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Introduction

On August 8, 1989, the United States Court of Appeals for the Eighth Circuit handed down its opinion in the case of *Tallarico v. Trans World Airlines, Inc.*[1] The opinion held that private individuals could sue air carriers for discriminatory treatment under the provisions of the Air Carrier Access Act.[2] The decision was a major development in this evolving area of federal antidiscrimination law. This article will examine the *Tallarico* opinion, its importance to all persons concerned with antidiscrimination legislation, and the unanswered questions still facing those who seek to ensure equal access to air transportation regardless of physical handicap.[3]

I. Background of the Air Carrier Access Act

A thorough understanding of the impact of the *Tallarico* decision requires a general knowledge of the legislative background of the Air Carrier Access Act. Seventeen years ago, Congress

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1. Tallarico v. Trans World Airlines, Inc., 881 F.2d 566 (8th Cir. 1989) [hereinafter *Tallarico II*].

2. *Id.* at 570 (citing 49 U.S.C. § 1374(c)(1) (Supp. IV 1986) [hereinafter ACAA]).

3. Although the authors are aware that the term "handicap" is objectionable to many physically challenged persons, the statutory language is used for the sake of clarity.

passed the Rehabilitation Act of 1973.[4] For millions of physically and mentally challenged Americans, this statute provided hope that the federal courts would finally provide a viable avenue of relief from discrimination against the disabled in housing, education, transportation, and a variety of other needs and activities that most United States citizens take for granted.[5] The Act's usefulness as a tool against discrimination, however, is severely limited by the fact that the only organizations subject to its provisions are those which receive federal subsidies. That limitation has a serious impact on the effectiveness of the antidiscrimination provision in the area of equal access to air transportation.[6]

The problem was illustrated in 1986 when the United States Supreme Court decided the case of *United States Department of*

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4. Pub. L. No. 93-112, 87 Stat. 357 (codified as amended at 29 U.S.C. §§ 794-796i (1988)). The statute provides that:

> [n]o otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

29 U.S.C. § 794.

5. Congress has noted that some 43,000,000 Americans have one or more physical or mental disabilities, and that:

> individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualificiation standards and criteria, segregation and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities . . . .

Americans With Disabilities Act, Pub. L. No. 101-339, § 2, — Stat. — (1990).

In response to this situation, Congress passed, and President Bush signed, the Americans With Disabilities Act, Pub. L. No. 101-336, — Stat. — (1990). This Act prohibits discrimination based on handicap in the areas of employment (Title II), public services (Title III), public accommodations and public transportation provided by private entities (Title IV) (excluding air transportation, § 303(a)). A detailed discussion of this bill or the numerous issues the disabled face in areas other than air transportation would exceed the scope of this article.

6. The horror stories recounted by handicapped air passengers are numerous. Reports of seriously damaged wheelchairs and other equipment, indifferent or even hostile treatment by airline "service" personnel, and general ignorance on the part of the airline industry regarding the actual needs and abilities of the physically challenged are commonplace. *See generally* Michael Ervin, *Unfriendly Skies*, The Progressive, June 1989, at 28 (focusing primarily on the stereotypes and attitudes which constitute barriers to equal access to air transportation for the handicapped). For a detailed discussion of the physical barriers encountered by the handicapped in air transportation, see Katherine Hunter & Robert Layton, *Barriers and Safety Risks for Elderly and Handicapped Travelers at Airports*, *reprinted in* Transportation Research Board, National Research Council, Issues in Providing Mobility for the Transportation Handicapped (1986).

Transportation v. Paralyzed Veterans of America.[7] In *Paralyzed Veterans*, the Court held that the Rehabilitation Act applied only to air carriers which received direct federal subsidies, thus excluding from its coverage most major airlines and the vast majority of commercial air passengers.[8] The consensus was that "the practical effect of *Paralyzed Veterans* was to leave handicapped air travelers subject to the possibility of discriminatory, inconsistent and unpredictable treatment on the part of air carriers."[9]

Congress acted quickly to redress the situation *Paralyzed Veterans* created. Later that same year, Congress passed the Air Carrier Access Act which provides that "[n]o air carrier may discriminate against any otherwise qualified handicapped individual, by reason of such handicap, in the provision of air transportation."[10] The passage of the Act applied the standard of equal access to the airline industry as a whole. However, the effectiveness of the new statute was soon tested.

