2004

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THE BATTLE FOR THE ARMREST REACHES NEW HEIGHTS: THE AIR CARRIERS ACCESS ACT AND THE ISSUES SURROUNDING THE AIRLINES' POLICY OF REQUIRING OBESE PASSENGERS TO PURCHASE ADDITIONAL TICKETS

BRIAN BOLTON

I. INTRODUCTION

AS A RESULT of news stories about Southwest Airlines' policy of requiring obese passengers to purchase additional seats on its flights instead of giving them free additional seats, advocates for the obese have focused their attention on the airline industry. While much of the commentary has focused on the problems facing the obese in the area of public accommodations, there has been little discussion of the detrimental impact that providing additional seats to obese passengers at no additional cost would have on the already failing airline industry, and no effort on the part of these advocates for the obese to reach a compromise that would be mutually beneficial to all parties.

Many have argued that obesity is an involuntary condition that constitutes a disability. Therefore, individuals suffering from obesity should be covered by statutes that protect individuals against discrimination. In the context of air transportation in the United States, this fight has taken place under the Air Carriers Access Act ("ACAA").

Advocates for the obese claim that the obese are disabled and therefore covered by ACAA. In addition, these advocates claim that, despite the ACAA's creation of an extensive administrative enforcement mechanism through the Department of Transportation, there should be an additional private right of action by which the obese can seek monetary remedies for alleged acts of discrimination.

This comment begins by summarizing the basic premise for all of the arguments in favor of providing obese passengers with an additional seat at no additional cost. These arguments will be presented as juxtaposed against the counterarguments of the different parties involved: (1) the airlines based on their financial condition, (2) those who are forced to share portions of their seats with obese passengers; and (3) others who desire to limit the protection of the ACAA and other disability statutes such as the Americans With Disabilities Act to those who are "truly disabled."

Following the presentation of the counterarguments, this comment will discuss the merits of whether obesity can constitute a disability under the federal disability statutes, and whether there is a private right of action under the ACAA. The comment will then advocate for an acceptable compromise between the two positions and examine current airline policies under this suggested course of action.

II. ARGUMENT AGAINST REQUIRING OBESE PASSENGERS TO PURCHASE ADDITIONAL TICKETS

While the airline industry uses the number of overweight and obese individuals to argue the financial impact that extending coverage to these individuals under the ACAA would have, others view this statistic as indicating a need to protect a growing class of people. Morbid obesity "is associated with serious, progressive, and disabling diseases such as diabetes, high blood pressure, cardiovascular disease, osteoarthritis of weight-bearing joints, respiratory problems, gallstones, urinary incontinence, swollen legs that can develop ulcers, gastroesophageal reflux, stroke, infertility, some types of cancer, and depression."2 Opponents of policies requiring obese passengers to purchase additional tickets, such as Executive Director of the American Obesity Society Morgan Downey, believe that "[i]t's just discriminatory and it's mean-spirited," and that the airline industry "is singling out a group that's been very heavily stigmatized rather than making some accommodations in their cabins."3

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III. ARGUMENTS FOR REQUIRING OBESE PASSENGERS TO PURCHASE ADDITIONAL TICKETS

A. AIRLINES' ARGUMENT BASED ON THE FINANCIAL CONDITION OF THE AIRLINE INDUSTRY

From the perspective of the major airlines operating in the United States, the argument over whether the obese should be considered disabled and therefore entitled to accommodation under the ACAA is simply about money. Even before the severe losses recorded in 2001 due to the September 11th attacks, the airlines had begun to suffer a financial decline. This decline resulted from the fact that while operating revenues increased, operating expenses increased by a greater amount. For example, in 1999, the airline industry recorded $123.24 billion in operating revenue, while incurring 114.56 billion in operating expenses. This resulted in an operating profit of $8.67 billion for 1999. However, in 2000, although operating revenue increased to $134.75 billion, operating expenses increased by an even greater amount to $127.23 billion. This resulted in an operating profit of $7.52 billion, a decline of $1.15 billion from 1999.

Mostly due to the events of September 11, 2001, airline profits plummeted in that year. In fact, Southwest Airlines was the only major air carrier in the United States to record a profit, managing to scrape together a modest profit of $511 million. Continental Airlines and Alaska Air Group also managed to record respectable numbers, recording losses of $95 million and $40 million, respectively. America West and Northwest recorded comparatively moderate losses of $148 million and $423 million, respectively. The real damage was suffered by four of the major airlines. Delta Air Lines suffered losses of $1.2 billion,
while American Airlines posted losses of $1.8 billion.\textsuperscript{14} US Airways posted losses of $2.0 billion.\textsuperscript{15} United Airlines suffered the greatest financial losses of 2001, recording losses of $2.1 billion.\textsuperscript{16} Altogether, the nine major airlines in the United States lost a total of $7.2 billion.\textsuperscript{17}

Congress predicted the extent of the losses resulting from the September 11th attacks.\textsuperscript{18} Two days after the attacks, Congress enacted the Air Transportation Safety and System Stabilization Act ("ATSSSA").\textsuperscript{19} The act authorized $5 billion in direct payments to the airlines in order to make up for the lost profits that occurred due to the four-day stoppage in air transportation that resulted from September 11th and the expected on-going reduction in the number of people utilizing air transportation.\textsuperscript{20} In addition, the act authorized federal loans and guarantees of loans to the airlines totaling $10 billion.\textsuperscript{21} However, even with this extensive federal effort to bail out the airline industry, many airlines still found themselves fighting their creditors in bankruptcy court.\textsuperscript{22} Moreover, it is important to note that the loss of $7.2 billion reported for the airline industry includes $3.8 billion of the $5 billion in direct payments authorized by the ATSSSA.\textsuperscript{23} Thus, without these payments, the loss in profits suffered by the airline industry would have been much worse.

The several billion dollar losses in 2001, combined with the increase in the growth rate of operating expenses in excess of operating revenues, have put the airline industry in an unstable position. A study by the Bureau of Transportation Statistics found that increasing breakeven load factors have also negatively impacted the financial condition of the airlines.\textsuperscript{24} The study defines a breakeven load factor as "the average percent of

\begin{thebibliography}{9}

\bibitem{14} Id.
\bibitem{15} Id.
\bibitem{16} Id.
\bibitem{17} Id.
\bibitem{18} Margaret M. Blair, \textit{The Economics of Post-September 11 Financial Aid to Airlines}, \textit{36 Ind. L. Rev.} 367 (2003).
\bibitem{19} Id. (citing Pub. L. No. 107-42, 115 Stat. 230 (2001)).
\bibitem{20} Id.
\bibitem{21} Id.
\bibitem{22} Id. at 368.
\end{thebibliography}
seats that must be filled on an average flight at current average fares for the airline's passenger revenue to break even with the airline's operating expenses." The study divided the major U.S. airlines into three groups: (1) "recently bankrupt," which are airlines that have gone bankrupt between 2001 and 2003; (2) "at risk," which are airlines that did not record profits from 2001 to 2003; and (3) "profitable," which are airlines that posted profits from 2001 to 2003. The study found that every airline except Southwest was facing declining breakeven load factors even before of September 11th. The practical effect of this decline in breakeven load factors is that for the "recently bankrupt" airlines, selling every single seat on every single flight would still not be enough to allow them to post a profit. Moreover, "at risk" airlines are currently facing breakeven load factors that are nearing 100%.

