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HIRING, FIRING, AND RETIRING: RECENT DEVELOPMENTS IN AIRLINE LABOR AND EMPLOYMENT LAW

FRANKLIN A. NACHMAN*

DURING THE LAST twenty years, dramatic changes have occurred in the legal relationships between employers and employees. Some of these changes have been brought about by statutory enactments, the most significant of which have been the Civil Rights Act of 1964\(^1\) and the Age Discrimination in Employment Act of 1967 (ADEA).\(^2\) Court decisions have also significantly contributed to these changes. In this decade, the most significant development in labor and employment law has been the erosion of the traditional employment-at-will doctrine, whereby the employer and employee were free to terminate any employment relationship that did not provide for a definite period of employment.\(^3\) Tort concepts have invaded an area traditionally governed by the law of contract, with the result that damage awards are becoming both unpredictable and larger.\(^4\) The business of hiring, firing, and retiring employees is a risky one.

Cases involving the airline industry have played a major role in the development of civil rights law, as well as labor and employment jurisprudence. These changes in the law

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3 See infra Section IV.
4 See infra Section IV D.
have evolved despite the fact that the airline industry was regulated for many years by the Civil Aeronautics Board; its labor relations have been governed largely by the Railway Labor Act (RLA); and even until recently, the industry has been highly unionized. This article will analyze recent significant developments in labor and employment cases involving the airline industry. It will first review cases arising under the Age Discrimination in Employment Act and Title VII of the Civil Rights Act of 1964. The article will then consider recent cases on the issue of whether the Railway Labor Act preempts the increasing number of common law contract and tort actions being brought by employees against airlines. Finally, the article will discuss the expanding theories of the law of wrongful discharge and how these theories have affected the airline industry.

I. AGE DISCRIMINATION IN EMPLOYMENT ACT

A. Hiring Pilots

Airlines frequently have policies providing they will not hire persons as pilots who are older than a maximum age. Two federal appeals courts have considered the question of whether such policies violate the ADEA, and have unfortunately reached opposite results.

In Murnane v. American Airlines, the plaintiff applied for employment with American as a flight officer, stating in his application that he was forty-three years of age. The airline did not accept the application, and plaintiff commenced suit.

The core of American’s defense was its employment structure, in which flight officer, co-pilot, and captain were three successive employment levels, and it was the policy of the company to require all flight officers to ad-
vance to the position of captain. No one was hired without that goal in mind. American maintained an "up or out" policy, which required a flight officer or co-pilot to receive the maximum amount of training required for such position, and if not qualified to advance to the next position, the person's employment would be terminated. Thus the airline's procedures did not allow for a career as a flight officer or co-pilot.

The district court found that the plaintiff established a prima facie case of discrimination, since he was a member of the class of persons intended to be protected under the ADEA. However, the district court dismissed the complaint because it determined that American's age forty guideline was a bona fide occupational qualification (BFOQ) pursuant to the Act. On appeal, the Court of Appeals for the District of Columbia affirmed the district court's opinion, finding that American's age policy was a BFOQ which was reasonably necessary to normal airline business.

Evidence at trial showed that "pilot error" accounted for 90% of all aviation accidents, but that the incidence of accidents decreased as the pilot gained experience. The court of appeals upheld the district court's finding that "the best experience an American Captain can have is acquired by flying American aircraft in American's three cockpit positions." The court further noted that since it took at least ten to fifteen years to progress from flight officer to co-pilot to captain, plaintiff would not have become a captain until his late fifties, and would have had to retire at age sixty in accordance with Federal Aviation Administration requirements. Thus, the court found that American's policy of limiting its new hiring to relatively young pilots ensured maximum experience of its captains

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8 Murnane, 482 F. Supp. at 144.
10 Murnane, 667 F.2d at 100.
11 Id. (emphasis in original).
12 Id.
with the airline, and thereby maximized safety.\textsuperscript{13}

The court's analysis of the BFOQ issue was enlightening. Plaintiff contended that, at most, the policy could demonstrate a marginal increase in the safety of passengers on the aircraft, and that a marginal safety increase was insufficient to support a blanket age rule. The court disagreed, finding that the maximization of safety was reasonably necessary to the normal operation of the airline, and, in fact, that safe transportation of its passengers was the essence of American's business.\textsuperscript{14} American was subject to a statutory mandate that it operate its business with "the highest possible degree" of safety.\textsuperscript{15} As a result, the court held that the airline industry must be accorded great leeway and discretion in determining the manner in which it may be operated most safely, and that merely "safe" operation was not sufficient.\textsuperscript{16} Interestingly, the opinion stated that courts do "not possess the expertise with which, in a cause presenting safety as the critical element, to supplant their judgments for those of the employer."\textsuperscript{17} It therefore affirmed the district court's judgment.

One week later, the Court of Appeals for the Fourth Circuit reached the opposite conclusion in \textit{Smallwood v. United Airlines}.\textsuperscript{18} The challenge in that case was to United's rule denying employment to pilot applicants over age thirty-five. The court of appeals reversed the district court's finding that the policy was a bona fide occupational qualification.

Smallwood was forty-eight years old at the time of his application, and had flown for ten years for another airline. During that time he had served as a first officer and captain on DC-8 and DC-10 aircraft, which were included in United's fleet.

At trial, the airline alleged that safety would be ad-

\begin{itemize}
\item \textsuperscript{13} Id.
\item \textsuperscript{14} Id. at 101.
\item \textsuperscript{15} 49 U.S.C. § 1421(b) (1982).
\item \textsuperscript{16} \textit{Murnane}, 667 F.2d at 101.
\item \textsuperscript{17} Id.
\item \textsuperscript{18} 661 F.2d 303 (4th Cir. 1981), \textit{cert. denied}, 456 U.S. 1007 (1982).
\end{itemize}
versely affected if it were forced to hire pilots over age thirty-five. It stated that hiring older pilots would impede its “crew concept”—the safe and effective operation of its three-man crews in a coordinated manner. It also argued that hiring pilots over age thirty-five, significantly raising the average age of pilot personnel, would disproportionately increase the chance of medical emergencies during flight. Its medical evidence showed that it was impossible to predetermine certain latent health problems that could affect the operation of aircraft. United also presented evidence of an “untraining” factor to be considered when evaluating the desirability of employing pilots with significant prior experience.

Plaintiff presented evidence that major air carriers found applicants with prior Navy or Air Force experience especially desirable, and that a previous merger between United and Capital Airlines resulted in a merger of flight crews without incident. The plaintiff also introduced evidence, which the court accepted, that United’s physical examination program was effective in detecting potentially disabling medical conditions, and that future problems could be detected with a high degree of certainty.

The court of appeals found, on the same evidence provided to the district court, that United failed to meet its burden of showing a BFOQ. The court did not refer to the district court decision in Murnane, thus leaving to speculation any attempt to reconcile these cases. The Fourth Circuit undertook a more active analysis of the evidence presented by the airline, and appeared to have been influenced by United’s early emphasis on economic justifications for the age thirty-five rule. However, as the court of appeals in Murnane concluded, economic benefits generated by a valid bona fide occupational qualification will not otherwise invalidate the company’s policy. United

19 Smallwood, 661 F.2d at 307-09.
20 Murnane, 482 F. Supp. at 135.
21 Smallwood, 661 F.2d at 307-08.
did not have an up-or-out policy like American's, and the court of appeals did not appear to be concerned that the pilots hired at an older age might not progress to the captain's seat.\textsuperscript{22}

The Supreme Court of the United States denied petitions for certiorari in both cases. Courts have subsequently cited these cases when considering the interplay between airline statutorily mandated safety duties and compliance with civil rights laws.\textsuperscript{23} The cases present two contrary views toward deference to airlines' safety decisions. However, no cases involving the issue of maximum age requirements for hiring pilots have arisen since 1981, and ultimate disposition of this issue therefore remains uncertain.

B. Mandatory Retirement for Flight Engineers

Before January 1, 1987, the ADEA prohibited mandatory retirement before age seventy. Western Airlines required its flight engineers as well as pilots to retire at age sixty and argued that the mandatory retirement rule was an occupational qualification. The Supreme Court of the United States ruled in the 1985 case of \textit{Western Air Lines v. Criswell}\textsuperscript{24} that such a policy was not a bona fide occupational qualification.

The Supreme Court's 8-0 decision noted that the flight engineer monitored a side-facing instrument panel and did not operate the flight controls unless the captain and first officer became incapacitated. It stated that while the Federal Aviation Administration prohibits any person over age sixty from serving as a pilot or first officer on a

\textsuperscript{22} On remand, United eventually prevailed by showing Smallwood made material misrepresentations on his employment application, and would have been denied employment regardless of age. \textit{See} Smallwood v. United Airlines, 728 F.2d 614, 626-27 (4th Cir. 1984).


\textsuperscript{24} 105 S. Ct. 2743 (1985).
commercial flight. The FAA refused to establish a similar mandatory retirement age for flight engineers. The FAA justified retention of mandatory retirement for pilots on the theory that "incapacitating medical events" and "adverse psychological, emotional, and physical changes" occur as a consequence of aging, and "[t]he inability to detect or predict with precision an individual's risk of sudden or subtle incapacitation, in the face of known age-related risks, counsels against relaxation of the rule." With respect to flight engineers, the FAA said, "While a flight engineer has important duties which contribute to the safe operation of the airplane, he or she may not assume the responsibilities of the pilot in command." The FAA also stated that statistics established that flight engineers rarely have been a contributing cause or factor in commercial aircraft accidents.

The case was tried to a jury in the district court, which found in favor of the plaintiffs. The court of appeals affirmed the decision, and the Supreme Court accepted review on the issue of whether the court's instruction on the BFOQ defense was sufficiently deferential to the airline's legitimate concern for the safety of its passengers.

The Supreme Court explored the legislative history of the enactment of the ADEA and its 1978 amendments. It emphasized that the BFOQ exception generally has only limited scope and application and must be construed narrowly. The EEOC adopted the same narrow construction of the BFOQ exception after it received authority for enforcing the statute.