II. The Facts of *Tallarico v. Trans World Airlines, Inc.*

On November 25, 1986, Polly Tallarico, a thirteen-year-old student, arrived at Houston's Hobby Airport for a Thanksgiving trip to St. Louis to visit her parents. Polly has cerebral palsy. She is able to communicate through sign language, by use of a communication board, a memo writer, and a Minispeak.[11] Although Polly normally uses a wheelchair, she is able to move around unassisted.[12] Polly has normal intelligence and is able to understand verbal and written instructions. Polly is able to fasten and unfasten a seatbelt and use an oxygen mask without assistance.[13] Furthermore, before November 1986 Polly had flown unaccompanied on at least one commercial flight without incident.[14]

All of the foregoing personal information about Polly had been given to a travel agent when Polly's parents made the reservations for her flight home on Trans World Airlines.[15] The travel

7. 477 U.S. 597 (1986).

8. *Id.* at 605-06.

9. S. Rep. No. 400, 99th Cong., 2d Sess. 2, *reprinted in* 1986 U.S. Code Cong. & Admin. News 2328, 2329.

10. 49 U.S.C. § 1374(c)(1) (Supp. V 1987).

11. *See* 881 F.2d at 569. The communication board is a tray-like device that attaches to Polly's wheelchair upon which is contained the alphabet, words, numbers and symbols to which she can point. *Id.* The memo writer is a small, typewriter-like device with a liquid crystal display and paper printer. *Id.* The Minispeak is a small computer device that vocalizes words that are typed into it. *Id.*

12. *Id.*; Trial Transcript Vol. 1 at 7-8; Vol. 2 at 135-36.

13. *Tallarico II* at 569; Trial Transcript Vol. 1 at 48; Vol. 2 at 136.

14. *Tallarico II* at 569; Trial Transcript Vol. 1 at 48.

15. Trial Transcript Vol. 2 at 31-32.

agent, in turn, conveyed this information to a TWA ticket agent more than thirty days before the plane's departure.[16] The travel agent also filed a TWA "special service request" with the airline. TWA's computer confirmed this special service request well before the date of the flight.[17] Having complied with all of TWA's policies and procedures, neither Polly Tallarico nor her parents had reason to expect any trouble when Polly arrived at the airport, accompanied only by a driver whom she had met that day. Upon arriving at the TWA service counter, however, the ticket agent informed Polly's driver that the girl would not be allowed to board the airplane.[18] The preliminary decision not to allow Polly to board apparently reflected the ticket agent's unilateral decision that Polly was unable to attend to her needs or follow the instructions of the flight crew. This decision, later confirmed by the acting station chief,[19] was made without ever attempting to discuss the situation with Polly herself.[20] The only communication any TWA personnel made was to Polly's driver, who, as mentioned, had met Polly only that day.

After the airline refused to allow her to board, Polly was forced to wait in the Houston airport for over ten hours, accompanied only by her driver. She had almost nothing to eat and no money.[21] No TWA personnel made any offer to assist Polly during this time, despite TWA's assurance to Polly's parents in St. Louis that TWA was caring for their daughter.[22] Polly's father flew from St. Louis to Houston and accompanied Polly home the next day, on a different airline.[23] Their flight home was without incident.[24]

Although Polly Tallarico's treatment by the airline was by no means unique,[25] the recently enacted Air Carrier Access Act gave Polly and her family a way to challenge the discrimination in court. However, the Tallaricos faced two major legal obstacles in

16. *Id.*

17. Trial Transcript Vol. 1 at 214.

18. *Tallarico II* at 568; Trial Transcript Vol. 1 at 121-22, 126, 130, 151.