Given the financial instability of the major airlines in the United States, it is easy to see why requiring the airlines to provide additional seats to obese passengers at the expense of losing a fare from another potential customer does not sit well with the airlines. Their argument becomes even more powerful after a consideration of the number of fares potentially affected. In the United States, the percentage of the adult population that is overweight is approaching 66%, while the percentage of obese adults is approaching 33%. These percentages translate into 129.6 million adults in the United States being overweight, with 61.3 million of those adults qualifying as obese. In addition to the sheer number of people in the United States who are overweight and obese, airlines are also concerned by the fact that those numbers are increasing. From the years 1960 to 2000, the percentage of adults in the United States who are considered overweight has increased from 31.5% to 33.6%. Because individuals who are either obese or morbidly obese are more likely to be considered disabled and gain protection under the

25 Id.
26 Id.
27 Id.
28 Id.
29 Id.
31 Id.
32 Id.
33 Id.
ACAA for reasons stated below, the airlines are even more alarmed with the recent trends regarding those categories. From 1960 to 2000, the percentage of obese adults in the United States increased from 13.3% to 30.9%.\textsuperscript{34} Between 1988 and the year 2000, the percentage of those who were considered morbidly obese increased from 2.9% to 4.7%.\textsuperscript{35}

The airlines acknowledge that not every obese passenger will require an additional seat, but they contend that even the loss of a small percentage of fares due to the provision of free seats to obese passengers could have a drastic effect.\textsuperscript{36} Because the airline is required to compensate a customer who is bumped off of a full flight, the airline will essentially lose a fare each time an obese passenger requires an additional seat on a full flight.\textsuperscript{37} Considering that in 2001, Southwest's entire profit was attributable to only six seats per flight, the provision of an additional seat at no additional cost for only a few obese passengers could greatly reduce or even eliminate its profits.\textsuperscript{38} Southwest has stated that "$[i]f we were to replace just three rows of three seats with two seats, each being one and a half times wider, we would have to significantly raise our fares to maintain our profit margin."\textsuperscript{39} The fact that Southwest was the only airline to record a profit in 2001, coupled with the increasing number of obese individuals in the United States, has made deciding to define being overweight or obese as a disability under the ACAA an extremely controversial issue and one that could have a serious impact on the airline industry.

B. ARGUMENT ON BEHALF OF THOSE FORCED TO SHARE PORTIONS OF THEIR SEATS WITH OBESE PASSENGERS

In addition to the argument that the airline industry will not be able to withstand the economic impact of giving obese passengers extra seats, another argument exists concerning the effect that not requiring obese passengers to purchase additional tickets has on other passengers. Two examples illustrate the point.

\textsuperscript{34} Id.
\textsuperscript{35} Id.
\textsuperscript{37} Id.
\textsuperscript{38} Id.
\textsuperscript{39} Id.
The first example results from a flight on board Delta Airlines from New Orleans to Cincinnati.40 Passenger Philip Shafer was forced to sit next to an obese passenger for the duration of the two-hour flight.41 The obese passenger had arrived at his seat and raised the armrest in order to fit into it.42 Shafer stated that the man was so large that without raising the armrest he could not have fit into the seat.43 Thus, the man was sitting on a portion of Shafer’s seat.44 Because the flight was full, Shafer, sitting on only a portion of the seat that he had paid for, was crunched between the opposite armrest and the obese passenger.45 Shafer eventually filed a lawsuit, claiming that “Delta breached its contract to provide him with a full seat and reasonable comfort because the obese man crowded onto his seat.”46 Shafer claims that he “‘suffered embarrassment, severe discomfort, mental anguish and severe emotional distress’” as a result of being seated with the obese passenger during the two-hour flight.47 Shafer believes that Delta should follow Southwest Airlines’ lead and require obese passengers to purchase additional tickets.48 If this were done, both the obese passenger and those forced to sit in only a portion of the seat that they paid for would be more comfortable.

The situation involving Shafer is typical of what occurs when obese passengers are not required to purchase additional tickets. The following is a more extreme, admittedly less frequent, example of what can result from the failure of the airlines to require obese passengers to purchase additional tickets. Sixty-three-year-old Barbara Hewson was forced to share a portion of her seat on a Virgin Atlantic flight from London to Los Angeles in 2001 after the obese passenger had raised the armrest in order to allow himself to sit.49 Hewson suffered more than mere

41 Id.
42 Id.
43 Id.
44 Id.
45 Id.
46 Id.
47 Id.
48 Id.
discomfort during the flight. As a result of being forced to share her seat with the obese passenger, Hewson suffered "a blood clot, torn leg muscles and sciatica." Although Hewson complained to the flight crew, they were unable to accommodate her because there were no empty seats on the flight. Despite having to pay Hewson $20,000, Virgin Atlantic has refused to adopt a policy similar to that of Southwest Airlines, which requires obese passengers to buy tickets for two seats.

Southwest Airlines has stated that

[I]t is certainly not safe, comfortable, or fair for a person who has purchased a ticket to be left with only a portion of a seat or no seat, nor should anyone be expected to occupy less than an entire seat. Further, it's not safe, comfortable, or fair for the Customer who is occupying more than one seat to be placed in the situation of having someone crowded in a portion of a seat.

Supporting this statement is the fact that 90% of complaints to Southwest Airlines' customer service resulted from passengers whose seats were encroached upon by obese passengers.

C. ARGUMENT BASED ON LIMITING PROTECTION TO THOSE WHO ARE "TRULY DISABLED"

The United States District Court for the Northern District of Georgia endorsed the following argument in the context of the Americans with Disabilities Act in Coleman v. Georgia Power Co., stating:

This conclusion is necessary in order to avoid a dilution of the ADA. The ADA was meant to protect people who are truly disabled. It is incumbent on the courts to faithfully adhere to the intended scope of the statute so that it does not become a catchall cause of action for discrimination based on appearance, size, and any number of other things far removed from the reasons the statutes were passed.

As indicated by the court in Coleman, an illustrative case for the argument that it is possible for plaintiffs to claim disability status for afflictions beyond those intended to be covered by the

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50 Id.
51 Id.
52 Id.
54 A Message from Southwest Airlines, supra note 36.
55 Koenig, supra note 3.
drafters of the statute is a case from the United States Fourth Circuit Court of Appeals, *Forrisi v. Bowen*. The plaintiff in that case sought protection as a disabled employee under the Rehabilitation Act, which has the same definition for disability as the ACA. The plaintiff suffered from acrophobia, the fear of heights. The plaintiff was employed as a utility systems repairer and operator, and his job required him to climb ladders. After telling his supervisor that he suffered from acrophobia, the plaintiff was terminated for not being able to perform the requirements of the position, despite his insistence that he would be able to perform the requirements if the employer would be willing to make some accommodations.

The court, using the same reasoning that many courts have used in finding that obesity is not a disability within the meaning of the Rehabilitation Act and the ADA, held that the plaintiff was not regarded as having a disability because his acrophobia did not "substantially limit" him in a "major life activity." The court found that Congress intended to draw a line limiting the coverage of the statute by carefully choosing the words "substantially" and "major." Thus, for an impairment to qualify as a disability it must be significant. The court went on to state that

It would debase [the] high purpose [of the statute] if the statutory protections available to those truly handicapped could be claimed by anyone whose disability was minor and whose relative severity of impairment was widely shared. Indeed, the very concept of an impairment implies a characteristic that is not commonplace and that poses for the particular individual a more general disadvantage.