Where safety issues arise, two inquiries are relevant:

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25 Id. at 2746 (citing 14 C.F.R. § 121.383(c) (1985)).
26 Id. (quoting 49 Fed. Reg. 14,695 (1984)).
27 Id. (quoting 49 Fed. Reg. 14,694 (1984)).
28 Id. at 2746-47.
30 Western Air Lines v. Criswell, 709 F.2d 544 (9th Cir. 1983).
31 Western Air Lines v. Criswell, 105 S. Ct. at 2750-51 (citing 33 Fed. Reg. 9,172 (1968) and 29 C.F.R. § 860.102(b) (1984)).
32 Id. at 2751 (citing 46 Fed. Reg. 47,727 (1981) and 29 C.F.R. § 1625.6 (1984)).
whether the job qualifications invoked to justify discrimination are reasonably necessary to the essence of the business; and (2) whether the qualifications are something more than "convenient" or "reasonable"; they must be "reasonably necessary" to the particular business, such that the employer is compelled to rely on age as a proxy for the safety related inquiry.\(^3\) The employer may satisfy this requirement in two ways. It could show that it had reasonable cause to believe that all or substantially all of the persons over the age qualifications would be unable to perform safely and efficiently, or that it was impossible or highly impractical to deal with the older employees on an individualized basis.\(^4\) Western unsuccessfully argued that the proper standard of proof for this defense was whether there existed a rational basis in fact for it to believe that the use of flight engineers over age sixty would increase the likelihood of risk to its passengers.

Justice Stevens' opinion for the unanimous Court found that the airline's evidence was not sufficient to allow deference on the issue of safety. He strongly disagreed with the airline's contention that a court of law was not the appropriate forum for resolution of this issue. The standard by which the qualification was to be decided was "reasonable necessity," and not "reasonableness."\(^5\) The court held that the jury was adequately instructed on the duties of safety, and that the jury was sufficiently informed that safety was the essence of Western's business. It also emphasized that many airlines did not require flight engineers to retire at age sixty, and that age was not a proxy for qualification for that job.\(^6\)

Unlike the pilot hiring issue, the Supreme Court decision in Criswell leaves no doubt as to the inability of airlines to force retirement of flight engineers at age sixty. Representatives of all of the major airlines appeared as

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\(^3\) See Usery v. Tamiami Trail Tours, 531 F.2d 224, 234-35 (5th Cir. 1976).
\(^4\) Criswell, 105 S. Ct. at 2752.
\(^5\) Id. at 2751.
\(^6\) Id. at 2754 n.28.
amicus curiae before the Supreme Court. The Criswell decision resulted in increased liability for Western. In December, 1980, it issued a "statement of corporate policy" reiterating its refusal to retain flight deck crew members after age sixty on grounds that had been decided adversely to it by the district court in the Criswell case. The trial judge who heard the Criswell case found this policy to be a willful violation of the ADEA in Stone v. Western Airlines.37

C. Downgrading of Pilots to Flight Engineer

Because pilots must retire at age sixty, while flight engineers may choose not to do so, pilots approaching age sixty often attempted to downbid to positions of flight engineers. Resolution of this issue was further complicated by the existence of collective bargaining agreements prohibiting downbidding. Case law on this issue is in conflict. Even though the Supreme Court of the United States in Trans World Airlines v. Thurston38 found that prohibiting pilots from downbidding to flight engineer violated the ADEA, the Court of Appeals for the Eleventh Circuit reached a different result a year later in Iervolino v. Delta Airlines.39

In the TWA case, the Air Line Pilots Association (ALPA) and TWA negotiated a collective bargaining agreement in 1977 which required every employee in the cockpit position to retire at the age of sixty. At the time of agreement, the provision was lawful under ADEA as a "bona fide seniority system."40 However, on April 6, 1978, Congress amended the Act to prohibit mandatory retirement of a protected individual because of age.41 The change of law caused concern for the airline, which believed that the col-

lective bargaining agreement, as applied to flight engineers, violated the amended ADEA.

Thereafter, TWA announced that the amended ADEA prohibited forced retirement of flight engineers at age sixty and proposed a new policy under which all employees in the cockpit positions, upon reaching age sixty, could continue working as flight engineers. The airline delayed implementing its policy until it had the benefit of ALPA's input, and the union promptly contended that the amendment to the ADEA did not require any change in existing policies. Despite union opposition, TWA adopted a plan whereby a captain or first officer could obtain flight engineer's status only if he submitted a bid for the position before age sixty and a flight engineer vacancy existed. If by virtue of lack of vacancies or insufficient seniority a pilot or first officer could not downbid to flight engineer before reaching age sixty, he would be retired. This new procedure was the only one in which a captain or first officer could not automatically displace or "bump" a senior flight engineer.

Plaintiffs, pilots who were unable to downbid before age sixty and were retired, instituted suit against both TWA and ALPA. They alleged that the transfer policy violated the ADEA because, while the airline allowed captains and first officers displaced for reasons other than age to bump less senior flight engineers, those compelled to vacate their positions on reaching age sixty had to resort to the bidding procedure. The district court entered summary judgment in favor of TWA and ALPA.\textsuperscript{42} The Court of Appeals for the Second Circuit reversed\textsuperscript{43} and found TWA liable for double damages because of a willful violation of the Act.\textsuperscript{44} The court of appeals found that ALPA had violated a portion of the Act prohibiting unions from

\textsuperscript{42} Air Line Pilots Ass'n v. Trans World Airlines, 547 F. Supp. 1221, 1232 (S.D.N.Y. 1982).

\textsuperscript{43} Air Line Pilots Ass'n v. Trans World Airlines, 713 F.2d 940, 957 (2d Cir. 1983).

\textsuperscript{44} Id. at 956 (citing 29 U.S.C. § 626(b) (1982)).
causing or attempting to cause an employer to engage in unlawful discrimination, but that the statute did not permit recovery of monetary damages against a labor organization. The Supreme Court accepted the appeal on the underlying issues of TWA's defenses, as well as its liability for actual damages.

Mr. Justice Powell, in a unanimous decision, found no difficulty in holding that TWA violated the ADEA. Noting that the ADEA proscribes differential treatment of older workers with respect to "a privilege of employment," the plaintiffs were denied such a privilege by a policy which enabled them to bump flight engineers for reasons other than age.

The court next considered, and quickly dispensed with, TWA's defenses of bona fide occupational qualification and bona fide seniority system. The extensive medical evidence present in *Western Airlines v. Criswell* was lacking in this case. Instead, TWA relied on a legal argument that since the age sixty rule was a BFOQ for captains and first officers, and Congress was concerned about the effect the amendment might have in limiting the employer's ability to terminate workers subject to a BFOQ, an individual could still be compelled to retire from a position for which age was a BFOQ. Justice Powell, while agreeing with TWA's reading of the legislative history, held that the BFOQ defense had to be considered with respect to the job to which the employee wished to transfer, and that it was irrelevant that age had been a BFOQ for his former job.

The Supreme Court also rejected the airline's argument

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45 Id. (citing 29 U.S.C. § 623(c)(3) (1982)).
46 Id. at 957.
48 Criswell, 105 S. Ct. at 2748.
50 *Thurston*, 105 S. Ct. at 623.
that its policy was lawful because it was part of a "bona
fide seniority system." The Court held that any senior-
ity system including a practice such as TWA's was not
"bona fide" under the statute, stating that while the FAA's
"age sixty rule" may have caused plaintiff's retirement,
TWA's seniority plan certainly "permitted" it within the
meaning of ADEA. Moreover, because captains and first
officers disqualified for reasons other than age were al-
lowed to bump less senior flight engineers, the mandatory
system was age based. As a matter of law, the court held
the defense unavailable.

The Court spent substantially more time reviewing the
Second Circuit's finding of willfulness against TWA. It
held that, while the court of appeals chose the proper
standard, finding a "willful" violation if "the employer
either knew or showed reckless disregard for the matter of
whether its conduct was prohibited by the ADEA," the
lower court misapplied the standard. The Court rejected
plaintiffs' argument that the violation is willful if the em-
ployer simply knew of the potential applicability of the
Act. The Supreme Court held that the record supported
TWA's contention that its officials acted reasonably and in
good faith in attempting to determine whether its plan vi-
olated the ADEA. The Court emphasized the immediate
attention given the question by the airline, and the oppo-
sition encountered from the pilots' union, including the
filing of a suit pursuant to Section 6 of the Railway Labor
Act to prevent implementation of the policy. In light of
the efforts made by the airline, and the difficult position
that it faced with the union, the Court's decision was
correct.

52 Thurston, 105 S. Ct. at 623.
53 The double damages section of the ADEA incorporated the standard of "will-
fore, in defining "willful," the Supreme Court looked to judicial interpretations of
the word in the context of FLSA and other civil and criminal statutes. Thurston,
105 S. Ct. at 624.
54 Thurston, 105 S. Ct. at 623.
In *Iervolino v. Delta Airlines*, the Court of Appeals for the Eleventh Circuit affirmed a jury verdict finding that Delta’s policy prohibiting captains to downbid two steps to flight engineer did not violate the ADEA. The court distinguished *TWA v. Thurston* because of dissimilarities in the airlines’ policies and the evidence presented in support of them.

Delta’s policy prohibited captains from transferring to flight engineer positions, or “two-step downbids.” Delta asserted that the policy qualified as a reasonable factor other than age (RFOA), as well as a BFOQ reasonably necessary to the safe transportation of passengers. The airline argued that the policy was based on the safety problems associated with two-step downbids. Delta’s expert testimony indicated that when former captains served as flight engineers, the roles of the crew members might become confused or ambiguous, and former captains serving as flight engineers could intimidate other crew members during an emergency. The airline also argued that, since an individual pilot may be entirely unaware of any difficulty in the transition until after a problem occurred, it would be impossible to predict which former captains would be safety risks.

Plaintiff introduced evidence that there would be no “role reversal” and that Delta could evaluate each former captain on an individual basis. He also presented medical evidence similar to that presented in the Supreme Court cases involving flight engineers. The jury returned a general verdict in favor of Delta, and the district court denied plaintiff’s post-trial motions. The court of appeals affirmed, finding that any errors committed by the trial court were harmless.

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56 796 F.2d 1408 (11th Cir. 1986), cert. denied, 107 S. Ct. 1300 (1987); see supra note 39. The Supreme Court’s denial of certiorari, despite seemingly contradictory results involving other airlines, suggests that the differing results do not produce significant constitutional issues, and that the distinct results may be attributable to the factual distinctions in the cases and the resolution of those distinctions by juries.

Rejecting plaintiff’s argument that the Supreme Court decision in *TWA v. Thurston* made Delta’s policy discriminatory on its face, the court of appeals distinguished *Thurston* on the basis that TWA allowed downbidding in some circumstances, but not by pilots who had reached age sixty. In contrast, Delta proved that its policy against two-step downbidding applied to all pilots, and plaintiffs did not present direct evidence of discrimination.