19. Trial Transcript Vol. 2 at 100; Vol. 3 at 35, 124, 190.

20. Trial Transcript Vol. 3 at 184.

21. Trial Transcript Vol. 1 at 160.

22. Trial Transcript Vol. 1 at 166-67.

23. Tallarico v. Trans World Airlines, 693 F. Supp. 785, 787 (E.D. Mo. 1988) [hereinafter *Tallarico I*].

24. Trial Transcript Vol. 1 at 65-67.

25. Disabled air travelers who are not expressly denied the right to board an aircraft nonetheless encounter substantial physical and attitudinal barriers before the flight ever leaves the ground. *See* Hunter & Layton, *supra* note 6, for a discussion of the various physical barriers in the airport terminal itself, including accessability problems related to parking, portals, foyers, passenger check-in, airport services, and gate access.

their pursuit of a judicial remedy. First, Congress had not specifically authorized suits by private individuals against air carriers for violations of the Act. Second, the Tallarico's damages, if measured in purely monetary terms, were too small to warrant a costly legal battle. If measured in terms of emotional damage and damage to Polly's confidence and self-esteem, however, the Tallaricos simply could not afford to ignore the incident.

III. The Trial

The Tallaricos filed suit against TWA in federal court in St. Louis, Missouri, claiming that the Air Carrier Access Act authorized individual suits against airlines.[26] The jury returned a verdict in favor of Polly and her parents in the amount of $92,000,[27] but their victory was short-lived. The trial judge ruled that, although the Act did confer the right to sue upon individual plaintiffs, the jury's award of $80,000 was excessive.[28] The court characterized the bulk of the award as damages "for emotional distress."[29] The court then concluded that such damages were not recoverable under the Act and, therefore, reduced the award to $1,350, an amount equal to the Tallarico's actual, out-of-pocket expenses.[30]

That ruling severely impaired the efficacy of the newly enacted Act as a means of redress for discriminatory practices. The jury found that the airline had engaged in discrimination. The court's ruling, if left unchallenged, would set a precedent which would allow private individuals to sue for discrimination, but would severely limit the amount of recoverable damages. Since, in many cases, the actual monetary loss victims of discrimination suffer is insufficient to warrant the high cost of lengthy litigation, the trial court's ruling would have left a large number of these victims with no effective recourse.

The Tallaricos appealed to the United States Court of Appeals for the Eighth Circuit. TWA also appealed, contending that the trial court had erred in deciding that private suits were authorized under the Act. Both the issue of whether a private cause of action existed and whether damages were available for emotional

26. The Tallaricos also asserted several state causes of action, including breach of contract and negligent infliction of emotional distress. *See Tallarico I* at 788.

27. *Id.* at 788 (E.D. Mo. 1988). The verdict consisted of damages in the amount of $80,000 on Polly's claim under the Act; $2,000 under a breach of contract claim; and $10,000 for the Tallarico's claim for negligent infliction of emotional distress. *Id.*

28. *Id.* at 790.

29. *Id.*

30. *Id.* at 790-91.

distress were questions with ramifications that could affect the entire area of antidiscrimination law and policy.

IV. The Appeal

A. Existence of a Private Cause of Action

The court of appeals first addressed the issue of whether the Air Carrier Access Act created a private right to sue air carriers for violations of the Act.[31] The court turned to the seminal case of *Cort v. Ash*,[32] which sets forth the four-part test for determining whether a federal statute creates an implied private cause of action.[33]

The first factor in the *Cort* test is whether the plaintiff is " 'one of the class for whose *especial* benefit the statute was enacted' . . . that is, does the statute create a federal right in favor of the plaintiff."[34] TWA argued that Polly Tallarico was not an intended beneficiary of the Act because the statute prohibited only discrimination directed against an "otherwise qualified handicapped individual."[35] Although the statute was silent as to the meaning of this term and TWA offered no expert testimony on this issue, TWA argued that Polly was not an otherwise qualified handicapped individual.[36]

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31. *Tallarico II*, 881 F.2d 566, 568-70 (8th Cir. 1989).