The reasoning behind this argument was well-stated in *Fredregill v. Nationwide Agribusiness Insurance Co.*, where the United States District Court for the Southern District of Iowa held that merely being obese, without a physiological disorder

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57 Id.
58 Forrisi v. Bowen, 794 F.2d 931, 933 (4th Cir. 1986).
59 29 U.S.C. § 705 (2004) (defining individual with a disability as "any person who . . . has a physical or mental impairment which substantially limits one or more . . . major life activities").
60 Bowen, 794 F.2d at 933.
61 Id.
62 Id.
63 Id. at 935.
64 Id. at 933-34.
65 Id. at 934.
66 Id.
causing the obesity, is not sufficient to satisfy the disability re-
requirement under the ADA and entitle the individual to cover-
age.\textsuperscript{67} The court stated that:

The statute and implementing regulations define the term disa-
bility to incorporate those persons who have physical or mental
impairments which truly limit the significant aspects of daily life
others take for granted, or are seen to have such impairments.
The definition is broad, but it is also carefully stated. It is incum-ent on courts to faithfully adhere to the intended scope of the
statute so that it does not become a catch-all cause of action for
discrimination based on appearance, size, and any number of
other things far removed from the reasons the statutes were
passed. If the ADA is construed to permit this, the clarity of the
national mandate Congress intended will lose its focus and the
achievement of its purpose will ultimately be impeded. The
treatment of [the plaintiff] because he did not fit the corporate
image may have been most unfair, but it did not violate the
ADA.\textsuperscript{68}

The court went on to state that:

People come in different shapes and different sizes. A large seg-
ment of the population is obese to some degree, and obesity is a
matter of degree. It is a mutable condition for some, immutable
for others. It affects different people in different ways, some-
times not at all. Obesity may be the product or cause of physi-
ological disorders or conditions, but it must relate to a
physiological disorder or condition to meet the statutory defini-
tion of disability as explained in the EEOC regulations and inter-
pretive guidance.\textsuperscript{69}

Thus, the crux of their argument is that only in rare cases
would Congress have intended for obesity to qualify as a disabil-
ity within the meaning of the statute. In order to evaluate the
strength of their argument, it is necessary to look at the lan-
guage of the ADA, the ACAA and the regulations promulgated
to implement those statutes.

(S.D. Iowa 1997).

\textsuperscript{68} Id. at 1091-92 (internal citations omitted).

\textsuperscript{69} Id. at 1089.
IV. "DISABILITY" UNDER THE AMERICANS WITH DISABILITIES ACT AND AIR CARRIERS ACCESS ACT

The ADA states that "[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to...[the] terms, conditions, and privileges of employment." The ADA defines "qualified individual with a disability" as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." The ADA defines "disability" as: (1) "a physical or mental impairment that substantially limits one or more of the major life activities of such individual"; (2) "a record of such an impairment"; or (3) "being regarded as having such an impairment."

The Air Carriers Access Act states that

In providing air transportation, an air carrier, including (subject to section 40105(b)) any foreign air carrier, may not discriminate against an 'otherwise qualified individual' on the following grounds: (1) the individual has a physical or mental impairment that substantially limits one or more major life activities, (2) the individual has a record of such an impairment, (3) the individual is regarded as having such an impairment.

The grounds on which an air carrier may not discriminate under the ACAA are identical to the definition of disability under the ADA. Both the ADA and the ACAA define the class of individuals who are disabled and thus covered by the statute using the definition in the Rehabilitation Act of 1973, the predecessor to the ADA.

Because there are no federal cases dealing with the issue of whether obesity is a disability under the ACAA, it is useful to analyze the cases that have examined the issue in the context of the ADA and the Rehabilitation Act, which both use the same definition for disability. Many of the cases that hold that obesity is not a disability rely on the regulations of the EEOC, which

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71 Id. § 12111(8).
72 Id. § 12102.
were promulgated to implement the ADA. Under those regulations, an “impairment” is “[a]ny physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine.”

The Sixth Circuit in *Andrews v. Ohio* relied heavily on this regulation in holding that the obese plaintiffs did not allege that they had an impairment because they did not allege that their obesity was “other than a mere, indeed possibly transitory, physical characteristic.” The court held that the physical characteristic of obesity is not an “impairment” within the definition of the ADA unless it results from a physiological disorder.

In a detailed discussion of previous cases that have examined whether obesity could constitute a disability, the Sixth Circuit in *Andrews* indicated that if a plaintiff’s obesity was the result of a physiological disorder, and it substantially limited one or more of his major life activities, he could be covered by the ADA. The court discussed the case of *Cook v. State of Rhode Island Department of Mental Health, Retardation, and Hospitals*, which considered whether morbid obesity could be an impairment within the context of the Rehabilitation Act. The First Circuit in *Cook* held that a morbidly obese plaintiff did have an impairment within the meaning of the statute because a physiological condition had caused the morbid obesity.

The court continued its attempt to draw a line for when obesity constitutes a disability with a discussion of the case of *Smaw v. Commonwealth of Virginia Department of State Police*. In *Smaw*, the plaintiff alleged that she was covered by the ADA because her simple obesity constituted a disability. The court ultimately rejected her claim on the ground that she did not produce any evidence that she was substantially limited in a major life activ-

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75 See *Andrews*, 104 F.3d at 808.
76 29 C.F.R. § 1630.2(h) (2004).
77 *Andrews*, 104 F.3d at 810.
78 Id.
79 Id. at 808.
80 Id. at 809 (discussing *Cook v. Dep’t of Mental Health, Retardation, & Hosps.*, 10 F.3d 17 (1st Cir. 1993)).
81 Id.
82 Id.
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ity.\textsuperscript{84} However, the court noted that it is not clear whether simple obesity could constitute an impairment under the ADA.\textsuperscript{85}

The Sixth Circuit continued its analysis with a discussion of \textit{Tudyman v. United Airlines}.\textsuperscript{86} \textit{Tudyman} is unique because it involved an individual who claimed to be "handicapped" under the Rehabilitation Act; however, the individual was overweight but not obese.\textsuperscript{87} The court found that he did not have an impairment and was therefore not entitled to protection under the Rehabilitation Act.\textsuperscript{88}

The above discussion, while not providing a bright line test whereby any and all individuals can be easily defined as disabled or not, seems to provide an analysis for courts to undertake when making the determination. The first step in the analysis will be to determine if a plaintiff is overweight or obese as the result of a physiological disorder, thus having an "impairment" within the meaning of the ADA.\textsuperscript{89} Regardless of how obese the individual is, and regardless of whether the resulting obesity substantially limits a major life activity, if the cause of an individual's overweight or obese condition is not due to a physiological disorder, he cannot be considered "disabled" for the purposes of the ADA.\textsuperscript{90}

If the individual is overweight or obese and the condition does in fact result from a physiological disorder, the court must determine if the individual is substantially limited in a major life activity because of his being overweight or obese.\textsuperscript{91} Because the limitation must be substantial, and the life activity must be major, it is likely that merely being overweight or possessing simple obesity will not qualify an individual as disabled under the statute. Morbid obesity, however, has the potential to substantially limit a major life activity, and therefore may qualify an individual as disabled. But again, the morbid obesity must be the result of a physiological disorder.\textsuperscript{92} This rule seems to be in line with the EEOC guidelines which state that "except in rare circum-
stances, obesity is not considered a disabling impairment."\textsuperscript{93} The practical implication of this rule in the context of obese individuals traveling on airlines in the United States is that the airlines should be able to require any obese passenger whose obesity is not the result of a physiological disorder and who is not substantially limited in a major life activity as a result of his obesity to purchase an additional seat on a flight.

V. PRIVATE RIGHT OF ACTION UNDER THE AIR CARRIERS ACCESS ACT

In addition to their argument that obesity is not a disability under the ACAA, the airlines and others who desire to limit the protection of disability statutes to those who are truly disabled also argue that there is no private right of action under the ACAA whereby individuals alleging violations of the act can seek judicial enforcement and compensation. Under the ADA, there is no question that a private right of action exists whereby individuals harmed by employers can seek recourse. Under the ACAA, however, federal circuit courts have been divided as to whether such a private right of action exists.

