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Order 2002-1-5

UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.

Issued by the Department of Transportation
on the 11th day of January 2002

Served January 11, 2002

OST Docket 2000-7009 – 12

Complaint of

Louise M. Caplan v. Continental Airlines, Inc.

Under 49 U.S.C. § 41705

ORDER AFFIRMING DISMISSAL OF COMPLAINT

This order affirms the dismissal of a formal third-party complaint filed by Ms. Louise Caplan (Ms. Caplan or Complainant) following the remand of the case by the U.S. Court of Appeals for the District of Columbia Circuit upon a motion by the Department. On March 3, 2000, Ms. Caplan filed a formal complaint under section 302.201 of the Department's Procedural Regulations (14 CFR 302.201)[1] against Continental Airlines, Inc. (Continental), alleging violations of the Air Carrier Access Act (49 U.S.C. 41705) and 14 CFR Part 382, the Department's rule prohibiting discrimination against the disabled in air transportation.[2] The Department dismissed the complaint in Order 2000-7-4,

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1 Section 302.200 et seq. has since been recodified as section 302.400 et seq. *See* Docket OST-97-2090, 65 FR 6457, February 9, 2000.

2 Part 382 imposes numerous specific requirements on air carriers in their treatment of disabled travelers. In addition to the general requirement that carriers not discriminate against disabled travelers stated in 14 CFR 382.7, the rule contains a number of other provisions pertinent to the Caplan case, including: (1) section 382.33(d) which requires that carriers establish a system to record accurately certain enumerated service requests of disabled travelers, but not including requests for the provision of wheelchair or electric cart assistance; (2) section 382.39(a) which requires that carriers provide mobility assistance to disabled travelers on request; (3) section 382.61 which requires that carriers train their employees adequately to meet the needs of disabled travelers; and (4) section 382.65 which requires that carriers make available Complaint

issued on July 6, 2000, and affirmed the dismissal in Order 2000-9-15, issued September 14, 2000.

Complaints similar to Ms. Caplan's complaint, we note, were investigated in a proceeding stemming from three administrative complaints filed by the Eastern Paralyzed Veterans against Continental in 1997 and 1998. That proceeding led to a consent order against the carrier, Order 2000-3-24, issued on March 27, 2000. Our dismissal of Ms. Caplan's complaint in Order 2000-7-4 was based in part on that settlement agreement, since the incident alleged in Ms. Caplan's complaint occurred on October 14, 1999, which was during the time period of the other incidents covered by the consent order, and involved factual circumstances similar to many other alleged violations within the scope of the settlement agreement. From the Department's perspective, therefore, the settlement agreement covered the Caplan incident.

On October 12, 2000, Ms. Caplan petitioned the U.S. Court of Appeals for the District of Columbia Circuit to take review of Orders 2000-7-4 and 2000-9-15 (*Caplan v. Dep't of Transp.*, U.S. Court of Appeals, D.C. Cir., No. 00-1439). In subsequent pleadings, Ms. Caplan claimed that the Department, in dismissing her complaint, had failed to investigate her allegations fully, as required by recent amendments to the Air Carrier Access Act, and requested that the court order the Department to hold an oral evidentiary hearing in this case.[3] On the basis of certain factual issues raised in Ms. Caplan's appellate filings, the Department responded to her petition in the Court of Appeals by requesting that the proceeding be remanded to the Office of Aviation Enforcement and Proceedings (Enforcement Office) for further investigation. The court granted the Department's motion in an order of February 26, 2001.

Resolution Officials (CROs) at airport locations who are trained to respond to and resolve complaints by disabled passengers.

In her original complaint filed with the Department, Ms. Caplan did not cite any specific section of Part 382 other than 14 CFR 382.5, a general provision stating definitions applicable to the rule. In subsequent pleadings, however, the Complainant claimed that Continental violated a number of provisions including section 382.7, the general provision outlawing discrimination against the disabled. Ms. Caplan's complaint asserted that, in violation of section 382.7(a)(2), Continental required her to accept electric cart assistance that she had not requested. In addition, the Complainant specifically alleged that Continental violated: (1) section 382.33(d) by failing to record her request for special services at San Diego accurately; (2) section 382.39(a) by failing to provide transportation assistance for her connecting flight at Houston; (3) section 382.61 by failing to train properly its Complaint Resolution Officials; and (4) section 382.65 by failing to make available a CRO who was knowledgeable regarding Part 382 requirements, and by the CRO's failing to provide a dispositive and appropriate resolution of her complaint.