32. 422 U.S. 66 (1975). In *Cort*, a stockbroker sought to bring a private cause of action against a corporation and its directors for alleged violations of 18 U.S.C. § 610 (1970 & Supp. III 1974) (repealed 1976), which prohibited corporations from making contributions in connection with certain federal elections. The Court held that no such implied cause of action existed, noting that there was no indication that Congress intended to create such a cause of action. The Court further noted that such cause would not aid the primary purpose of the statute and that the area was one traditionally relegated to state law. *Id.* at 82-85.

33. The four factors are: (1) whether the plaintiff is a member of the class the statute was intended to benefit; (2) whether there is any indication of whether Congress intended to create or deny a remedy; (3) whether the implied remedy is consistent with the underlying purposes of the legislative scheme; and (4) whether the remedy is traditionally left to state law such that giving a federal cause of action would be inappropriate. 422 U.S. 66, 78 (1975) (citations omitted).

34. *Id.* (quoting Texas & Pacific R.R. Co. v. Rigsby, 241 U.S. 33, 39 (1916)) (emphasis in original).

35. *Tallarico II* at 569 (citing 49 U.S.C. § 1374(c)(1) (Supp. V 1987)).

36. *Id.* The term "handicapped individual" is defined as: "any individual who has a physical or mental impairment that substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment." 49 U.S.C. § 1374(c)(2) (Supp. V 1987). The Act required that the Secretary of Transportation promulgate, within 120 days of the enactment of the statute (October 2, 1986), "regulations to ensure non-discriminatory treatment of qualified handicapped individuals consistent with safe carriage of all passengers on air carriers." Pub. L. No. 99-435, § 3, 100 Stat. 1080 (1986). As of the time of the appeal in *Tallarico*, no such regulations had been promulgated. The trial court noted that due to the lack of such regulations, TWA had "little official guidance as

The Eighth Circuit disagreed with TWA's argument and noted that the Act itself does not define the term "otherwise qualified handicapped individual."[37] The court went on to state, however, that Congress intended the term to be construed in accordance with existing Department of Transportation regulations.[38] The existing regulations defined a "qualified handicapped person" as a handicapped person as one:

> (1) Who tenders payment for air transportation; (2) Whose carriage will not violate Federal Aviation Administration Regulations . . . and (3) Who is willing and able to comply with reasonable requests of airline personnel or, if not, is accompanied by a responsible adult passenger who can ensure that the requests are complied with.[39]

The Eighth Circuit held that Polly Tallarico met all four criteria of the regulation.[40]

Of special significance to future claimants under the Act was the court's analysis and evaluation of Polly Tallarico's ability to comply with "reasonable safety requests of the airline personnel."[41] TWA attempted to justify its behavior by referring to the many physical challenges handicapped passengers such as Polly face and the safety concerns purportedly arising from those challenges.[42] The Eighth Circuit, however, broadened the focus of its inquiry to include evidence that demonstrated Polly's accomplishments in attempting to overcome her handicap. The court noted, for example, that Polly has normal intelligence, is able to move about on her own, and that she had a variety of methods for communicating her needs and/or responding to instructions from air-

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to whether particular handicaps did or did not prevent a person from being an 'otherwise qualified handicapped individual.' " *Tallarico I*, 693 F. Supp. at 789. However, the legislative history of the Act made it clear that the term was intended to be consistent with the Department of Transportation's definition in 14 C.F.R. § 382.3(c) (1988). *See Tallarico II*, 881 F.2d at 569 and *infra* notes 38-39 and accompanying text. The trial court used this definition in its instructions to the jury. *See Tallarico I*, at 789.

37. 881 F.2d at 569.

38. *Id.*; *see* S. Rep. No. 400, 99th Cong., 2d Sess. 4, *reprinted in* 1986 U.S. Code Cong. & Admin. News 2328, 2332.

39. 14 C.F.R. § 382.3(c) (1988). There was no dispute that Polly had tendered payment for the flight or that her carriage would not violate FAA regulations.

40. 881 F.2d at 569.