The Fifth Circuit in the 1991 case of \textit{Shinault v. American Airlines, Inc.} and the Eighth Circuit in the 1989 case of \textit{Tallarico v. Trans World Airlines, Inc.} both found a private right of action to exist under the ACAA.\textsuperscript{94} In \textit{Tallarico}, the Eighth Circuit acknowledged that no language in the ACAA specifically provides for a private right of action.\textsuperscript{95} However, the court went on to state that a private right of action could be implied, looking to the United States Supreme Court case of \textit{Cort v. Ash} for guidance in making the determination.\textsuperscript{96} According to \textit{Cort}, when determining whether a private right of action can be implied from a statute, four factors must be examined.\textsuperscript{97} Under the first factor, the party requesting relief must be a member of the class of persons that was targeted by Congress to be benefited by the statute.\textsuperscript{98} The court held, after a detailed factual inquiry, that because the plaintiff fell within the statutory definition of "otherwise qualified handicapped individual," she was a member of

\textsuperscript{93} 29 C.F.R. pt 1630, App. § 1630.2(j) (2004).
\textsuperscript{94} Shinault v. Am. Airlines, Inc., 936 F.2d 796, 800 (5th Cir. 1991); Tallarico v. Trans World Airlines, Inc., 881 F.2d 566, 570 (8th Cir. 1989).
\textsuperscript{95} Tallarico, 881 F.2d at 568.
\textsuperscript{96} Id. (citing Cort v. Ash, 422 U.S. 66, 78 (1975)).
\textsuperscript{97} Id.
\textsuperscript{98} Id.
the class of persons that was targeted by Congress to be benefited by the statute.99

The court in Tallarico, looking to the legislative history of the ACA and the provisions of the Rehabilitation Act, found that the second factor was also met concerning the ACA.100 Under the second factor, there must be some explicit or implicit indication of legislative intent to create the suggested remedy—in this case, the private right of action.101 The legislative history stated that the ACA was enacted to protect disabled airline passengers from discriminatory treatment.102 It further stated that the legislation was enacted in response to a Supreme Court decision that held that the Rehabilitation Act did not apply to commercial airlines unless they received direct federal funding.103 The court in Tallarico reasoned that because the Rehabilitation Act contains a private right of action, the ACA was enacted in response to a decision removing the subject matter of the ACA from the Rehabilitation Act, and because the ACA was “patterned after the Rehabilitation Act,” Congress must have “implicitly intended that handicapped persons would have an implied private cause of action to remedy perceived violations of the [ACAA].”104

The third inquiry that must be made under Cort is whether it is “consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff.”105 The court in Tallarico merely stated that this condition had been met and offered no additional explanation.106 The court went on to state that the fourth factor had been met—answering the question “is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law” in the negative.107 Based on the fact that the four factors for determining whether a remedy can be implied from a statute had been met, the court determined that it could read into the statute the specific remedy of a private right of action whereby

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99 Id. at 569.
100 Id. at 570.
101 Id. at 568.
102 Id. at 569-70.
103 Id. (citing United States Dep't of Transp. v. Paralyzed Veterans, 477 U.S. 597 (1986)).
104 Id. at 570.
105 Id. at 568 (citing Cort, 422 U.S. at 78).
106 Id. at 568, 570.
107 Id.
an individual may have some recourse for violations of the ACA.

Two years after Tallarico, the Fifth Circuit in the case of Shinault v. American Airlines, Inc. addressed the same issue. When district courts began following the holdings of both Tallarico and Shinault, it appeared that passengers who were harmed by violations of the ACA would have a private right of action under the statute. However, when the Eleventh Circuit addressed the question in the 2002 case of Love v. Delta Air Lines, it rejected the argument that a private right of action can be implied under the ACA. The Love court cited, as its reasoning for reaching a conclusion contrary to Tallarico and Shinault, the fact that those two cases had been decided before Alexander v. Sandoval. In Sandoval, the U.S. Supreme Court clarified the principles under which a private right of action may be inferred from a statute. According to Sandoval, federal courts do not have the power to create a private right of action because the Constitution gave this power to Congress. However, if the federal courts interpret an existing statute as evidencing that Congress originally intended to create a private right of action through passage of the statute, the courts may find that the private right of action exists. The court went on to state that in determining whether Congress intended to create a private right of action, statutory intent is determinative. Therefore, the other three factors in Cort are only relevant if

108 Id.
109 Shinault, 936 F.2d at 800.
110 Id.
111 Turturro v. Continental Airlines, 128 F. Supp. 2d 170, 180 n.5 (S.D.N.Y. 2001) (acknowledging that a private right of action has been found to exist under the ACA and citing Tallarico); Adiutori v. Sky Harbor Int'l Airport, No. 95-15774, 1996 WL 673805, at *3 (9th Cir. Nov. 20, 1996) (citing Shinault and Tallarico in acknowledging that the ACA contains an implied private right of action).
112 Love v. Delta Airlines, 310 F.3d 1347, 1360 (11th Cir. 2002).
113 Id. at 1359; Alexander v. Sandoval, 532 U.S. 275 (2001).
114 See generally Sandoval, 532 U.S. 275.
115 Love, 310 F.3d at 1352.
116 Id.
117 Id.
118 The other three Cort factors include (1) whether the party requesting relief is a member of the class of persons that was targeted by Congress to be benefited by the statute; (2) whether it is "consistent with the underlying purposes of the
they help to determine whether, by creating the statute, Congress intended to give a private right of action to individuals affected by violations of the statute.\textsuperscript{119}

The court in Love stated that under the principles announced in Sandoval, when determining whether Congress intended to create a private right of action, the courts should first look for language "explicitly conferring a right directly on a class of persons that includes the plaintiff in a case, or language identifying the class for whose especial benefit the statute was enacted."\textsuperscript{120}

No language in the ACAA exists that would explicitly create a private right of action.\textsuperscript{121} However, the ACAA does identify and define "otherwise qualified individual" and includes the Rehabilitation Act definition of disability, stating that air carriers may not discriminate on the basis of that definition.\textsuperscript{122} Thus, the court was forced to move on to the next step in the inquiry.\textsuperscript{123}

The court stated that the second step in the inquiry is to examine the structure of the statute for a mechanism with which to enforce the statute.\textsuperscript{124} This step is necessary because, according to Sandoval, "the express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others."\textsuperscript{125} Thus, if the court is able to find an enforcement mechanism, the court should not find that a private right of action was intended by Congress.\textsuperscript{126}

Through a lengthy discussion of the ACAA, the court ultimately identified three enforcement mechanisms created by the statute itself and the accompanying regulations.\textsuperscript{127} The first enforcement mechanism that the court identified was the requirement that the Department of Transportation investigate claims of violations of the ACAA.\textsuperscript{128} Accompanying the requirement to investigate is the Department of Transportation's authority to