3 *See* Petitioner's Response in Opposition to Respondent's Motion to Dismiss, *Caplan v. Dep't of Transp.*, No. 00-1439, Dec. 12, 2000, at 5, 6.

The Enforcement Office has now completed its supplemental investigation undertaken pursuant to the remand. For purposes of its investigation, the Enforcement Office requested both Continental and Ms. Caplan to supplement the record with affidavits confirming their versions of what occurred and suggested that both parties provide the names of witnesses, if any, who might corroborate their respective accounts. In response, the parties provided affidavits and statements setting out their versions of the events at issue. After consideration of these materials, we have concluded that they reflect a continued disparity in their respective descriptions of the incidents in question. Neither party provided names of witnesses who might be called on to verify either of the conflicting narratives other than those previously identified as directly involved in the incidents.

In the Caplan affidavit, the Complainant restates the allegations in her complaint filed with the Department. Ms. Caplan claims that, on a trip from San Diego to Baltimore, with a connection at Houston, Continental failed to provide adequate wheelchair assistance. According to Ms. Caplan, she made an appropriate request for such assistance to a Continental agent at San Diego when she began her travel. The ticket clerk at San Diego, according to the complaint, "deliberately and willfully" checked a box on the service request form indicating a request for electric cart service rather than wheelchair service. When Ms. Caplan arrived in Houston no wheelchair was available to assist her in traveling to the departure gate for her connecting flight to Baltimore. The Continental agent whom she and her husband confronted noted that the service request form indicated an electric cart rather than a wheelchair and stated that a cart would arrive shortly. There was, according to Ms. Caplan, a further verbal exchange between her husband and the agent regarding the carrier's failure to have a wheelchair available. Ms. Caplan claims that her husband then located a wheelchair and proceeded to push the Complainant to the departure area for the connecting flight, which they reached in time to board.

Continental provided a statement from its gate agent at San Diego who filled out Ms. Caplan's special service request form and an affidavit from its gate agent at Houston who responded to the Caplans. The San Diego agent states that she did not specifically recall the Caplan party, although as a matter of practice she does not assume a passenger wants a particular form of assistance but always intends to mark a request form to reflect the wishes of the traveler. She strongly disputes Ms. Caplan's contention that she intentionally marked the form contrary to the passenger's express preferences as a matter of convenience for the carrier. The Houston agent, who was also a certified

Complaint Resolution Officer (CRO) for the carrier,[4] provided an affidavit that generally agrees with the Caplan statement in describing the strained verbal exchange between the parties. However, his statement contradicts the Caplans' by asserting that the Complainant did not insist on a wheelchair, but in fact accepted the assistance of a motorized cart once one arrived. The incident, from the time the Caplans arrived at the gate desk to their departure on the electric cart, occurred within 8 to 15 minutes, according to the Continental agent. Ms. Caplan and Continental's CRO agree that Ms. Caplan did in fact make her connecting flight despite the delay in obtaining the desired assistance.

In light of these generally contradictory statements, and without independent witnesses to support either version of the incident, we believe that insufficient evidence exists to support a successful enforcement action and that further investigation would prove futile. It should also be noted that the violation alleged by Ms. Caplan was not as egregious a case as those of other disabled passengers whose complaints were explicitly subject to Order 2000-3-24, since Ms. Caplan ultimately did receive mobility assistance and did reach her connecting flight to her final destination. In this regard, the Enforcement Office has adopted the general policy of regarding as the most serious violations of Part 382's wheelchair assistance requirements those: (1) involving the stranding or abandonment of a disabled person in a wheelchair in the terminal or on-board an aircraft, or (2) resulting in a missed connection. Neither of those circumstances occurred in Ms. Caplan's case.