41. *Id.*

42. TWA's position on this issue is indicative of the widespread stereotypes regarding the ability of disabled persons to engage in "normal" activity. For example, the trial court stated that Polly was "wheelchair bound," despite the evidence that she climbs in and out of her wheelchair without assistance, she can walk on her knees, crawl, climb up and down stairs and perform numerous tasks without any assistance whatsoever. *See Tallarico I*, at 789. Furthermore, Polly regularly participates in swimming, skiing and many other physically challenging activities.

line personnel.[43] Having concluded that Polly was capable of complying with reasonable safety requests, the court held that she was an "otherwise qualified handicapped individual."[44]

This type of analysis, which considers the abilities of the individual, rather than merely the disabilities, is clearly necessary to carry out the spirit of the Act and to insure that the law will be available to those individuals who are most in need of its protection. Unless airlines are willing to engage in a case-by-case evaluation, individuals will too often be judged on appearances, or on the basis of misinformation, rather than on their ability to overcome handicaps. This type of discrimination is wholly unrelated to the safety concerns which the air carriers insist underlie their regulations.

Although the airline industry continues to insist that it alone is capable of deciding whether or not a particular passenger represents a safety threat, the result is that too often airline representatives fail to make an objective, individualized determination of the issue. Instead, as in Polly's case, snap judgments are often made without any attempt to evaluate the individual, even in the face of airline policies to the contrary.[45] Despite the conceded problems, the airline industry is fighting to retain its unilateral power to determine which individuals are fit to travel.[46] An essential element of any meaningful judicial review of an airline's decision with respect to carriage of handicapped passengers must include the same

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43. 881 F.2d at 569.

44. *Id.*

45. *See infra* note 84. The problem of inconsistent treatment is sometimes so severe that a passenger will complete one part of a trip unassisted and without incident, only to be told by the same airline that an attendant is required on the return trip. *See* Hunter & Layton, *supra* note 6, at 37-38.

46. To this end, the Air Transport Association of America recently petitioned the Federal Aviation Administration to issue a rule establishing air carrier authority to refuse service, to require a passenger to be accompanied by an attendant, and to restrict certain seats. *See* FAA Summary Notice No. PR-89-4, 54 Fed. Reg. 19,388 (1989). The authority to restrict "certain seats" refers to one of the most controversial issues in air travel today. The airline industry has consistently asserted that airlines should be allowed to prohibit persons with disabilities from sitting in certain "exit row" seats. Groups representing the disabled counter that this practice is demeaning and unrelated to any valid safety concerns. When members of both groups convened to try to compromise on rules to be promulgated under the ACAA, the issue of exit row seating proved to be the sticking point which led to the eventual breakdown of the talks. *See* 53 Fed. Reg. 23,574 (1988). On March 13, 1989, the FAA published a notice of proposed rule-making on this subject. 54 Fed. Reg. 10,484 (1989) (to be codified at 14 C.F.R. pts. 121 & 135) (proposed Mar. 13, 1989). The proposed rule requires the airlines to determine the "suitability" of any person it allows to sit in an exit row. *Id.* at 10,494 (to be codified at 14 C.F.R. § 121.585). "Suitability" is supposed to be determined "in a non-discriminatory manner consistent with the requirements of this section, by persons designated in the [airline's] operations manual." *Id.* The purported purpose of the rule is to in-

kind of balanced, individualistic evaluation the Eighth Circuit conducted in *Tallarico*.

The appellate court then turned to the second factor in the *Cort* analysis, namely whether there was any indication of legislative intent either to create a private remedy or to deny one.[47] The court first noted that, as discussed above,[48] the Air Carrier Access Act was Congress's response to the *Paralyzed Veterans* case, in which the Supreme Court had severely limited the scope of the Rehabilitation Act of 1984.[49] Additionally, the Federal Aviation Act, which contained a general prohibition against unfair preferences, had consistently been held to create a private cause of action.[50] The court further noted that the Act was patterned after section 504 of the Rehabilitation Act of 1973, which implied a private cause of action.[51] The court concluded that the Congress's intent was to allow individuals to sue under the Act for redress of discriminatory airline practices.[52] Thus, after summarily disposing of the third and fourth factors,[53] the court concluded that an implied, private cause of action does exist under the Air Carrier Ac-

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sure that individuals seated in the exit row are capable of performing a number of evacuation activities which might be required in an emergency.