\textsuperscript{119} Id.
\textsuperscript{120} Id. (citing Cannon v. Univ. of Chicago, 441 U.S. 677, 690 (1979)).
\textsuperscript{121} Id.
\textsuperscript{122} Id. at 1358.
\textsuperscript{123} Id.
\textsuperscript{124} Id. at 1353.
\textsuperscript{125} Id.
\textsuperscript{126} Id.
\textsuperscript{127} Id. at 1357.
\textsuperscript{128} Id.
sanction air carriers upon a finding that they have violated the ACAA.\textsuperscript{129} The second enforcement mechanism that the court identified under the ACAA was the requirement that air carriers provide dispute resolution mechanisms.\textsuperscript{130} The final enforcement mechanism under the ACAA is the judicial review of the Department of Transportation's response by the court of appeals.\textsuperscript{131} Because it was able to identify three distinct enforcement mechanisms, the court concluded that Congress would not have explicitly created these enforcement mechanisms in the statute itself while at the same time fully intending to create an additional mechanism, a private right of action, by implication.\textsuperscript{132} Because it was not the intention of Congress to create a private right of action under the ACAA, the court stated that it was without power to do so.\textsuperscript{133}

The court further stated that the third step in the process—examining the legislative history of the statute and the context in which it was passed—is only to be performed if the court has been unable to determine conclusively whether it was intended by Congress that a private right of action exists in the statute through its text and structure.\textsuperscript{134} Although the court had already determined that it was not the intention of Congress to create a private right of action in the ACAA through its examination of the structure of the statute, the court went through this third step just to illustrate the strength of its opinion.\textsuperscript{135}

The court stated that the ACAA was enacted in response to \textit{U.S. Department of Transportation v. Paralyzed Veterans}, which held that the Rehabilitation Act did not apply to commercial airlines unless they directly received federal funding.\textsuperscript{136} Congress passed the ACAA in order to protect disabled passengers from discriminatory treatment by the airlines.\textsuperscript{137} Thus, had Congress intended to create a private right of action under the statute, it would have written language into the statute expressly providing for such a right of action instead of setting up an administrative enforcement mechanism.\textsuperscript{138} The court went on to state that be-

\textsuperscript{129} \textit{Id.}
\textsuperscript{130} \textit{Id.}
\textsuperscript{131} \textit{Id.}
\textsuperscript{132} \textit{Id.} at 1357-58.
\textsuperscript{133} \textit{Id.} at 1358.
\textsuperscript{134} \textit{Id.} at 1358.
\textsuperscript{135} \textit{Id.} at 1358.
\textsuperscript{136} \textit{Id.} (citing 477 U.S. 597 (1998)).
\textsuperscript{137} \textit{Id.}
\textsuperscript{138} \textit{Id.}
cause Congress must have intended to create the private right of action, the regulations that accompany the statute cannot by themselves create such a right of action.\textsuperscript{139}

In light of the fact that \textit{Sandoval} refined the analysis for implying a private right of action, it is likely that courts will follow the lead of the Eleventh Circuit and hold that no private right of action exists under the ACAA. For example, in the first case in federal court to address the issue after the Eleventh Circuit reached its decision in \textit{Love}, the United States District Court for the District of Columbia addressed the issue in \textit{Fox v. American Airlines, Inc.}\textsuperscript{140} In \textit{Fox}, the court cited the decision of the Eleventh Circuit in \textit{Love}, stating that the Eighth Circuit in \textit{Tallarico} and the Fifth Circuit in \textit{Shinault} based their decisions on the factors announced in \textit{Cort v. Ash}, and were thus obsolete in light of the Supreme Court’s decision in \textit{Sandoval}.\textsuperscript{141} In holding that a private right of action does not exist under the ACAA, the court essentially adopted the reasoning of the Eleventh Circuit in \textit{Love}.\textsuperscript{142} The court focused on the \textit{Love} court’s reasoning that Congress did not intend to provide for such a right because it instead chose to design an elaborate administrative enforcement scheme buttressed by the possibility of judicial review.\textsuperscript{143} Most recently, the Tenth Circuit in \textit{Boswell v. Skywest Airlines, Inc.} raised the issue of whether a private right of action exists under the ACAA sua sponte, as the Eleventh Circuit’s decision in \textit{Love} had not been delivered at the time the case was before the district court.\textsuperscript{144} The court conducted the same analysis as that in \textit{Love} and \textit{Fox}, stated that it agreed with the Eleventh Circuit’s decision in \textit{Love}, and held that the ACAA does not contain a private right of action.\textsuperscript{145}

Despite the Eleventh Circuit’s application of the test laid out by the Supreme Court in \textit{Sandoval} to the context of the ACAA, it is still possible for a private right of action to be implied by the courts under the ACAA. For example, the United States District Court for the District of Massachusetts in \textit{Deterra v. America West Airlines, Inc.} stated that it did not disagree with the holdings of

\begin{itemize}
  \item \textsuperscript{139} \textit{Id.} at 1353.
  \item \textsuperscript{140} \textit{Fox v. Am. Airlines, Inc.}, No. 02-2069, 2003 WL 21854800, at *3 (D.D.C. Aug. 5, 2003).
  \item \textsuperscript{141} \textit{Id.}
  \item \textsuperscript{142} \textit{Id.} at *4.
  \item \textsuperscript{143} \textit{Id.} at *3.
  \item \textsuperscript{144} \textit{Boswell v. Skywest Airlines, Inc.}, 361 F.3d 1263, 1266 (10th Cir. 2004).
  \item \textsuperscript{145} \textit{Id.} at 1265-71.
\end{itemize}
other courts that a private right of action existed for persons harmed by violations of the ACAA that involved discrimination.\textsuperscript{146} Instead, that court was faced with the issue of “whether a violation of a regulation in a nondiscriminatory manner which did not cause discrimination warrants resort to a federal court for a remedy.”\textsuperscript{147} The \textit{Deterra} court was apparently aware of the Supreme Court’s decision in \textit{Sandoval}, upon which the Eleventh Circuit in \textit{Love} and the D.C. District Court in \textit{Fox} so heavily relied.\textsuperscript{148} In fact, in reaching its decision that Congress did not intend to imply a private right of action under the ACAA to cases involving only nondiscriminatory violations of a regulation, the court specifically cited \textit{Sandoval} for the rule that Congressional intent is determinative in assessing whether there is a private right of action under a statute.\textsuperscript{149} Moreover, the court again cited \textit{Sandoval} for the rule that regulations, although “having the force and effect of law,” cannot create a private right of action.\textsuperscript{150}

Although the District Court of Massachusetts’ decision in \textit{Deterra} was made prior to the Eleventh Circuit’s decision in \textit{Love}, the case illustrates that even under the test for determining whether a private right of action exists under a statute laid out in \textit{Sandoval}, courts may reach different conclusions. It is important to note that the question of whether a private right of action existed under the ACAA was assumed for the purposes of summary judgment in \textit{Deterra}.\textsuperscript{151} However, it is significant that the court cited and applied portions of the \textit{Sandoval} opinion without engaging in the same analysis as the Eleventh Circuit in \textit{Love} as to whether it was Congress’s intent to create a private right of action under the ACAA.\textsuperscript{152}

Moreover, it is also necessary to point out that the Supreme Court in \textit{Sandoval} was not faced with the question of whether a private right of action exists under the ACAA.\textsuperscript{153} The Court instead was faced with the question of whether a private right of action existed under another statute, and simply clarified the

\begin{flushleft}
\textsuperscript{147} \textit{Id.}
\textsuperscript{148} \textit{Id.} at 309.
\textsuperscript{149} \textit{Id.}
\textsuperscript{150} \textit{Id.} at 312 n.49.
\textsuperscript{151} \textit{Id.}
\textsuperscript{152} \textit{Id.} at 310-12.
\end{flushleft}
test used to make that determination. Because the Supreme Court has not had occasion to answer the specific question of whether the ACAA contains a private right of action, it is possible that courts will continue to be divided on the issue.