On the airline’s BFOQ defense, the court held that the jury received proper instructions, and that its decision was not clearly erroneous. One of the instructions stated that the reasonableness of Delta’s safety precautions should not be judged by the standard of other bodies or other airlines. The court upheld the instruction, noting that in *Western Airlines v. Criswell*, the Supreme Court concluded standards of the FAA and other airlines are relevant to an airline’s BFOQ defense, but are not to be accorded conclusive weight. The court of appeals stated that the district court erred in excluding the identities of other airlines that permit flight engineers, including former captains, to serve after age sixty. Nevertheless, the exclusion was not reversible error because the plaintiff introduced testimony of several flight engineers who had served past the age of sixty and evidence that the FAA had not extended the age sixty requirement for captains and first officers to flight engineers.

The court found the BFOQ and RFOA defenses amply supported by the record, including evidence from Delta of accident reports and testimony of pilots showing improper performance of flight engineering duties that could adversely affect flight safety, especially during emergencies. The court also decided to consider nonage factors related to the job qualification, while noting the divergence of opinion on this issue in many cases involving the airline industry.

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58 *Iervolino*, 796 F.2d at 1413-14 n.3.
59 *Id.* at 1420.
60 *Id.* at 1418 n.11.
The divergence between *Trans World Airlines v. Thurston* and *Iervolino v. Delta Airlines* causes the case of *Monroe v. United Airlines*\(^6\) to assume added significance. Plaintiffs in that case consisted of two separate classes. The first included flight engineers required to retire at age sixty, and the second consisted of captains and first officers challenging United's refusal to allow them to transfer to flight engineering positions when they reached age sixty. A district court jury rejected United's claim that its age requirement was a BFOQ and that its refusal to allow the transfers was based on reasons other than age, in this case, the airline's bona fide seniority system. The Court of Appeals for the Seventh Circuit rejected United's argument that a judgment n.o.v. should have been granted on its defenses. However, the court found that the district judge erred by improperly instructing the jury on the BFOQ issue and also by submitting an instruction on pretext, or defendant's subjective motivation for its policy.\(^6\) The court held that an employer's subjective motivation is irrelevant where the BFOQ defense depends solely on the objective test of whether justification exists for an age qualification.\(^6\)

The improper instruction on pretext also required a new trial on the bona fide seniority system defense. Unlike TWA, United argued that it only permitted pilots to bump flight engineers when the pilots were reasonably likely to serve as pilots again. Plaintiffs introduced evidence that United did not strictly enforce the requirement

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\(^6\) Cases involving violations of civil rights must follow a three-part test set forth by the Supreme Court case of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). The plaintiff must make a prima facie showing of discrimination by showing membership in a protected class (i.e., race, age, or sex) and rejection by the employer despite the plaintiff's qualification for the job and the employer's need for personnel. If plaintiff meets this burden, defendant must show legitimate, non-discriminatory reasons for its actions. Once defendant does so, plaintiff must show the defendant's evidence is actually a pretext for discrimination. The third test is irrelevant where discrimination is admitted, but is justified by defenses as previously discussed. *Monroe*, 736 F.2d at 402-04.

\(^6\) *Monroe*, 736 F.2d at 403.
that a pilot be able to regain flying status. The court of appeals found that plaintiffs' evidence was sufficient to support a finding that United administered its seniority system in a discriminatory manner, but remanded the case for further proceedings.\(^6^4\) It did not decide whether the system was not bona fide because only pilots forced to retire at age sixty were prevented from becoming flight engineers.

The *Criswell* decision will preclude United from justifying any refusal to permit flight engineers to continue working past age sixty. However, given the conflicting results on the issue of prohibiting captains from bumping flight engineers, the actual operation of the seniority system by United will become increasingly important.

A case closer to *Iervolino* is the 1984 decision of the Fifth Circuit in *Johnson v. American Airlines*.\(^6^5\) Plaintiffs in *Johnson* were flight crew members who desired to remain as flight officers. A jury found that American prevailed on its BFOQ defense, and the court of appeals affirmed.\(^6^6\)

American's evidence showed that its policy against placing former pilots in the flight engineer's position improved crew coordination and, more specifically, prevented the dangers of "command syndrome." Command syndrome occurs when a senior airman, placed in a subordinate position, mentally or physically resumes his former role as captain, especially during emergencies.\(^6^7\) The defense related also to American's "up-and-out" policy, previously discussed in *Murnane*. Because of the required progression from flight engineer to captain, permitting former captains or first officers to fill flight engineer slots would result in "seat blocking," and would prevent promotion of qualified pilots.\(^6^8\) The court of appeals held that the necessity for on-the-job training and

\(^{6^4}\) Id. at 407.
\(^{6^5}\) 745 F.2d 988 (5th Cir. 1984), cert. denied, 105 S. Ct. 3500 (1985).
\(^{6^6}\) Id. at 994.
\(^{6^7}\) Id. at 991, 994.
\(^{6^8}\) Id.
recoupment of investment in pilot training could be considered part of a BFOQ defense.\textsuperscript{69}

In \textit{EEOC v. Pan American World Airways},\textsuperscript{70} the issue before the district court was the validity of a consent decree. The district court disapproved the consent decree because the settlement agreement offered claimants inadequate compensation and a majority of claimants formally objected to the decree.\textsuperscript{71} Pan American argued that its policy toward sixty-year-old pilots was a BFOQ on the basis of \textit{Johnson}. The district court disagreed that \textit{Johnson} provided a strong defense of Pan Am's policy. It distinguished the case on the basis that the plaintiffs in \textit{Johnson} did not move for a directed verdict or a judgment n.o.v. Therefore, the Fifth Circuit had limited its review to whether there was any evidence to support the jury verdict. Secondly, \textit{Johnson} did not decide whether an employer could raise a BFOQ defense when it made exceptions in its general policy.\textsuperscript{72} The court noted that Pan Am had several exceptions to the policy that senior pilots could not fly as flight engineers, and emphasized, as the Supreme Court did in \textit{Criswell}, that these exceptions refuted any evidence that safety concerns legitimately justified an age sixty pilot retirement rule.\textsuperscript{73} The Court of Appeals for the Ninth Circuit dismissed Pan Am's appeal on the basis that the district court's order was not final for purposes of appellate jurisdiction.\textsuperscript{74}

While at least the conflicts in the case law appear to be settled, the January 1, 1987 amendments to the ADEA create the possibility for more litigation by removing the age seventy ceiling on mandatory retirement. Airlines wishing to retain the age seventy limitation will have to go back to court armed with medical evidence, such as that presented in \textit{Thurston} and \textit{Criswell}.

\textsuperscript{69} \textit{Id.} at 993.
\textsuperscript{70} 622 F. Supp. 633 (N.D. Cal. 1985).
\textsuperscript{71} \textit{Id.} at 648-49.
\textsuperscript{72} \textit{Id.} at 646.
\textsuperscript{73} \textit{Id.}
\textsuperscript{74} \textit{EEOC v. Pan American World Airways}, 796 F.2d 314, 317 (9th Cir. 1986).
D. Other Pilot Cases

The merger of Pan Am and National Airlines and the subsequent integration of seniority lists of pilots and flight engineers gave rise to an ADEA suit in *Cook v. Pan American World Airways*. The problems encountered in merging the lists included different arrangements for cross-bidding of positions at the two airlines, integration of a large number of Pan Am pilots on furlough, and reconciliation of the different fleets of the airlines and the carriers' relative financial strengths. An arbitrator prepared two integrated lists, one for pilots and one for engineers, which the Civil Aeronautics Board approved, but which proved unacceptable to members of the plaintiff class, employees of Pan Am.

The complaint alleged that the merger resulted in an insertion of many under-forty National pilots ahead of over-forty Pan Am pilots. The complaint also alleged that the merger resulted in furloughs of Pan Am pilots over forty. The district court dismissed the case as a collateral attack on the CAB's order, but the Second Circuit reversed. The appellate court held that it had a right to review the merger for ADEA violations, and stated that for the plaintiffs to show a violation, they must prove the seniority system was subterfuge for age discrimination. The mere fact that plaintiffs were worse off than previously would not be sufficient. The case was remanded to the district court for reconsideration.

Recent cases involving corporate pilots illustrate issues that often arise in individual ADEA claims. In *Stuart v. Tenneco, Inc.*, the employer discharged one of its pilots for violation of sick leave and for conflicts of interest. Plaintiff admitted that he flew while on sick leave status, but claimed that his dismissal was a pretext for age discrimination. This case is noteworthy because the court

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75 771 F.2d 635, 636 (2d Cir. 1985), cert. denied, 106 S. Ct. 895 (1986).
76 Id. at 638-39.
77 See id. at 643.
found that the plaintiff did not produce sufficient evidence on the pretext issue to overcome defendant’s summary judgment motion, and the case was dismissed as a matter of law.

In the recent case of Wilkins v. Eaton Corp.,\(^79\) the plaintiff was a 51-year old pilot terminated for refusal to use a company required checklist. Plaintiff claimed that the company did not uniformly enforce the checklist requirement, and a district court jury agreed with him. On appeal, the Sixth Circuit reversed and entered judgment as a matter of law in favor of Eaton. The court of appeals found that plaintiff’s proof failed to show pretext on the part of the employer and the evidence did not suggest age discrimination.\(^80\)

E. Reductions in Force — Other Employees

In Barber v. American Airlines,\(^81\) three plaintiffs aged fifty-one, fifty-eight, and forty-nine, were required by American to transfer from Little Rock to Dallas. The first two employees took early retirement, and the third, who was not old enough to do so, left the airline. Plaintiffs alleged age discrimination by the airline’s refusal to permit them to bump less senior employees. American disagreed, stating its policy permitted bumping only to positions in which the more senior employee was qualified. Plaintiffs countered by arguing that they had a right to be trained for other positions.

The jury found for the plaintiffs, but the Eighth Circuit Court of Appeals reversed and entered judgment n.o.v. in favor of American. The court found no evidence of favoritism for younger employees, noting that the persons whom plaintiffs wished to bump were also in the class protected by the ADEA. Furthermore, although some employees were allowed to bump less senior employees,

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\(^{79}\) 797 F. 2d 242 (6th Cir. 1986).

\(^{80}\) Id. at 344.

\(^{81}\) 791 F.2d 658 (8th Cir.), cert. denied, 107 S.Ct. 278 (1986).
there was no showing that age was a determining factor in the company's decision to permit bumping.

Another case illustrating that jury verdicts for plaintiffs in ADEA cases get overturned more often than ordinary jury verdicts is Coburn v. Pan American World Airways.\(^8\) Plaintiff in that case was a reservation supervisor reduced out at age forty-three. The airline's policy required it to reduce the least productive employee in the peer group at issue. The jury found for the plaintiff; the district court granted judgment n.o.v.; and the court of appeals affirmed the judgment in favor of Pan Am.

