental and physical health than probably any other profession.<sup>145</sup> Failing to protect the privacy of pilots with regard to their medical and psychiatric records may simply lead pilots experiencing difficulties to refuse to report those difficulties even to their health care providers.

### III. PILOT'S BILL OF RIGHTS 2

On February 25, 2015, Senator Jim Inhofe and Representative Sam Graves introduced a bill to amend the Pilot's Bill of Rights.<sup>146</sup> The stated purpose of the Bill is to "facilitate appeals and to apply to other certificates issued by the [FAA], [and] to require the revision of the third[-]class medical certification regulations issued by the [FAA]."<sup>147</sup> The first section of the Bill would expand the types of flights and aircraft that could be operated with just a valid State driver's license without any FAA medical certificate.<sup>148</sup> Pursuant to the Bill, a pilot flying an aircraft with fewer than five passengers, which has a maximum seating capacity of six occupants and maximum certificated takeoff weight of no more than 6,000 pounds, can fly without a medical certificate under visual flight rules (VFR) or instrument flight rules (IFR) at a maximum altitude of 14,000 feet and maximum indicated airspeed of 250 knots.<sup>149</sup> The current regulations allow for use of a valid driver's license in lieu of a medical certificate only for light-sport aircraft, gliders, or balloons.<sup>150</sup> A light-sport aircraft is defined as:

[A]n aircraft, other than a helicopter or powered-lift that, since its original certification, has continued to meet the following:

- (1) A maximum takeoff weight of not more than –
  - i. 1,320 pounds (600 kilograms) for aircraft not intended for operation on water; or
  - ii. 1,430 pounds (650 kilograms) for an aircraft intended for operation on water.

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<sup>144</sup> See ACTION PLAN, *supra* note 131, at 3.

<sup>145</sup> See EASA Piloting Regulations, *supra* note 120.

<sup>146</sup> S. 571, 114th Cong. (2015).

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* § 2.

<sup>149</sup> *Id.*

<sup>150</sup> Certification: Pilots, Flight Instructors, and Ground Instructors, 14 C.F.R. § 61.23(c)(1) (2016).



- (2) A maximum airspeed in level flight with maximum continuous power ( $V_H$ ) of not more than 120 knots CAS under standard atmospheric conditions at sea level.
- (3) A maximum never-exceed speed ( $V_{NE}$ ) of not more than 120 knots CAS for a glider.
- (4) A maximum stalling speed or minimum steady flight speed without the use of lift-enhancing devices ( $V_{SI}$ ) of not more than 45 knots CAS at the aircraft's maximum certificated takeoff weight and most critical center of gravity.
- (5) A maximum seating capacity of no more than two persons, including the pilot.
- (6) A single, reciprocating engine, if powered.
- (7) A fixed or ground-adjustable propeller if a powered aircraft other than a powered glider.
- (8) A fixed or feathering propeller system if a powered glider.
- (9) A fixed-pitch, semi-rigid, teetering, two-blade rotor system, if a gyroplane.
- (10) A non[-]pressurized cabin, if equipped with a cabin.
- (11) Fixed landing gear, except for an aircraft intended for operation on water or a glider.
- (12) Fixed or retractable landing gear, or a hull, for an aircraft intended for operation on water.
- (13) Fixed or retractable landing gear for a glider.<sup>151</sup>

The amendments proposed in the Pilot's Bill of Rights 2 not only simplify the standards for operating an aircraft with a driver's license as the pilot's medical certificate, but also expand the operations that can be carried out in this manner.<sup>152</sup> The maximum weight is increased from 1,320 or 1,430 pounds to 6,000 pounds; the maximum speed is increased from 120 knots CAS to 250 knots indicated; and the maximum capacity is increased from two occupants to six occupants.<sup>153</sup> Along with the expansion, the Bill would require the Administrator to report within five years regarding changes in small aircraft activity and safety-related incidents.<sup>154</sup>

The proposed amendment of the regulations allowing pilots to fly a more diverse category of aircraft may prove beneficial to encouraging self-regulation with regard to reduced medical fitness. Although an airline pilot who is denied a first class medical certificate will not be able to remain employed by the airline to

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<sup>151</sup> *Id.* § 61.23(c); Definitions and Abbreviations, 14 C.F.R. § 1.1 (2016) (defining "Light-sport aircraft").

<sup>152</sup> S. 571, 114th Cong. (2015).

<sup>153</sup> *Id.* § 2(a)(8).

<sup>154</sup> *Id.* § 2(h).

pilot the same type aircraft, that same pilot may remain eligible for a less than first-class medical certificate. Further, the knowledge that some level of piloting will remain available without a medical certificate might be sufficient consolation to reduce the stress and anxiety pilots feel when noticing possible changes in medical condition, such as Lubitz's concern about his vision.<sup>155</sup>

#### IV. CONCLUSION

The U.S. airline industry has seen record low accident rates over the past few years.<sup>156</sup> However, high profile foreign accidents in recent years, including the Germanwings crash, leave the public with a feeling that aviation is becoming less safe in some sense,<sup>157</sup> leading to calls for more regulations. In the next twenty years, it is anticipated that demand for airline pilots will exceed supply.<sup>158</sup> Now, possibly more than ever, it will be critical to find the balance between enacting regulations that enhance safety in commercial aviation and encouragement and promotion of aviation activities, including the business level operation of airlines as well as the more personal level of pilot training, recruitment, and retention. For airlines, which have a tremendous business interest in ensuring safety, even if only for liability and goodwill concerns, the cost of extensive medical assessment needs to be balanced with the actual risk posed by mental disorders. For prospective and current pilots, the decision to seek employment as an airline transport pilot may come down to a balance between love of flying and concerns about privacy, expense, and hassle. *The Wall Street Journal* recently quoted Peggy Gilligan of the FAA as stating, “‘Safety numbers are already so low that you must count close calls, accidents that didn’t happen[,]’ to target safety enhancements.”<sup>159</sup> EASA’s executive director, Patrick Ky, was quoted in the same article as saying, “One Germanwings is one too many, for sure . . . . The challenge that I put to our organization is to aim for zero accidents, which we

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<sup>155</sup> See Huggler, *supra* note 16.

<sup>156</sup> Andy Pasztor, *U.S. Airline Accident Rate Remained Near Record Low Last Year*, WALL ST. J. (Aug. 11, 2015), <http://www.wsj.com/articles/u-s-airline-accident-rate-remained-near-record-low-last-year-1439311216> [<https://perma.cc/DR3P-9629>].

<sup>157</sup> *Id.*

<sup>158</sup> Brian Prentice & Philippe Gouel, *Pilot Shortage Threatens to Slow U.S. Airline Growth*, FORBES (Jan. 28, 2016), <http://www.forbes.com/sites/oliverwyman/2016/01/28/pilot-shortage-threatens-to-slow-u-s-airline-growth/#75b1e60ebb6e> [[perma.cc/Z4YD-STD2](https://perma.cc/Z4YD-STD2)].

<sup>159</sup> Pasztor, *supra* note 156.

will never reach.”<sup>160</sup> It seems public misconceptions regarding safety will keep the regulators busy for the foreseeable future.

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<sup>160</sup> *Id.*