The difference in reasoning between the Eight Circuit in *Tallarico* and the Eleventh Circuit in *Love* serves as a useful example of how courts could utilize the same test for finding a private right of action announced in *Sandoval* but reach different conclusions about whether such a right of action exists. Even under the principles in *Sandoval*, Congressional intent is determined by an examination of the text and structure of the statute. In performing this analysis, both courts noted that the ACAA was enacted to provide disabled airline passengers the protection taken from them by the Supreme Court in *Paralyzed Veterans*.

The Eight Circuit in *Tallarico* noted that when Congress drafted the ACAA, it patterned the new statute after the Rehabilitation Act. The court reasoned that because courts have found that the Rehabilitation Act implies a private right of action, and because Congress patterned the ACAA after that act (based on the structure of the statute) Congress must therefore have intended for a private right of action to exist.

The Eleventh Circuit in *Love* acknowledged that Congress passed the ACAA in order to protect disabled passengers from discriminatory practices on the part of the air carriers. However, that court reasoned that had Congress intended to create a private right of action under the statute, it would have written language into the statute expressly providing for such a right instead of setting up an administrative enforcement mechanism.

While the possibility of the existence of a private right of action under the ACAA has not completely been foreclosed, the Eleventh Circuit's decision in *Love* seems to indicate that those who wish to extend protection to the obese under the ACAA may have to rely on the administrative enforcement mechanism of the Department of Transportation. However, as discussed above, this would only allow obese passengers whose obesity re-

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154 *Id.* at 286-87.
155 *Id.* at 288.
156 *Tallarico*, 881 F.2d at 569; *Love*, 310 F.3d at 1358.
157 *Tallarico*, 881 F.2d at 570.
158 *Id.* at 569-70.
159 *Love*, 310 F.3d at 1358.
160 *Id.*
sults from a physiological condition and who are substantially limited in a major life activity to avoid paying for an additional seat. In practice, creating a system of documentation and proof of disability status—that the individual is obese as a result of a physiological condition and is substantially limited in a major life activity—would create significant costs of implementation and ultimately prove to be unworkable. Although it is possible that the Department of Transportation could implement some procedure by which the obese could qualify for protection under the statute, this comment advocates for a different approach based on concepts created in the Americans with Disabilities Act ("ADA"), the regulations promulgated by the EEOC to implement the ADA, and the resulting judicial interpretations. However, in order to understand the proposed solution, it is important to understand the framework created under the ADA.

VI. FRAMEWORK CREATED BY THE AMERICANS WITH DISABILITIES ACT

Under 42 U.S.C. § 12112(b)(5)(A), the term "discriminate" includes "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity."\(^\text{161}\) Under § 12111(9)(B), "reasonable accommodation may include. . . reassignment to a vacant position.\(^\text{162}\) The House Report explains that although reassignment may constitute a reasonable accommodation for purposes of the ADA, the employer is not required to create a vacancy for the disabled employee. It is only required to reassign the employee to a position that is currently vacant.\(^\text{163}\) In addition, the reasonable accommodation requirement of the ADA does not require an employer to reassign the employee to a position that would constitute a promotion.\(^\text{164}\) Therefore, for purposes of determining which positions are vacant, positions that


\(^{162}\) Id. § 12111(9)(B).


\(^{164}\) Id. at 1176.
would constitute a promotion are not considered. In addition, the employee covered under the ADA does not get to choose his preferred form of accommodation. The statute only requires that the accommodation that the employer offers be reasonable. Moreover, in order to comply with the statute, the employer only has to offer an accommodation that is reasonable. Once the employer has made this offer, he no longer has any duties under the statute. Thus, if an employee rejects a reasonable accommodation, he has no recourse under the statute. In addition, the category of reasonable accommodations does not include modification of the position.

In addition to the reasonableness requirement, the courts interpreting the ADA have required both parties to engage in an interactive process by which the employer and the employee determine a reasonable accommodation that is agreeable to both parties. The employee is normally required to initiate the process by giving the employer notice of his disability along with the limitations caused by the disability. Once the employee has initiated the process, the employer then has an obligation to engage in the interactive process to determine and ultimately offer the employee a reasonable accommodation.

Accompanying the interactive process is an obligation on the part of both the employee and the employer to make communications in good faith. Thus, an employer or employee who obstructs or delays the process, or simply fails to communicate during the process, does not comply with the requirement to make communications in good faith.

The Tenth Circuit case of Smith v. Midland Brake, Inc. serves as a useful illustration of the process created by the ADA. In Smith, an employee of Midland Brake, employed in a position that involved light assembly, developed chronic dermatitis of the hands.
and other muscular injuries.\textsuperscript{176} Smith, the employee, sought medical treatment for his condition, and his doctors recommended restrictions on the work he was able to perform.\textsuperscript{177} In some instances, his doctors instructed him to discontinue his work for short periods of time.\textsuperscript{178} While on leave of absence, Smith was fired due to the fact that Midland Brake was unable to accommodate the doctor-recommended restrictions.\textsuperscript{179}

Under the framework created by the ADA, Smith must show that he is a qualified individual with a disability, i.e., that he has a disability that fits within the definition under the ADA and can perform the essential functions of his job with, or without if applicable, reasonable accommodation.\textsuperscript{180} He would be able to show that he has a disability within the meaning of the statute by proving that his muscular injuries and chronic dermatitis of the hands constitute a physical impairment that substantially limits one or more major life activities, including working.\textsuperscript{181} He could also fulfill the requirement by showing that he has a record of such an impairment, or that he is regarded as having such an impairment.\textsuperscript{182}

Because reassignment to a vacant position constitutes a reasonable accommodation under the ADA, Smith could prevail on his cause of action by showing that there existed an open position and that he was refused a reasonable accommodation that would have allowed him to perform the essential functions of the position.\textsuperscript{183} However, if the position was not vacant, or constituted a promotion, he would be unable to make the showing that this constituted a reasonable accommodation.\textsuperscript{184} Moreover, if another accommodation was available, reasonable, and offered by the employer, he would not be able to make a showing that the employer failed to make a reasonable accommodation.\textsuperscript{185}

In addition to making a showing that he is a qualified individual with a disability, Smith must show that he initiated and participated in an interactive process with Midland Brake to

\textsuperscript{176} Smith v. Midland Brake, Inc., 138 F.3d 1304, 1307 (10th Cir. 1998).
\textsuperscript{177} Id.
\textsuperscript{178} Id.
\textsuperscript{179} Id.
\textsuperscript{181} See id. § 12102.
\textsuperscript{182} Id.
\textsuperscript{183} Smith, 180 F.3d at 1179.
\textsuperscript{184} Id. at 1170.
\textsuperscript{185} Id. at 1177.
determine a reasonable accommodation that would allow him to perform the essential functions of his job.\footnote{186} For example, if Smith failed to (1) tell Midland Brake of his disability, (2) suggest either that he could be assigned to a different position or receive some other accommodation, or (3) engage in a dialogue to determine an appropriate accommodation, he would not be able to prevail on his claim.\footnote{187} Likewise, if Smith could show that he made Midland Brake aware of his disability, suggested a reasonable accommodation, including reassignment to a vacant position, made good faith attempts to participate in an interactive process with Midland Brake, and that Midland Brake refused to cooperate in the interactive process, he would be able to prevail on his ADA claim.\footnote{188}

Even if the employee can make all the necessary showings for his prima facie case under the ADA, the employer can prevail on the claim by making a showing that the accommodation would constitute an undue hardship.\footnote{189} The ADA defines "undue hardship" as

\begin{quote}
[A]n action requiring significant difficulty or expense, when considered in light of ... [certain] factors, [such as] the nature and cost of the accommodation needed under this chapter; the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility; the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and the type of operation or operations of the covered entity, including composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.\footnote{190}
\end{quote}
VII. PROCEDURE FOR ACCOMMODATING AN OBESE AIRLINE PASSENGER IF ANALYZED UNDER FRAMEWORK CREATED BY THE AMERICANS WITH DISABILITIES ACT

The Air Carriers Access Act states that "[i]n providing air transportation, an air carrier, including (subject to section 40105(b)) any foreign air carrier, may not discriminate against an otherwise qualified individual" on the basis of three grounds.191 The grounds on which an air carrier may not discriminate under the ACAA are identical to the definition of disability under the ADA. Both the ADA and the ACAA identify the class of individuals who are disabled and thus covered by the statute by using the same definition as found in the Rehabilitation Act of 1973, the predecessor to the ADA.192 In the context of the Rehabilitation Act and the ADA, courts have stated that "[b]ecause the standards under both of the acts are largely the same, cases construing one statute are instructive in construing the other."193 Thus, cases construing the ADA should also be instructive in construing the ACAA.