The court of appeals found that the airline followed its policy to the letter. Pan Am demonstrated legitimate nondiscriminatory reasons for reducing out the plaintiff, who did not meet the necessary burden to show pretext. The evidence did not show a pattern of discrimination, and did show that the productivity rating was properly applied.

F. Application to Foreign Airlines

In Gadzer v. Air India,\(^8\) the district court held that the ADEA applies to an airline owned by a foreign government as well as to domestic airlines. The court rejected Air India's argument that as an instrumentality of a foreign nation, it should not be considered "an employer"\(^8\) for the definitional purposes of the Act. In 1984, Congress passed an amendment to the ADEA, extending the Act's protection to United States citizens employed abroad by American corporations or their subsidiaries, except when application of the ADEA would violate the law of the foreign country.\(^8\)

\(^{8}\) 711 F.2d 339 (D.C. Cir. 1983).
\(^{8}\) 29 U.S.C. § 630(b) (1982).
II. TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

A. Flight Attendant Cases

Title VII of the Civil Rights Act of 1964 prohibiting race and sex discrimination in employment first impacted the airline industry when applied to flight attendants. Litigation of sex discrimination claims resulted in class action suits taking several years to resolve. Liability questions were complex, with the issues further complicated by the difficulty the courts encountered in fashioning appropriate remedies for the victims of sex discrimination. As will be discussed, the resolution of these cases often resulted in employees being pitted against their unions, and unions aligning themselves with airline management.

1. Discrimination Against Males

The 1971 decision in *Diaz v. Pan American World Airways*[^86^] is a landmark case not only for its specific result, but also for the analysis that would be frequently applied in other civil rights cases involving the airline industry. In *Diaz*, plaintiff, a male, applied for a job as a cabin attendant. He was rejected because Pan Am had a policy of restricting that position to females. The airline admitted its policy, and the parties stipulated that the primary issue was whether the female gender was a BFOQ reasonably necessary to the normal operation of Pan Am's business.

In a decision that reflects a time long since past, the district court found for the airline based on the airline's history of the use of female flight attendants, passenger preference, basic psychological reasons for the preference, and the actualities of the hiring process[^87^]. The court found that the performance of female attendants was superior in such nonmechanical aspects of the job as providing reassurance to anxious passengers, giving courteous personalized service, and, in general, making flights

[^86^]: 442 F.2d 385 (5th Cir. 1971), cert. denied, 450 U.S. 940 (1972).
as pleasurable as possible within the limitations imposed by aircraft operations.\(^{88}\) The airline even introduced the testimony of a psychiatrist, who testified that the airplane cabin represented a unique environment, requiring the air carrier to take account of the special psychological needs of its passengers, which needs were better attended to by females.\(^{89}\)

The Fifth Circuit reversed the district court, emphasizing that the primary function of an airline is to transport passengers safely from one point to another. The court found the issues raised by the airline regarding the relative abilities of the average male or female cabin attendant to be tangential to the essence of Pan Am's business. Use of strictly female flight attendants was not a business necessity, but at most a business convenience.\(^{90}\)

The court also held that the airline's passengers' preference for female flight attendants was insufficient. It referred to EEOC guidelines that a BFOQ ought not to be based on "the refusal to hire an individual because of the preferences of co-workers, the employer, clients or customers."\(^{91}\) Avoiding Pan Am's argument that customer preferences were not based on stereotype thinking, the court said that the wishes of the passengers, based on nonmechanical aspects of the job, were too tangential to the airline's duty to transport passengers safely to justify sex discrimination.\(^{92}\)

Ten years later, Southwest Airlines unsuccessfully attempted to sidestep the \textit{Diaz} decision. \textit{Wilson v. Southwest Airlines}\(^{93}\) was another class action brought by male job applicants refused employment by the airline. Southwest justified its palpably discriminatory policy by claiming that sex discrimination was crucial to its continued financial success. It did so by placing before the court its famous

\(^{88}\) \textit{Id.} at 565-66.
\(^{89}\) \textit{Id.}
\(^{90}\) \textit{Diaz}, 442 F.2d at 388.
\(^{91}\) \textit{Id.} at 387 (citing 29 C.F.R. § 1604.2(a) (1984)).
\(^{92}\) \textit{Id.} at 388.
“love” personality. As the district court noted, unabashed allusions to love and sex pervaded all aspects of the airline’s public image. Southwest argued that customer preference for one sex was so strong that its business would be undermined if employees of the opposite sex were hired.

Unfortunately for the airline, its statistical studies did not support its premise that friendly flight attendants was a prima facie motivation for customers choosing to fly Southwest. Moreover, even if sex sold Southwest, such customer preference would not rise to the level of a business necessity, as defined by *Diaz*. The court also found disturbing the airline’s attempt to make sex a BFOQ because it chose to exploit female sexuality as a marketing tool. There can be no doubt that female sex is not a bona fide occupational qualification for the position of airline cabin attendant.

2. Marital Status

United Airlines and its flight attendants litigated for years the airline’s early requirement that female flight attendants be unmarried. In *Sprogis v. United Airlines*, decided in 1971, the Court of Appeals for the Seventh Circuit found the policy to involve sex discrimination and affirmed the lower court’s judgment against the airline.

United argued, citing an earlier Delta Airlines case, that the qualification merely distinguished between classes of employees within the job category of flight attendant in the same manner as educational or physical requirements. The airline unsuccessfully argued to the district court and court of appeals that the rule did not constitute discrimination on the basis of sex. The court of appeals, following an EEOC regulation, held that, even if the rule is not directed against all females, so long as

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94 Id. at 304.
95 444 F.2d 1194 (7th Cir. 1971).
97 29 C.F.R. § 1604.3(a) (1984).
sex is a factor in the rule’s application, the company was engaging in discrimination on the basis of sex.

The Seventh Circuit, citing the *Diaz* decision, quickly dispensed with United’s BFOQ argument. It noted the only reason specifically addressed to the rule was that the airline imposed the requirement after it received complaints from husbands concerning their wives’ working schedules and the irregularity of hours. The court found the spouse’s complaints insufficient as a matter of law to be an indicator of employee competence.

3. **Pregnancy**

Litigation about married female flight attendants invariably led to litigation about pregnant flight attendants. In studying the history of this litigation, the Fourth Circuit stated: “A number of the same medical experts have appeared in cross-sections of the decided cases. Some courts have considered virtually the same medical testimony, and have reached such contradictory results that it is impossible to reconcile them.”

One may safely conclude, however, that while discrimination on the basis of pregnancy violates Title VII, some business necessities will justify a mandatory maternity leave policy.

The 1977 case of *In re National Airlines* explored the boundaries of decision making based on pregnancy. The decision preceded the 1978 amendments to Title VII treating discrimination solely on the basis of pregnancy as sex discrimination. The court found that a mandatory pregnancy leave policy discriminated against women, as it was not an equivalent term and condition of employment with men. On the issue of National’s BFOQ defense, the court reviewed the testimony of four eminent physicians

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98 *Sprogis*, 444 F.2d at 1199 (citing *Diaz*, 442 F.2d at 387).
100 434 F. Supp. 249, 266, 269 (S.D. Fla. 1977), *aff’d*, 700 F.2d 695 (11th Cir. 1982).
and found that if a flight attendant could perform safety tasks before pregnancy, she could do so while pregnant, at least during the first thirteen weeks.102 From the period of thirteen to twenty weeks, the issue would have to be treated on an individual basis. After twenty weeks, the airline was justified in requiring the flight attendant to take leave. The primary issue was one of safety, and, most importantly, evacuating an aircraft in the event of an emergency. The court found the policy justified as a business necessity, as well as a bona fide occupational qualification.

Other decisions have upheld air carrier policies requiring flight attendants to discontinue flying immediately upon knowledge of pregnancy. In Condit v. United Airlines,103 the employees did not dispute the right to ground pregnant flight attendants, but argued that leave should not be required during the first five or six months of pregnancy absent individualized medical support. The district court rejected plaintiffs' argument; the unequivocal opinion stated, "The safety of the passengers must come first — In case of doubt, that doubt must be resolved in favor of the passengers — Airlines must take no chances when it comes to safety."104 The Court of Appeals for the Fourth Circuit affirmed.105 Cases involving Delta Airlines,106 Pan Am,107 and Eastern108 reached similar results. A 1977 case involving American Airlines109 reached a result similar to the National Airlines decision.

The most recent decision upholding immediate maternity leave was Levin v. Delta Airlines,110 decided in 1984. The Court of Appeals for the Fifth Circuit noted that

102 National Airlines, 434 F. Supp. at 263.
104 Condit, 13 Fair Empl. Prac. Cas. (BNA) at 693.
105 Condit, 558 F.2d at 1177.
107 Harriss v. Pan American World Airways, 649 F.2d 670 (9th Cir. 1980).
108 Burwell, 633 F.2d at 361.
110 730 F.2d at 994.
Delta's pregnancy policy was discriminatory before 1978 as having a disparate impact on women, and after the 1978 amendment, it constituted disparate treatment. However, the court found that the airline upheld its BFOQ defense, and issues of pretext and motivation were irrelevant. Finally, the court rejected plaintiff's argument that the airline was required to shift pregnant flight attendants to available ground positions rather than placing them on unpaid maternity leave. The court eschewed the premise that a "less discriminatory alternative" required the airline to place flight attendants in any ground position, including ones for which they had not been trained.

4. Reinstatement and Seniority

In earlier cases involving termination of married and pregnant flight attendants, the issue arose as to whether the airline was required to give retroactive seniority to flight attendants whose termination violated Title VII. The issue created a difficult problem for unions representing displaced workers. Employees who had not taken leave or been terminated objected to loss of seniority to plaintiff class members, many of whom had not worked for several years.

Cases involving American Airlines and United Airlines held that it was permissible for a settlement agreement not to provide retroactive credit for those terminated employees who returned. In litigation involving Trans World Airlines, the issue was whether the airline had to reemploy plaintiff class members, terminated

111 This concept has its basis in the Supreme Court case of Ablemarle Paper Co. v. Moody, 422 U.S. 405 (1975), and was expanded in Wright v. Olin Corp., 697 F.2d 1172, 1191 (4th Cir. 1986).
114 Air Line Stewards & Stewardesses Ass'n v. Trans World Airlines, 713 F.2d 319 (7th Cir. 1983).
on account of marriage, as soon as they could be trained, or whether reemployment had to be contingent on existing vacancies. The Court of Appeals for the Seventh Circuit, referring to its prior approval of a settlement agreement, held that the airline was required to hire only as vacancies became available. This litigation occurred at the time when TWA furloughed several of its employees, and a different result would have had an adverse affect on the airline.