While this article was being drafted, on March 6, 1990, the Department of Transportation issued a Final Rule implementing the ACAA. *See* 55 Fed. Reg. 8008 (1990) (to be codified at 14 C.F.R. pt. 382) (effective Apr. 5, 1990). On the same day, the Federal Aviation Administration issued its Final Rule regarding exit row seating. *See* 55 Fed. Reg. 8054 (1990) (to be codified at 14 C.F.R. pts. 121 & 135).

These rules do not represent a complete victory for either side of this controversy. On the one hand, the Department of Transportation's rule substantially limits air carriers' discretion to adopt discriminatory policies which are purportedly safety-based. In effect, the rule prohibits any such policy which is not *required* by a specific Federal Aviation Administration safety regulation. This should help to eliminate many of the inconsistent policies previously encountered by passengers who transfer from one airline to another or even between flights of the same airline. *See* Hunter & Layton, *supra* note 6, at 37. The rule also specifically limits the situations in which an air carrier may require a passenger to travel with an attendant. 55 Fed. Reg. 8029-32 (1990) (to be codified at 14 C.F.R. § 382.35).

On the other hand, the FAA rule gives air carriers discretion to prohibit handicapped passengers from sitting in exit row seats if the carrier determines that the passenger is unable to perform certain objective, non-discriminatory tasks related to exiting the aircraft. 55 Fed. Reg. 10,495-96 (1990) (to be codified at 14 C.F.R. § 135.127).

47. *Tallarico II*, 881 F.2d at 569.

48. *See supra* note 10 and accompanying text.

49. *Id.* at 569-70 (citing 477 U.S. 597, 605-06 (1986)).

50. *Id.* at 570. *See* Hingson v. Pacific Southwest Airlines, 743 F.2d 1408 (9th Cir. 1984); Smith v. Piedmont Aviation Inc., 567 F.2d 290 (5th Cir. 1978); Nader v. Allegheny Airlines, Inc., 512 F.2d 527 (D.C. Cir.), *rev'd on other grounds*, 426 U.S. 299 (1975) (all recognizing a private cause of action under the FAA).

51. 881 F.2d at 570. *See* 29 U.S.C. § 794 (1988); *see, e.g.*, Miener v. Missouri, 673 F.2d 969 (8th Cir.), *cert. denied*, 459 U.S. 909 (1982).

52. 881 F.2d at 570.

53. *Id.*

cess Act.[54]

B. Proper Measure of Damages

Finally, the appellate court turned to the issue of the proper measure of damages under the Air Carrier Access Act.[55] The trial court had decided that damages for emotional distress were not recoverable under the Act "because the Air Carrier Access Act is an anti-discrimination statute, as a matter of law, emotional distress damages are not recoverable for violations of the Act."[56] In support of its decision, the trial court pointed to three federal antidiscrimination statutes under which emotional damages are not allowed:[57] the Equal Employment Opportunity Act of 1972 (Title VII);[58] the Age Discrimination in Employment Act of 1967;[59] and the Rehabilitation Act of 1973.[60]

On appeal, the Tallaricos argued that these statutes were not dispositive, since each contained a specific enumeration of remedies available thereunder.[61] Conversely, the Air Carrier Access Act does not enumerate the remedies Congress specifically envi-

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54. *Id.*

55. *Id.* at 570-71.

56. 693 F. Supp. 785, 790-91.

57. *Id.* at 790-91 (citing Muldrew v. Anheuser Busch, Inc., 728 F.2d 989, 992 n.2 (8th Cir. 1984) (no emotional distress damages in Title VII actions); Fiedler v. Indianhead Truck Lines, Inc., 670 F.2d 806, 810 n.3 (8th Cir. 1982) (no emotional distress damages allowed in ADEA actions); Bradford v. Iron County C-4 School Dist., 37 Empl. Prac. Dec. (CCH) para. 35,404 (E.D. Mo. 1984) (no emotional distress damages in Rehabilitation Act actions); Martin v. Cardinal Glennon Memorial Hosp., 599 F. Supp. 284, 284 (E.D. Mo. 1984)).