If the statutory framework created by the ADA were used in cases involving obesity as a disability, an equitable solution could be reached that would allow obese passengers to reduce their increased costs of air transportation without putting the airlines out of business or requiring them to substantially raise ticket prices for other passengers. Under the ADA, a passenger would have to show that he was a "qualified individual with a disability." In this case, the language "otherwise qualified individual" of the ACAA would be substituted for "qualified individual with a disability," the language of the ADA.

Applying the ADA framework in the context of obese airline passengers, the obese passenger and the airline would be required to engage in an interactive process to determine what type of reasonable accommodation would be appropriate to the obese passenger's specific situation. The obese passenger would be required to initiate the process by giving the airline prior notification of his condition and discuss the limitations caused by his obesity, i.e., the fact that he will require an additional seat on his flight or flights. The airline would then be required to

192 Andrews v. Ohio, 104 F.3d 803, 807 (6th Cir. 1997) (discussing the definitions of "handicapped individual" under the Rehabilitation Act and "disability" under the ADA); 42 U.S.C § 12112(a); 49 U.S.C. § 41705(a).
193 E.g., Andrews, 104 F.3d at 807.
engage in an interactive process by which both the airline and the obese passenger would try to determine a reasonable accommodation, in this case, trying to rearrange passengers in a manner that would allow an additional vacant seat to be next to him.

Under the ADA, an employer is not required to create a vacancy for a disabled employee because such an accommodation has been determined not "reasonable" under the statute.\textsuperscript{194} This should also be true in the context of air transportation. Due to the unstable economic condition of the airlines, as discussed earlier, requiring an airline to bump passengers in order to make room for an obese passenger would not be reasonable. Not only would this result in a loss of profits to the airline due to a loss of one fare for each obese passenger on the flight, it would also anger customers who are bumped, possibly causing them to use another carrier.

Under the ADA, the reasonable accommodation provision does not require an employer to reassign the employee to a position that would constitute a promotion. If the analogy were extended to the air transportation context, the airline would not be required to reassign obese passengers to the first-class section on flights.

If it were determined to be unreasonable in the air transportation context, to bump a ticketed passenger in order to create a vacant seat for an obese passenger, the interactive process requirement under the ADA framework assures that the obese passenger would still have an opportunity to secure a reasonable accommodation. The interactive process would require the obese passenger and the airline to work together to reassign the passenger to a flight that has two vacant seats that the obese passenger could use. Because in the airline industry, different flights on different days and different times of the day are more crowded than others, the airline would be required to work with the obese passenger to determine an alternative date and time that would constitute a reasonable accommodation for the passenger.

As under the ADA, a passenger would not have the right to choose his preferred accommodation.\textsuperscript{195} The statute only requires that the employer offer an accommodation that is reasonable,\textsuperscript{196} so it follows that an airline would only have to offer a

\textsuperscript{194} Smith, 180 F.3d at 1156.
\textsuperscript{195} Id. at 1177.
\textsuperscript{196} Id.
reassignment that would be reasonable. Once the airline has offered an accommodation that is reasonable, the airline’s duty would be discharged and the obese passenger would have to either accept the accommodation or lose any claim under the ACAA.

However, the determination of what exactly constitutes a reasonable accommodation, as was the case under the ADA, will be a point of contention for the parties. Questions such as how many hours, or days, a person can “reasonably” be delayed will have to be answered. Very likely, these questions will have to be determined on a case by case basis by the courts or the Department of Transportation. Thus, in practice, the airlines would be likely to reassign passengers to flights that would satisfy the obese passenger’s particular scheduling requirements because the airlines would want to avoid litigation.

Some advocates for the obese have suggested that the airlines could accommodate obese passengers by simply modifying seats on all flights.\footnote{197 Koenig, supra note 3.} If the analogy of the ADA is extended to the air transportation context, again, a sensible answer to the problem can be reached. Under the ADA, in the employment context, the modification of a position to enable a disabled employee to perform the functions of the position does not constitute a reasonable accommodation.\footnote{198 Smith, 180 F.3d at 1170.} Thus by analogy, forcing the air carriers to modify existing seats by widening them to accommodate obese passengers should not constitute a reasonable accommodation.

Under the “undue hardship” affirmative defense of the ADA, if the employee successfully shows that an accommodation is reasonable, the employer may still prevail if he can show that the reasonable accommodation would constitute an “undue hardship.”\footnote{199 42 U.S.C. § 12112 (2004).} As previously noted, reassignment to an occupied seat, reassignment to a seat in first class, or modification of seats on airplanes would probably not be held to constitute reasonable accommodations, as has been the case under the ADA. However, even if they were held to be reasonable, the airline could still refuse to provide the obese passenger with these accommodations by showing that they would constitute an undue hardship. Given the financial condition of the airlines and the fact that only six seats per flight were attributable to Southwest

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197 Koenig, supra note 3.
198 Smith, 180 F.3d at 1170.
Airlines’ profit in 2001, it is likely that the adjudicator would find that those accommodations would constitute an undue hardship.

VIII. SOUTHWEST AIRLINES’ POLICY TOWARDS OBESE PASSENGERS OCCUPYING ADDITIONAL SEATS

Having established the framework with which the airlines’ current policies should conform, this comment will now analyze different existing policies, beginning with that of Southwest Airlines. Since 1980, Southwest Airlines has had a policy of requiring obese passengers who must raise the armrest and sit in an additional seat to purchase a ticket for that additional seat.\textsuperscript{200} This policy extends to anyone who occupies more than one seat, including infants occupying a seat in a restraining device, passengers placing a musical instrument in an adjacent seat, and obese passengers sitting in two seats.\textsuperscript{201} The price of the additional seat will vary depending on the type of ticket the obese passenger purchases for himself.\textsuperscript{202} If the obese passenger purchases a discounted fare by making an advance purchase, the cost of the additional seat will be the same as the seat initially purchased.\textsuperscript{203} However, if the obese passenger does not purchase a discounted fare in advance, but instead purchases an unrestricted full fare, then he will have to pay the price of a child’s fare for the additional seat.\textsuperscript{204}

Southwest Airlines’ policy of making obese passengers purchase an additional seat is limited to those passengers who must raise the armrest between two seats in order to fit in the seats.\textsuperscript{205} Thus, Southwest does not rely on the fact that a person is clinically obese based on the Body Mass Index to determine if the passenger must purchase an additional seat.\textsuperscript{206} It simply makes the determination based on whether the passenger actually sits in one seat, or occupies more than one seat.\textsuperscript{207}

Southwest has also taken steps in an effort to ensure that the process is handled discretely.\textsuperscript{208} For example, employees of the