5. Equal Pay Between Male and Female Attendants

While not litigated solely under Title VII, two cases in which male flight attendants were paid higher wages than female attendants reached opposite results. Northwest Airlines was found liable for violating the Equal Pay Act of 1963 and Title VII of the Civil Rights Act of 1964 in Laffey v. Northwest Airlines, because salaries paid to women employed as flight attendants were lower than those paid to men serving as pursers for work found to be substantially equal. Other violations included providing female flight attendants with less desirable layover accommodations and allowances for uniform maintenance, as well as imposing weight restrictions on female flight attendants only. The litigation, including substantial awards of attorneys' fees to plaintiffs' counsel, stretched over two decades.

Northwest conceded that its prior practice of refusing to allow females to become pursers violated Title VII. However, it challenged the court's findings that the jobs were intrinsically equal and thus commanded equal salaries even for flight attendants who might not seek purser status. The court of appeals affirmed the district court's

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115 Air Line Stewards & Stewardesses Ass'n v. Trans World Airlines, 630 F.2d 1164 (7th Cir. 1980).
finding that the respective employment burdens did not justify unequal pay and other practices. The court noted that pursers assigned to flights in which they did not function as “senior cabin attendants” received the same salary as supervisory flight attendants, but female flight attendants rendering like services did not derive supplemental income. The evidence showed that flight attendants’ supervisory labors might even exceed those of pursers, who were often positioned in the first class section with less responsibility and few supervisory duties because of assistance from other experienced flight personnel.

The same issue yielded a contrary result in Maguire v. Trans World Airlines. The district court found that Laffey had no precedential value, because it involved a different employer, and because the factual settings of the two cases were so significantly different as to justify a contrary result. The court dismissed the Title VII claim as untimely commenced.

In Maguire, a pay differential existed between cabin attendants on international flights (higher) and domestic flights (lower). Another distinction was made between cabin attendants on international flights (lower) and pursers (higher). As at Northwest, the practice of hiring pursers began with commencement of international flights. However, TWA hired and promoted female flight attendants to pursers.

The district court held that unequal pay resulted from disparate job responsibilities and was not because of sex. Contrasting TWA and Northwest, the district court noted that TWA did not have a position of senior cabin attendant. The purser always had responsibilities for cabin service and never flew on domestic flights. The TWA cabin attendant was never in charge of cabin service on international flights. The different and additional duties of pursers included dealing with the airline’s commissary;

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119 Laffey, 567 F.2d at 451.
120 Id. at 442-43.
determining and obtaining governmental forms necessary for international flights; briefing the captain and cabin attendants before each flight; being more proficient in foreign languages; completing and properly delivering all United States and foreign government forms and reports required from the airline; recording sales of liquor and other items; and accounting for currency received from sales, including conversion of foreign currencies into domestic currency. The comparison of the job responsibilities, together with a lack of history of discrimination, resulted in the verdict in favor of TWA.

B. Miscellaneous Title VII Actions

1. Transsexuality

In a case of first and lasting impression for airlines, the Court of Appeals for the Seventh Circuit held that transsexuality was not a protected status for purposes of a Title VII action. In Ulane v. Eastern Airlines, Karen Ulane, formerly Kenneth Ulane, brought suit alleging that Eastern Airlines violated Title VII’s prohibitions against discrimination toward transsexuals and women by refusing to return him/her to flight status and terminating him/her after “gender reassignment surgery.” Eastern terminated plaintiff on the grounds that psychological problems associated with transsexualism threatened the safety of the airline, and that because surgery was medically unproven as a cure for “gender disphoria,” potential risk to the safety of the passengers existed.

The district court denied the airline’s motion to dismiss, finding that transsexuals were protected by Title VII. The district court’s decision in favor of the plaintiff included a scathing attack on the airline’s decision and its supporting evidence. Contrary to opinions which gave

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122 Id. at 1291-96.
123 742 F.2d 1081 (7th Cir. 1984), cert. denied, 471 U.S. 1017 (1985).
airlines a wide latitude in protecting the safety of its passengers, Judge John F. Grady found Eastern's safety arguments to be a pretext for sex discrimination.

The Court of Appeals for the Seventh Circuit reversed, holding as a matter of law that transsexuals were not intended by Congress to be a protected class when it enacted Title VII. The decision avoided the necessity of determining the merits of Eastern's defenses. The Seventh Circuit also found that in the absence of proof that Eastern discriminated against Ulane as a woman, rather than as a transsexual, the district court's judgment in favor of the plaintiff on that count was erroneous as a matter of law.

2. Height and Weight Requirements

As seen in the flight engineer and pregnancy cases, similar medical evidence often yields different results. Courts of appeals in Gerdom v. Continental Airlines and Laffey v. Northwest Airlines held that the airlines violated Title VII by enforcing height and weight requirements against female flight attendants, while not enforcing similar requirements against males. While acknowledging the benefit to the employer of a trim flight crew, the courts denied that application of these requirements solely to women constituted a bona fide occupational qualification or business necessity.

Several other courts, for example Jarrel v. Eastern Airlines, Inc. and Leonard v. National Airlines, Inc. have up-

126 Ulane, 742 F.2d at 1085. Legal historians will find no legislative history on Title VII's prohibition of sex discrimination. Congress was concerned with race discrimination when it enacted the Civil Rights Act of 1964. Sex as a basis for discrimination was added as a floor amendment one day before the House approved Title VII without prior debate. The amendment ironically was the gambit of a Southern Congressman hoping to scuttle adoption of the entire bill. See Developments in the Law — Employment Discrimination of Title VII of the Civil Rights Act of 1964, 84 HARV. L. REV. 1109, 1167 (1971).

127 Ulane, 742 F.2d at 1087.

128 692 F.2d 602, 609 (9th Cir. 1982), cert. dismissed, 460 U.S. 1074 (1983).


held physiologically based policies where they were reasonably applied to both men and women. Courts are more willing to approve limitations on weight than height, since like race and sex, height cannot be changed, while weight can. An enterprising United employee attempted to bypass the airline’s weight limitations by alleging that he was a handicapped individual protected by Section 504 of the Rehabilitation Act. A federal district court, however, did not reward such ingenuity, and found that he was not protected by Section 504 in *Tudyman v. United Airlines*.

3. Religious Accommodation

Title VII makes it an unlawful employment practice to discriminate against an employee on the basis of religion. The Act requires an employer, short of “undue hardship,” to “reasonably accommodate” the religious needs of its employees. The landmark case on this issue is *Trans World Airlines v. Hardison*, decided by the Supreme Court of the United States in 1977. The employee worked as a clerk in the stores department of TWA’s Kansas City base. After his employment, Hardison became a member of the Worldwide Church of God, a tenet of which was that one must observe the Sabbath by refraining from performing any work from sunset on Friday until sunset on Saturday. The airline temporarily solved the problem by transferring Hardison to the 11:00 p.m. to 7:00 a.m. shift. The problem resurfaced when the employee bid for and received a transfer to another position, where he did not have sufficient seniority to observe the Sabbath regularly. Attempts by the airline, the employee, and the Machinist’s Union to resolve the problem were

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4. 29 C.F.R. § 1605.2(c) (1986).
unavailing, and TWA terminated Hardison for failing to report to work on a Saturday.

The Supreme Court, reversing the decision of the court of appeals\(^{136}\) in favor of the plaintiff, found that TWA made reasonable efforts to accommodate Hardison's religious needs, and that the airline did not have to breach a collective bargaining agreement to do so. Nor was the airline required to permit plaintiff to work a four-day work week, as this would have left the airline shorthanded on at least one shift a week. The majority of the Supreme Court found that requiring the airline to incur such additional costs was not justified.\(^{137}\)

More recently, a pilot whose religion prohibited him from working on the Sabbath prevailed in a Title VII suit against United Airlines. The district court found that United did not make reasonable attempts to accommodate the pilot's schedule in *Kendall v. United Airlines*.\(^{158}\) The court denied any relief to the plaintiff, but awarded attorney's fees.

4. *Hairstyle*

In *Rogers v. American Airlines*,\(^{139}\) a federal district court held that a flight attendant's hairstyle was not protected by Title VII. However, it denied the airline's motion to dismiss the claim that the airline discriminatorily applied its grooming rules against black flight attendants.

### III. Railway Labor Act

Collective bargaining in the private airline industry is governed by the Railway Labor Act,\(^{140}\) and not the National Labor Relations Act.\(^{141}\) The RLA involves a higher degree of governmental intervention with respect to dis-

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130 Trans World Airlines v. Hardison, 527 F.2d 33 (8th Cir. 1975).
137 Hardison, 432 U.S. at 85.
pute resolution than the NLRA, and less governmental intervention in all other aspects of labor relations.\footnote{For a more complete discussion of the differences between the RLA and NLRA see Arouca & Perritt, Transportation Labor Regulation: Is the Railway Labor Act or the National Labor Relations Act the Better Statutory Vehicle?, 36 LAB. L.J. 145 (1985).} Grievances, referred to as “minor disputes,” must be adjusted by voluntarily established boards of adjustment or by an administrative agency.\footnote{\textit{Chicago \\& N.W. Ry. v. United Transp. Union, 402 U.S. 570, 581 (1971).}} The Act provides for the National Mediation Board to mediate major disputes, or interest disputes, and certain nonadjusted minor disputes. The Board may also induce the parties to submit disputes not resolved by mediation to arbitration. Compliance with the dispute settlement procedures of the Act can be enforced in court.\footnote{\textit{See, e.g., Henry v. Delta Airlines, 759 F.2d 870, 871-72 (11th Cir. 1985).}} Decisions of System Boards of Adjustment are subject to a very narrow scope of review by federal appeals courts and are seldom reversed.\footnote{808 F.2d 76 (D.C. Cir. 1987).}

It is not the purpose of this article to analyze the many issues arising under the Railway Labor Act. It will discuss two issues. The first is the interplay between the arbitration process and public policy safety issues. The second is the question of the extent to which the RLA preempts common law tort and contract claims.

A. Arbitration and Public Policy

The Railway Labor Act’s interest in deference to arbitration of disputes will sometimes conflict with the parties’ notions of public policy. With respect to the airlines, the foremost public policy is that of safety. The recent case of \textit{Northwest Airlines v. Air Line Pilots Association}\footnote{808 F.2d 76 (D.C. Cir. 1987).} illustrates the tension involved between these concepts and the great deference afforded to arbitrators’ decisions by courts pursuant to the RLA.