In a pleading filed with her Court of Appeals petition for review, Ms. Caplan also asserts that the Department must afford her an oral evidentiary hearing before an administrative law judge.[5] It is our view that under applicable

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4 CROs are carrier personnel trained to be familiar with all of Part 382 and the carrier's procedures, and are required to have the authority to resolve disputes involving disabled passengers. Pursuant to 14 CFR 382.65, carriers must make available a CRO to any person who complains of alleged violations of Part 382. Continental, as part of its supplemental materials, provided a copy of the Houston agent's certificate of completion of the carrier's CRO training program.

5 *See Id.* at 12, 13. In her response, Ms. Caplan states that "the Petitioner . . vigorously asserts the position that the provisions of 14 C.F.R. 380.200 et seq. [sic] requires [sic] the Department to provide the Petitioner with an oral evidentiary hearing before an independent Administrative Law Judge." Ms. Caplan further asserts that "section 707(c)(1) [49 U.S.C. § 41705(c)(1)] now requires the Department to provide the Petitioner with a hearing on the merits of each specific allegation of violation of the ACAA." *Id.* at 13. Section 707(c)(1) reads, "The Secretary shall investigate each complaint of a violation of subsection (a)." The Department has complied with this provision, which makes no mention of a requirement for an oral evidentiary hearing. In addition, we note that the petitioner in her December 12 response refers mistakenly to the "provisions of 14 C.F.R. 380.200 et seq." Apparently, she is referring to 14 C.F.R.

precedent[6] the Enforcement Office was clearly within its discretion when it determined, based on a number of considerations, not to institute an oral evidentiary hearing in response to her complaint. Those considerations remain valid. No hearing was warranted at the time of Ms. Caplan's original filing, nor would such a hearing be justified at this point. In no case does the filing of a formal or informal complaint alleging violations of Part 382 obligate the Department to undertake a formal administrative enforcement proceeding. Our general policy has been to seek formal enforcement remedies only in instances where we have clear and convincing evidence of numerous violations of Part 382, such as in the prior case against Continental or our pending enforcement case against Northwest Airlines,[7] or of particularly egregious individual violations.[8] In fact, even if all of Ms. Caplan's allegations are accepted, there is no need for an evidentiary hearing in this case because (1) the issue was resolved in the prior Continental consent order (Order 2000-3-24); (2) the Department has determined that there is insufficient evidence of any violation of its regulations to justify such a hearing; and (3) nothing new would be learned since the parties have had ample opportunity to present their cases. Moreover, the Department conducted an adequate investigation initially which then was expanded in the supplemental investigation undertaken since the remand of the case in March 2001.

302.200 et seq., now 14 C.F.R. 302.401 *et seq.*, for 14 C.F.R. Part 380 has to do with Public Charters and concludes with section 380.67.

6 In *Heckler v. Chaney*, 470 U.S. 821 (1985), the Court held that an "an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion."(*Heckler* at 831) The Court, further, noted that, "the reasons for this general unsuitability [of judicial review] are many. First, an agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise. Thus, the agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all." (*Id.*) To initiate a formal enforcement proceeding the Departmental regulations would require that the Enforcement Office prepare a formal complaint for an administrative proceeding before an administrative law judge and prosecute the case through discovery, hearing and appeal phases. Moreover, Continental has already been found to have committed similar violations during the time period in which the incident described in Ms. Caplan's complaint occurred, and has consented to cease and desist from such violations in the future. The public interest in pursuing Ms. Caplan's specific complaint is at best negligible. The resources which would be required to pursue the case would be better allocated to cases where a real likelihood of successful litigation exists.

7 *Northwest Airlines, Inc., Enforcement Proceeding*, OST Docket No. 01-10598.

8 *See, e.g.*, Order 98-9-23 against Lufthansa Airlines for failure to permit a qualified disabled passenger to board his flight. In that case, the passenger was prevented from boarding a flight on which he held confirmed reservations due to the carrier's insistence that he undergo a medical evaluation prior to travel.

We therefore affirm our prior decision to dismiss the complaint and find that further review of this matter is not in the public interest.

ACCORDINGLY, I affirm the dismissal of the third-party complaint in this docket.

This order is issued under authority assigned in 14 CFR 385.34(b) and shall be effective as the final action of the Department within 30 days after service.

By:

ROSALIND A. KNAPP
Deputy General Counsel

(SEAL)

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