\textsuperscript{200} A Message from Southwest Airlines, supra note 36.
\textsuperscript{201} Id.
\textsuperscript{202} Id.
\textsuperscript{203} Id.
\textsuperscript{204} Id.
\textsuperscript{205} Id.
\textsuperscript{206} Id.
\textsuperscript{207} Id.
\textsuperscript{208} Id.
Airline will only inform obese passengers of the policy who will clearly be required to raise the armrest and sit in an additional seat.\textsuperscript{209} If it is debatable whether the person will require an additional seat, the employees will not approach the passenger.\textsuperscript{210} Those obese passengers who have been informed of the policy and requirement to purchase an additional seat and who contend that they will sit in only one seat are pre-boarded under the policy in order to allow the employees a chance to determine if the obese passenger actually is capable of fitting into only one seat.\textsuperscript{211}

Obese passengers who contest the determination that they will require an additional seat are not the only passengers who will receive the benefits of pre-boarding.\textsuperscript{212} Any obese passenger who arrives in time will be able to pre-board in order to ensure that the passenger is able to find two empty seats next to each other.\textsuperscript{213} If the obese passenger does not arrive in time for pre-boarding, the flight attendants will discreetly ask other passengers to change seats in order to create two empty seats next to each other in which the obese passenger can sit.\textsuperscript{214}

Southwest Airlines has an additional policy that gets far less attention from the advocates for the obese and others who wish to expand the class of persons who are considered “disabled” for the purposes of the Americans with Disabilities Act, Air Carriers Access Act, and other disability statutes. Southwest Airlines allows the obese passenger to purchase the additional seat in advance.\textsuperscript{215} This allows the airline to remove the additional seat from its inventory and help to ensure that the flight is not oversold.\textsuperscript{216} In addition, as long as the flight is not oversold, Southwest will issue a refund for the price of the additional seat to the obese passenger.\textsuperscript{217} Therefore, by allowing the obese passenger to purchase the additional seat in advance, there is a greater likelihood that the flight will not be oversold and that the passenger will only have had to pay for one of the two seats in which he sat.\textsuperscript{218} In the event that a flight is oversold, the obese passen-

\begin{footnotesize}
\textsuperscript{209} Id.
\textsuperscript{210} Id.
\textsuperscript{211} Id.
\textsuperscript{212} Id.
\textsuperscript{213} Id.
\textsuperscript{214} Id.
\textsuperscript{215} Id.
\textsuperscript{216} Id.
\textsuperscript{217} Id.
\textsuperscript{218} Id.
\end{footnotesize}
AACA AND OBESE PASSENGERS

The policy of requiring obese passengers to purchase additional tickets is not limited to Southwest Airlines. Continental Airlines, American Airlines, and Northwest Airlines all have policies requiring obese passengers who take up more than one seat to purchase additional seats. While some of these airlines do allow the second seat to be purchased at a lower rate, none of them are willing to offer a refund if the flight does not oversell. Delta Airlines and United Airlines do not have a policy requiring obese passengers to purchase additional tickets.

IX. OTHER MAJOR AIR CARRIERS' POLICIES TOWARD OBESE PASSENGERS

Southwest Airlines' policy toward obese passengers is consistent with the approach this comment advocates. Southwest encourages obese passengers to initiate an interactive process, but does not require the obese passenger to do so. Even if the obese passenger fails to notify Southwest in advance, he may still receive a refund for the additional seat as long as the flight does not oversell. Southwest is also participating in the interactive process in good faith, as they are willing to discuss other possible flights in which the obese passenger is more likely to get a refund. While Southwest will not create a vacancy or modify its seats to accommodate obese passengers, they would not be required to do so under this framework. Moreover, Southwest's policy of allowing the obese passenger to purchase the additional seat in advance, allowing the airline to remove a seat from its inventory in order to virtually ensure that the obese passenger will be entitled to a refund, actually goes far beyond the requirements of the framework. Thus, Southwest Airlines' policy toward obese passengers complies with the framework advocated by this comment, and has resulted in reaching a workable
middle ground between the airlines, obese passengers, and those who would otherwise be forced to share portions of their seats with obese passengers.

As stated above, Delta Airlines and United Airlines do not require obese passengers to purchase additional seats on flights. This policy obviously does not fulfill the requirements of the framework advocated by this comment. While the policy is acceptable to both obese passengers who are not required to purchase additional seats and seemingly to the airlines who created the policy, this policy has failed to address the argument of those who are forced to share portions of their seats with obese passengers. Thus, through adopting this policy, these airlines have risked further complaints and lawsuits by angry passengers which could ultimately result in a decline in the number of passengers willing to choose their airlines.

The policies of Continental, American, and Northwest Airlines, requiring obese passengers to purchase additional seats, also do not comply with the framework advocated by this comment. While their policies are acceptable to the airlines and those who otherwise would be forced to share portions of their seats with obese passengers, the policies fail to address the financial concerns of the obese passengers. In order to comply with the framework, these airlines would only be required to provide additional seats at no additional cost on flights that are not full, and engage in an interactive process in order to help the obese passengers select flights that are less likely to be full.

X. CONCLUSION

The problem of creating policies to address the issue of obese passengers requiring additional seats on airlines is one that affects everyone who participates in the airline industry, including the airlines, those who are forced to share portions of their seats with obese passengers, and the obese passengers themselves. The vast majority of the commentary focusing on the issue has been from advocates of the obese who desire additional seats at no additional cost for all obese passengers. However, their arguments ignore the economic reality in which the airline industry exists, one that has recently been faced with financial instability.

In response to this commentary, some airlines have adopted policies providing additional seats at no additional cost to obese passengers, blindly disregarding even their own financial concerns. Other airlines have ignored the concerns of the obese and required all obese passengers to purchase additional seats,
while at the same time providing no refund in the event that a flight contains empty seats. This comment advocates for an approach that addresses the concerns of all the parties involved, and reaches a workable middle ground. Under this approach, obese passengers will not be required to purchase an additional seat if a flight contains empty seats, and airlines will be required to work with the obese passengers to find flights that are not likely to be full. In addition, other passengers will not be forced to choose between having to share a portion of the seat for which they paid and being bumped from flights because an additional seat must be provided to an obese passenger. Moreover, the airlines will not be significantly affected financially, as evidenced by the fact that the only airline to turn a profit in 2001 did so while maintaining a policy similar to that advocated by this comment. Further evidence of the economic feasibility of such an approach is the fact that in August 2003, the airline industry in the United States recorded unused seat miles of 45.24 billion. Therefore, by simply helping obese passengers find flights that contain unused seats and allowing them to sit in them at no additional cost, the airlines can implement a policy that addresses the needs of obese passengers, those passengers who would otherwise be forced to share portions of their seats with obese passengers, and their own economic concerns.

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225 In practice, this policy could be implemented either voluntarily by the airlines, as was the case in the implementation of Southwest Airlines' policy, or it could be facilitated by the Department of Transportation. Because it is unlikely that a private right of action exists under the ACAA whereby an obese passenger can seek a remedy for alleged ACAA violations, the enforcement mechanism through the Department of Transportation is likely the only avenue through which complaints will be addressed. While under the ACAA, the Department of Transportation can only remedy complaints affecting those who are disabled (in this case, those who have obesity that results from a physiological disorder and are severely limited in a major life activity), the Department could insist on implementing the policy advocated for by this comment for those who qualify as being disabled within the meaning of the statute. However, the current position of the Department is that under the ACAA, airlines "are not required to furnish more than one seat per ticket or to provide a seat in a class of service other than the one the passenger has purchased." 14 C.F.R. § 382.38(i) (2004).