Following an alcohol related incident, Northwest discharged First Officer Larry Morrison. ALPA filed a grievance on the pilot’s behalf, with the result that the panel of
the Northwest Airline System Board of Adjustment issued an arbitration award finding that since the pilot suffered from alcoholism, Northwest’s discharge was “without just cause” under the terms of the collective bargaining agreement between the parties. The Board ruled that the pilot should be offered reinstatement, without back pay or benefits, on certification by the Federal Air Surgeon that he had recovered from the effects of his alcoholism, including at least two years’ abstinence from alcohol.

Northwest filed a complaint in the United States District Court for the District of Columbia seeking to set aside the arbitration award. The court granted summary judgment for the airline, finding the Board’s award inconsistent with public policy. The union appealed, contending that the district court acted in excess of its authority in overturning the Board’s arbitration award. The court of appeals reversed and reinstated the arbitration award.

The court of appeals noted that judges had no license to impose their own brand of justice in determining applicable public policy. Public policy emanates from clear statutory or case law, and not from general considerations of supposed public interest. The appeals court held that the trial judge erred in ignoring the fact that the parties’ agreement to arbitrate did not exclude safety related grievances, noting that there had been numerous arbitrations under the RLA involving grievances implicating safety issues, and that no court had ever held that an arbitral board lacked jurisdiction to consider such issues.

B. Preemption

As will be discussed in the next section on wrongful discharge law, courts are continually recognizing and creating new causes of action for employees against employers. The results often obliterate the distinction between tort and contract actions. The doctrine of preemption, a diffi-
cult concept in any setting, assumes added importance as industrious attorneys attempt to draft complaints to evade the procedures set forth in the Railway Labor Act and to recover greater damages for discharged employees.\(^{150}\)

The preemption doctrine in labor law has been affected by two competing concerns. First, state law must be preempted to protect the primary jurisdiction of the administrative agency created by Congress to oversee the development of uniform rules of law governing labor-management relations.\(^{151}\) Therefore, arguably, courts generally may not adjudicate claims based on conduct protected or prohibited by federal labor law.\(^{152}\) On the other hand, the Supreme Court has been unwilling to preempt all local regulation touching or concerning the relationships between employees, employers, and unions.\(^{153}\) Thus when state law seeks to regulate conduct which is only a “peripheral concern” of federal labor law or where it touches interests “deeply rooted” in local feeling and responsibility, courts must employ a balancing test to weigh the potential harm to the federal scheme against the importance of the state’s interest in protecting its citizens.\(^{154}\)

Preemption under the Railway Labor Act has been more stringent than under the National Labor Relations Act. Garden variety wrongful discharge actions, so-called “minor disputes” involving rights under the collective bargaining agreement, are ordinarily subject to mandatory arbitration.\(^{155}\) As the Supreme Court has noted, “Congress considered it essential to keep these so-


called 'minor disputes' within the Adjustment Board and out of the courts." As a result, courts will carefully scrutinize any discharge claim by a union employee to determine whether arbitration provides the appropriate forum for resolution.

In *Peterson v. Airline Pilots Association International*, a pilot sued his union alleging that it coerced his employer into firing him for his prior failure to respect a nationwide ALPA job action. He contended that the union failed to live up to its duty of fair representation and violated state law prohibiting blacklisting, conspiracy, and interference with a contractual relationship. The district court held that his state law claims were preempted by the Railway Labor Act, and the Court of Appeals for the Fourth Circuit affirmed.

The court concluded that the allegations in Peterson's complaint were hardly peripheral to the concerns of federal labor law. It also found the state law claims nearly identical to the federal claim in substance and relief. The court rejected plaintiff's argument that his claims fell within the "outrageous conduct" exception to preemption. While noting that a state has a substantial interest in protecting its citizens from alleged outrageous conduct, the claims of the plaintiff did not rise to that level, and the large overlap between the state and federal claims required preemption.

In *Majors v. U.S. Air*, plaintiff alleged false imprisonment and defamation arising out of an incident in which he was accused of theft while on the job. The district court, in an opinion often cited in decisions upholding preemption, found that the state did not have an overriding interest in resolving this matter. The court also held that the collective bargaining agreement did not have to

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157 759 F.2d 1161 (4th Cir. 1985).
158 See Farmer, 430 U.S. at 301.
refer specifically to the issue between the employee and employer to mandate preemption, as long as the issue arguably fell within federal labor law.160

A federal district court found a claim for fraud to be preempted in Schwadron v. Trans World Airlines.161 Plaintiff had been furloughed by the airline and found employment elsewhere. He resigned his new job when advised by TWA that he was being called back, only to find that the information was incorrect. He filed a grievance through his union, and proceeded through the first two stages of a four-step procedure. When the union withdrew its assistance at the third stage, plaintiff filed suit for negligent misrepresentation in state court. The airline removed the case to the federal district court, which granted the airline's motion to dismiss. It concluded that the dispute was subject to the Railway Labor Act, and that the narrow exception for outrageous conduct was inapplicable.

A similar result occurred in Schroeder v. Trans World Airlines,162 in which a student captain was taken off of a training program. The airline removed his state court suit alleging unlawful business practices, and then moved to dismiss the complaint. The district court, looking to the substance of the complaint rather than the form, held that it was essentially one for wrongful demotion and that the Railway Labor Act preempted it. The Court of Appeals for the Ninth Circuit affirmed the dismissal.163

State courts have also had occasion to analyze preemption issues when unionized airline employees have raised tort claims. Most recently, in DeTomaso v. Pan American World Airways,164 the California Supreme Court reversed the decisions of the trial and intermediate appellate

160 Id. at 857.
162 702 F.2d 189, 191 (9th Cir. 1983).
163 Id. at 192.
courts which awarded actual and punitive damages to a Pan Am employee who had already resolved a grievance with the airline involving the same subject matter.

Plaintiff was a cargo handler who was terminated for fraud, dishonesty and abuse of company policy after he allegedly stole company property in the presence of his family and co-workers. On the same day as his discharge, plaintiff filed a grievance claiming his termination violated the agreement between Pan Am and his union. During the arbitration process, the parties agreed to a settlement reinstating plaintiff and making him whole. Plaintiff filed suit prior to discharge and settlement of the grievance, but even after settlement of the grievance, amended his complaint seeking damages for defamation and intentional infliction of emotional distress. The jury awarded plaintiff $265,000 in general damages and $300,000 in punitive damages. The trial court granted the motion for a new trial on the limited issue of damages and both parties appealed. The court of appeals affirmed the verdict, holding that plaintiff’s damages did not flow from his discharge or from the collective bargaining agreement, but from the false charges and outrageous conduct of the airline in accusing him of theft.

The Supreme Court of California, in a 4-0 decision, reversed. It aptly noted that the airline followed the requirements of the collective bargaining agreement in investigating and terminating the plaintiff, and that the union appeared on the employee’s behalf throughout the dispute. Looking to the substance of the claims and not their characterization, the California Supreme Court found that all of DeTomaso’s claimed damages flowed from his wrongful dismissal from employment. Adjudication of such issues would necessarily involve interpretation of the collective bargaining agreement, which a court has no jurisdiction to do. Mere theoretical legal indepen-

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166 DeTomaso, 733 P.2d at 622.
dence does not save a purported tort cause of action from preemption by the RLA. Instead, it must appear from the employee's complaint that the facts forming the basis of a cause of action either: 1) are unrelated to matters expressly or impliedly governed by the collective bargaining agreement, or 2) so far exceed the scope of reasonable conduct in the context of such matters that reference to the collective bargaining agreement is unnecessary to resolve the claim.\textsuperscript{167}

The California Supreme Court's decision coincides with the ruling of the California Court of Appeals in \textit{Miller v. United Airlines}.\textsuperscript{168} The plaintiff was a senior flight attendant whose performance was the subject of a petition circulated by junior co-workers. The result, in plaintiff's estimation, was that the employees and the airline were engaging in a pattern of harassment to force her to quit. Plaintiff filed a contractual grievance as well as a grievance under the collective bargaining agreement.

The court of appeals affirmed the summary judgment, finding that nine of the counts were preempted by the Railway Labor Act. It found no authority allowing an employee to seek damages for emotional and physical distress by filing a state tort claim in order to circumvent the federal statute.

The Railway Labor Act preempts claims of members of labor organizations only. Recent federal and state court cases on this issue have reached similar results.\textsuperscript{169} Non-union employees are free to pursue common law contract and tort remedies, a right they have availed themselves of frequently, as the following section demonstrates.

\textbf{IV. Employment-At-Will and Tort Cases}

As noted earlier in this article, a major revolution in American labor and employment law during the last ten

\textsuperscript{167} \textit{Id.} at 621.


years has been the erosion of the doctrine of at-will employment.\textsuperscript{170} Under the traditional rules, unless circumstances indicated otherwise, a contract which set forth an annual salary rate but no definite term of employment was considered to be for indefinite employment, terminable at the will of either party without incurring liability for breach of contract. The traditional rule has received harsh criticism from academic commentators, as well as from many state and federal judges who have condemned the doctrine as archaic and barbarous.\textsuperscript{171} The result has been a proliferation of exceptions to the rule and the substitution of new tort causes of action for traditional contract claims and remedies. The airline industry has not escaped these changes.

There are four theories by which courts have recognized a cause of action for wrongful discharge, and they are often commingled.\textsuperscript{172} They are: (1) the discharge violates public policy;\textsuperscript{173} (2) the discharge violates an implied contract term;\textsuperscript{174} (3) the discharge violates an implied duty of good faith and fair dealing in all employment contracts;\textsuperscript{175} and (4) the discharge gives rise to a tort claim, usually outrageous conduct or defamation.\textsuperscript{176} This article will discuss these theories with respect to the airline industry, but will not attempt to dissect all of the many issues that arise in this type of litigation.


\textsuperscript{171} See infra note 172; Sabine Pilot Serv. v. Hauck, 687 S.W.2d 733 (Tex. 1985).


\textsuperscript{173} See infra subsection A.

\textsuperscript{174} See infra subsection B.

\textsuperscript{175} See infra subsection C.

\textsuperscript{176} See infra subsection D.
A. Public Policy Discharge

This theory was the first to gain judicial acceptance, and is subject to different degrees of interpretation depending on the jurisdiction. Many decisions have limited public policy discharges to discharges in retaliation for the employee’s exercise of a right specifically protected by state law or refusal to commit acts prohibited by law.\textsuperscript{177} In more liberal jurisdictions, courts have set forth their own concepts of public policy, whereby any action of the employer deemed sufficiently unconscionable will be characterized as contrary to public policy.\textsuperscript{178} It can be safely concluded that dismissal of an employee for exercising rights guaranteed by state law, such as filing a worker’s compensation claim,\textsuperscript{179} or for failure to participate in an activity violating state law,\textsuperscript{180} will be deemed discharges in violation of public policy.

Not surprisingly, cases coming out of the airline industry on this issue involve safety concerns. In \textit{Bueethe v. Britt Airlines},\textsuperscript{181} plaintiff filed suit in state court in Indiana alleging that he was discharged by the air carrier after he refused to fly an airplane he considered to be unsafe. The case was removed to federal court. After a prior appeal disposing of jurisdictional questions, the district court and court of appeals ruled in favor of the airline on the merits. Twice, over the orders of the pilot in command, plaintiff refused to fly company aircraft, resulting in flight cancellations. The alleged defects involved the auto-feather system in one instance, and the fire warning light in the other.

\textit{Bueethe} claimed his dismissal violated public policy as expressed in Section 8-21-2-2 of the Indiana Code, requiring aircraft operating within the state to conform to

\textsuperscript{178} See, e.g., Nees v. Hocks, 272 Or. 210, 536 P.2d 512 (1975).
\textsuperscript{181} 787 F.2d 1194 (7th Cir. 1986).
federal airworthiness standards. The district court and court of appeals disagreed. Judge Posner, speaking for the Seventh Circuit, held that the statute did not purport to create a right on the part of co-pilots or other crew members to refuse to fly an aircraft that they did not believe to be airworthy. The court found no policy expressed in Indiana that would permit airline employees to decide when an aircraft could be flown.

A similar case was Rachford v. Evergreen International Airlines,\textsuperscript{182} in which a flight engineer claimed he was discharged for informing the Federal Aviation Administration about excessive oil consumption by one of the company's aircraft. Defendant moved to dismiss the complaint for failure to state a claim for which relief could be granted, and the district court granted the motion.

Judge Leighton found that plaintiff's complaint did not sufficiently state a claim for retaliatory discharge under Illinois law, as the doctrine of retaliatory discharge required the termination to be in violation of public policy of the state. He noted that while Illinois has a general policy in favor of aviation safety, the state has no interest in enforcing federal law, even if that federal law is allegedly incorporated in the state's general public policy. The court also dismissed plaintiff's claim allegedly premised on a private right of action under the Federal Aviation Act.\textsuperscript{183} The court could find no right of action, either express or implied, that would have permitted an employee to sue an air carrier, nor did the Act require an air carrier to continue to employ an employee. Finally, the court dismissed plaintiff's final claim that his consultation with fellow employees and representation of their joint safety concerns to management constituted protected activity within the Railway Labor Act. Since plaintiff was not a member of a labor organization, he could not seek the

\begin{itemize}
  \item \textsuperscript{182} 596 F. Supp. 384 (N.D. Ill. 1984).
  \item \textsuperscript{183} 49 U.S.C. §§ 1421, 1425 (1982).
\end{itemize}
A claim failing to allege or prove that an employee was discharged for exercising specific statutory rights, or alleging vague and general rights, will not be sufficient to support a claim for a public policy discharge. In *Catania v. Eastern Airlines*, plaintiffs contended their discharges violated the public policy of Florida as articulated in the state’s right to work law. The court of appeals concluded that the claim was based on allegations “too general to permit legal analysis.” In *Grandchamp v. United Air Lines*, the United States District Court for Colorado dismissed a claim for public policy discharge in the absence of any allegation of termination for exercising statutorily protected rights. However, as will be discussed, plaintiffs did prevail in *Grandchamp* on a tort theory. In *Kavanagh v. KLM Royal Dutch Airlines*, the district court dismissed an employee’s suit alleging KLM terminated him in violation of public policy because he hired an attorney to represent him in a dispute with the airline.

Unlike cases arising out of civil rights statutes, reference to cases involving airlines on this issue will not assist in predicting the outcome of a given suit, which will be governed by state law. Assuming the public policy allegation is not itself preempted by another statute (such as Title VII, ADEA, or OSHA), the trend appears to be toward a sharper definition of public policy, finding its source in state statutes or constitutions. The other major body of public policy discharge cases, which have not as yet involved airlines, include termination for refusal to commit crimes such as perjury, or price fixing, or for

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185 381 So. 2d 265 (Fla. Dist. Ct. App. 1980).
186 36 Empl. Prac. Dec. (CCH) ¶ 34,987 (D. Colo. 1985); see infra note 217 and accompanying text for further discussion of *Grandchamp*.
188 29 U.S.C. §§ 654(a), 660(c) (1982).
reporting violations to governmental agencies.\(^{191}\)

**B. Implied Contracts**

Airlines, like many large employers, issue employee manuals to document and explain company practices and procedures. As a result, employees without written contracts have often seized on these manuals as creating contractual rights. The alleged rights range from due process procedures up to a substantive right not to be discharged except for just cause. Courts have also enforced oral promises for permanent employment where they found promises to be sufficiently definite and supported by other consideration. The doctrine itself is less than ten years old, with the landmark case being *Toussiant v. Blue Cross and Blue Shield*.\(^{192}\)

In *Brooks v. Trans World Airlines*,\(^{193}\) the federal district court in Colorado denied the airline's motion for summary judgment, holding that the company's management policy and procedure manual gave the employee the right to bump other employees, notwithstanding the fact that the manual was unilaterally promulgated by the airline. The implied contract doctrine may be applied to discipline and demotion as well as to termination.

Ironically, a federal court in California denied that TWA's management policy and procedure manual created an implied promise that the airline "would not act arbitrarily in dealing with its employees."\(^{194}\) Without citing *Brooks*, the Court of Appeals for the Ninth Circuit held that the threshold issue is whether the parties reached an implied meeting of the minds regarding certain aspects of their employment relationship. In the case before it, the court held that the manual could not be viewed as a mani-
festation of the intent of the parties because it conflicted with the employment application which stated the employment was terminable at will. The Ninth Circuit therefore affirmed the dismissal of the case, brought by management employees who were furloughed for refusing to accept continued employment in nonmanagement positions.

In *Gorrill v. Icelandair/Flugleidir*, the Second Circuit found former pilots of Icelandair were entitled to contract protection from the airline employee manual. The record showed that the plaintiffs had sought written employment agreements, but were assured that the company would follow its operations manual.

In *Parker v. United Airlines*, the Court of Appeals of Washington rejected an employee’s argument that employment forms referring to “regular employment” and setting forth specific grounds for dismissal prevented the airline from terminating her employment without just cause. The employment forms and the manual stating that an employee could be discharged for cause or economic reasons were held to be unenforceable promises. The court of appeals also rejected plaintiff’s argument that her promise to indemnify United for losses it might sustain because of her acts and to assign to it inventions made during the course of her work constituted “independent consideration” requiring dismissal only for cause.

The case of *Continental Air Lines, Inc. v. Keenan* in which the Supreme Court of Colorado recently adopted the implied contract doctrine, illustrates many of the issues that arise when this theory is invoked. Plaintiff, a managerial employee in Continental’s Denver domicile, was terminated after several customer complaints. Keenan alleged breach of an implied contract in that the airline’s employee manual purportedly afforded him pro-

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195 761 F.2d 847 (2d Cir. 1985); see supra note 169.
197 731 P.2d 708 (Colo. 1987).
cedural rights before he could be discharged and that Continental lacked just cause to dismiss him.

At his deposition, plaintiff stated that he did not recall discussing the employment manual when he was hired. Continental filed a motion for summary judgment, arguing that the employment manual did not create any contract rights, but even if it did, those rights were not bargained for. Plaintiff's memory suddenly improved, and he filed an affidavit in response to the motion, asserting that he had discussed the manual and that it was an important consideration in his acceptance of employment with Continental. The district court granted the airline's motion for summary judgment, but the court of appeals reversed in a brief unpublished opinion.

The Supreme Court of Colorado, given the occasion to make new law, proceeded to do so. After a brief review of law in other jurisdictions, the court ruled that the presumption of at-will employment would not be considered absolute, but would be rebuttable under certain circumstances. Adopting neither the categorical rule that an employee manual automatically becomes part of an employment contract, nor the contrary rule that manuals are no more than unilateral expressions of company policy, the court held that an employee could enforce termination procedures under two theories: 1) ordinary contract principles reflected by offer and acceptance; and 2) the theory of promissory estoppel, by which the employee demonstrates that the employer should reasonably have expected the employee to consider the manual as a commitment from the employer, and that the employee reasonably relied on termination procedures to his detriment. The Supreme Court remanded the case to the trial court for disposition of Continental's motion for summary judgment under the two alternate theories of liability. The exceptions to the rule fashioned by the court in *Keenan* are generally fact intensive; therefore, employ-

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198 Id. at 711.
199 Id. at 711-12.
ees following the court’s guideline should at least be able to create a jury question on the ultimate issue of liability.

If a discernible trend can be ascertained in this area, it is that employee handbooks will be treated as more than mere gratuities. Absent any disclaimer to that effect, they generally will be enforced if they contain provisions giving employees procedural or substantive rights. Disclaimers have been upheld if sufficiently clear. If the manual restricts itself to company policies such as vacation, sick leave, and other related matters, the manual should not be found to confer protection against discharge. Some jurisdictions require that the handbook or manual actually be bargained for, but the standard of proof has often been quite low.

C. Implied Covenant of Good Faith and Fair Dealing

The doctrine of implied covenant of good faith and fair dealing began with insurance contracts, and has largely remained there. However, activist courts, most notably in California, have extended the duty to the employment setting. The most prominent example of this theory, frequently cited by other courts, is *Cleary v. American Airlines*.

Plaintiff, an eighteen year employee of American, began as a payroll clerk and worked his way up to an airport operations agent. He alleged that the airline wrongfully suspended him from his employment and wrongfully terminated him without just cause, supposedly for com-

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201 Sears, Roebuck & Co. has successfully defended these claims by raising the disclaimer in its employee manual that the manual creates no contractual rights and no employee has the right to waive any of the provisions of the manual. See, e.g., Novosel v. Sears, Roebuck & Co., 495 F. Supp. 344 (E.D. Mich. 1980).
202 See Hunt v. IBM Mid America, Employees Federal Credit Union, 384 N.W.2d 853 (Minn. 1986) (distinguishing Pine River State Bank v. Mettille, 333 N.W.2d 622 (Minn. 1983)).
mitting violations of the airline's regulations, but in fact for his union organizing activities. Plaintiff sought compensatory and punitive damages.

The trial court dismissed Cleary's complaint, but the court of appeals reversed, holding that plaintiff sufficiently stated claims for relief. Commingling theories from public policy discharge cases, implied contract cases, and the landmark insurance cases of Comunale v. Traders & General Insurance Co., and Gruenberg v. Aetna Insurance Co., the court held that the implied covenant of good faith and fair dealing applied to all contracts, and that it was unconditional and independent in nature. Having arrived at the conclusion that every contract in California contained the duty of good faith and fair dealing, the court found two considerations to support its decision that plaintiff properly stated a claim for relief. The first was his longevity of service and the second was the express policy of American Airlines to adopt specific procedures for adjudicating employee disputes. The court remanded the case to the trial court for further consideration. As a federal judge recently noted, while attempting to sort out the numerous California cases on this issue, the result of Cleary was that more enlightened employers faced greater potential liability from at-will employees. The Supreme Court of California is presently reconsidering all theories of wrongful discharge in the case of Foley v. Interactive Data Corp.

 Courts in other jurisdictions have almost unanimously rejected the reasoning and result of the Cleary decision. For example, while the court in Brooks v. Trans World Airlines found an implied contract, it refused to find an implied covenant of good faith and fair dealing. In

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205 50 Cal. 2d 654, 328 P.2d 198 (1958).
209 574 F. Supp. at 805; see supra note 199 and accompanying text.
Gianaculas v. Trans World Airlines\textsuperscript{210} the Ninth Circuit, interpreting California law, rejected the argument that the airline's policy manual constituted standards of good faith and fair dealing. Other suits against airlines in which courts have rejected this theory are Grunn v. Hawaiian Airlines,\textsuperscript{211} a Georgia case; Yanai v. Japan Air Lines Co.,\textsuperscript{212} a case from Hawaii; and Bouzianis v. U.S. Air,\textsuperscript{213} a Massachusetts case.

Very few decisions have been reported in states that recognize the implied duty of good faith and fair dealing in employment contracts. In the recent case of Grayson v. American Airlines,\textsuperscript{214} the Court of Appeals for the Tenth Circuit, interpreting Oklahoma law, held that the airline's termination of the plaintiff, due to a reduction in force caused by the air traffic controllers' strike and general slowdown in the airline industry, constituted "good cause" for purposes of the parties' agreement requiring good cause for termination. However, the court of appeals reversed the district court's grant of summary judgment in the airline's favor on the issue of whether its failure to find alternative positions for the plaintiff within the company after termination breached the implied duty of good faith and fair dealing.

Cases after Cleary have generally limited the implied covenant of good faith and fair dealing to long-time employees, whom the courts seem to believe have a greater expectation of fair treatment from their employers. Thus, even if a court recognizes the doctrine, an employee must allege sufficient facts to show why the doctrine should apply to the subject matter of the complaint.\textsuperscript{215}

\begin{footnotesize}
\footnote{210}{761 F.2d at 1391; see supra note 194 and accompanying text.}
\footnote{211}{162 Ga. App. 474, 291 S.E.2d 779 (1982).}
\footnote{212}{118 L.R.R.M. (BNA) 2042 (D. Haw. 1984).}
\footnote{213}{120 L.R.R.M. (BNA) 2927 (D. Mass. 1985).}
\footnote{214}{803 F.2d 1097 (10th Cir. 1986).}
\end{footnotesize}
D. Tort Claims

It is axiomatic that damages recoverable under tort theories yield greater awards than traditional contract remedies. Tort damages include noneconomic losses such as mental pain and suffering, as well as punitive damages. Since the sky is literally the limit for damages in some tort cases, former employees will often plead tort causes of action with claims for wrongful discharge. Such torts include fraud, libel and/or slander, and outrageous conduct. In many cases the employees have prevailed.

In Crossman v. Trans World Airlines,\(^{216}\) plaintiff was hired by TWA to work in Saudi Arabia. At the time of the hiring, TWA informed Crossman that he would later be transferred to the payroll of Saudi Arabian Airlines (Saudia). Plaintiff accepted employment with Saudia, and worked on its payroll for approximately one year before being charged with theft of Saudia property, and of an automobile. He served eleven months in a Saudi Arabian prison. The authorities released him from prison and sent him back to the United States. He filed a suit in Illinois against TWA and Saudia. The district court dismissed one claim for breach of contract and another for intentional infliction of emotional distress.

Plaintiff claimed that TWA fraudulently misrepresented that it would always be in Saudi Arabia, and that TWA would not desert its former employees. Crossman alleged the airline breached that promise by failing to assist him while he was in prison. The court dismissed plaintiff’s claims for breach of contract and outrageous conduct as a matter of law. It submitted the fraud counts to the jury, which returned a verdict in plaintiff’s favor for $75,000.

The Court of Appeals for the Seventh Circuit, in a 2 to 1 decision, reversed the jury verdict and entered judgment in favor of TWA. It held that the trial court should have granted the airline’s motion for directed verdict on the ground that plaintiff failed to prove that the alleged

\(^{216}\) 777 F.2d 1271 (7th Cir. 1985).
misrepresentations caused his imprisonment in Saudi Arabia. The appeals court decision, while properly decided, may have given plaintiff more benefit of the doubt than deserved. Plaintiff conceded that TWA never promised him assistance in the event he were incarcerated, and he even signed a foreign laws agreement stating that TWA would not accept responsibility for violations of foreign laws by its employees. The case illustrates the ability of employees to raise a promise allegedly made before or during employment as the basis for misrepresentation claims, even when written policies and procedures belie the promise's existence.

In Grandchamp v. United Air Lines, an interesting decision whose precedential force will be decided in the appeal now pending before the Tenth Circuit, plaintiffs were long-time employees of United in Denver who, on their termination, filed suit raising every conceivable theory. Judge Carrigan dismissed all claims except violation of the Colorado Age Discrimination Act, and a pendent state claim for outrageous conduct. Plaintiffs alleged that the airline had embarked on a systematic program to eliminate older employees, and that this conduct was sufficiently outrageous in character and degree as to violate everyday notions of decency. Plaintiffs voluntarily dismissed their state statutory claim before trial. The court, despite reservations, submitted the outrage claim to the jury. The jury found in favor of the plaintiffs, and awarded substantial damages. The trial court denied United's post-trial motions, and the case is now on appeal.

Defamation claims often arise where a former employee does not like the reasons given for termination, and where the employer discloses the fact of termination to third parties. The recent California decision of DeTomaso v. Pan

\footnote{217} 36 Empl. Prac. Dec. (CCH) at ¶ 34,987; see supra note 186 and accompanying text. 

\footnote{218} See RESTATEMENT (SECOND) OF TORTS § 46 comment d (1965).
American World Airways,\textsuperscript{219} discussed in the previous section, illustrates a case in which the plaintiff might have recovered both tort and contract damages but for the preemption of the tort claims by the Railway Labor Act. The tort damages for defamation certainly exceeded any damages for wrongful termination. For precisely that reason, plaintiff vigorously attempted to avoid arbitration through Railway Labor Act procedures. The California Supreme Court held that the tort claims were preempted by the RLA.

In Jones v. Britt Airways,\textsuperscript{220} plaintiff alleged that on several occasions, her employer stated to other employees that she had been dismissed for embezzling company funds. Her discharge followed an incident involving a voided airline ticket. Plaintiff had volunteered to assist in the investigation, including taking a polygraph test, but no investigation occurred before her termination. The federal court interpreted Illinois law to hold that communication to any third party, including company employees, satisfied the publication requirement. The airline also failed to demonstrate that publication of its statement was protected by a qualified privilege, leading to denial of its motion for summary judgment. In Brantley v. Zantop International Airlines,\textsuperscript{221} a Michigan federal court reached a similar conclusion on the publication issue.

The theory of negligent hiring has implications for the employment practices of airlines, and further demonstrates the precarious position in which employers find themselves. In Doe v. American Airlines,\textsuperscript{222} plaintiff alleged negligent hiring because of the airline's failure to safeguard its passengers from exposure to employees having contagious diseases. The lawsuit grew out of an alterca-

\textsuperscript{219} 43 Cal. 3d 517, 235 Cal. Rptr. 292, 733 P.2d 614 (1987); see supra note 164 and accompanying text.


\textsuperscript{222} The case was filed in the Circuit Court for Cook County, Illinois on September 2, 1986. The docket number is 86 L. 19638. The author believes the case has been removed to the Federal District Court for the Northern District of Illinois.
tion between a passenger and a boarding agent, who allegedly kicked plaintiff in the shins and bit her.

Following the incident, the passenger requested that the AIDS antibody test be performed on the employee, and the test result was positive. Plaintiff was tested for AIDS antibodies, and the test showed negative. Plaintiff sued for assault and battery, emotional and mental suffering, negligent hiring and exemplary damages. The case is still pending.

Airlines, as well as other employers who serve the public, find themselves in a serious predicament as a result of potential tort liability from claims such as Doe. Given the recent decision of the Supreme Court of the United States in School Board of Nassau County v. Arline, holding that persons suffering from contagious diseases are "handicapped" for purposes of the Rehabilitation Act, employers must make reasonable accommodations for those employees, and may not merely discharge them. Moreover, plaintiff's claim that American was negligent in not screening employees for contagious diseases comes at a time of increasing resistance to widescale testing of employees before hiring and during the employment relationship.

**Conclusion**

The era during which employers were free to decide the fate of their workers without restriction is over. The enactment of the Railway Labor Act, various civil rights acts, the erosion of the employment-at-will doctrine, and evolution of intermingled theories of tort and contract are harsh realities that every employer must address. The airline industry has been the subject of many of the most

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significant labor and employment cases of the last ten years.

With respect to federal civil rights statutes, airlines must carefully scrutinize each new decision, as an opinion involving one employer will not necessarily be applied to another. In common law tort and contract suits, the airlines cannot necessarily assume that any discharge of a unionized employee will automatically be resolved by arbitration before a board of adjustment. Finally, with respect to nonunionized employees, airlines cannot assume that the bottom line in the event of liability will be limited to loss of earnings and potential future earnings. The age of American law when a tort was a tort and a contract a contract has been replaced by an atmosphere where hiring, firing, and even retiring are subject to sudden change in the law. The doctrine of *stare decisis* is no longer sacred. The experience has been bitterly contested and extremely costly.