58. 42 U.S.C. § 2000(e) (1982 & Supp. V 1987) [hereinafter Title VII].

59. 29 U.S.C. §§ 621-624 and 631 (1988) [hereinafter ADEA].

60. 29 U.S.C. §§ 701-796i (1988).

61. 881 F.2d at 570. For instance, Title VII, the general federal prohibition on employment discrimination, provides in part, that: "It shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . ." 42 U.S.C. § 2000e-2(a)(1) (1982). 42 U.S.C. § 2000e-5(g) specifically provides for injunctive relief, as well as reinstatement and back pay for a period of not more than two years.

Likewise, the ADEA, 29 U.S.C. §§ 621-624 and 631 (1982 & Supp. V 1985), prohibits employment discrimination on the basis of age, with regard to employees between 40 and 70 years of age. *See* 29 U.S.C. § 631. The ADEA incorporates the remedial provisions of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 216(b) (1988), which specifically provides for the recovery of unpaid minimum wages and overtime compensation, as well as an equal, additional amount as liquidated damages. *See* 29 U.S.C. § 626(b) (1988).

The Rehabilitation Act of 1984, 29 U.S.C. §§ 701-796i (1988), incorporates the remedies available under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5 (1982), which provides remedies similar to those available under Title VII. *See* 29 U.S.C. § 794a(a)(2) (1988); Bradford v. Iron County C-4 School Dist., 37 Empl. Prac. Dec. (CCH) para. 35,404 at 1301-02 (E.D. Mo. 1984).

sioned.[62] Additionally, the statutes the trial court cited deal primarily with employment discrimination, an area in which damages are readily susceptible to quantification in the form of reinstatement, back pay, or similar items. The damage the disability discrimination in the *Tallarico* case caused is more difficult to quantify.[63] The adverse impact of disability discrimination manifests itself through the victim's emotional well-being and self-esteem more severely than on his or her pocketbook. For example, it is relatively easy to determine the price of an airline ticket or the cost of securing alternate transportation. Yet, the emotional damage done to a thirteen-year-old girl, who is told that she is not fit to travel alone and is then left to fend for herself in an airport for over ten hours, may be less easily ascertainable, but is nonetheless real.[64] The $1,350 the trial court awarded may have restored the financial loss, but it fell far short of restoring Polly's self-respect, dignity and peace of mind. As a deterrent, the award did virtually nothing to dissuade airlines from the same, or worse, behavior in the future. In short, the trial court's ruling emasculated the Act both as a remedial tool and as a deterrent to future discrimination.

Furthermore, the premise underlying the district court's decision that emotional damages are unavailable, as a matter of law, under federal antidiscrimination statutes, was erroneous.[65] As the Tallaricos pointed out on appeal, it is well established that damages for emotional distress are available under 42 U.S.C. § 1983,[66] which provides a remedy for individuals who are deprived of their constitutional rights.[67] Damages for emotional distress are also al-

62. It is a well-settled principle of statutory construction that if a statute sets forth a specific remedial structure, courts should be reluctant to imply any other remedies, absent a clear legislative intent to the contrary. *See* Bailey v. Federal Intermediate Credit Bank, 788 F.2d 498, 500 (8th Cir.), *cert. denied*, 479 U.S. 915 (1986).

63. *Cf. Bradford*, 37 Empl. Prac. Dec. (CCH) para. 35,404, at 1302. (court discusses insufficiency of traditional employment discrimination remedies in cases of educational discrimination).

64. The Tallaricos presented substantial evidence regarding the emotional impact the incident had on Polly. 881 F.2d 566, 571 (8th Cir. 1989). The Tallaricos introduced evidence that Polly was visibly upset during the entire incident at the airport. In addition, several observers noted a marked change in Polly's behavior after the incident. Polly was angry and upset about the situation and became more quiet and withdrawn. *Id.* An official at Polly's school testified that after the incident Polly spent a great amount of time alone by her bed after school, and that Polly never regained her normal, happy disposition before the end of the school term. *Id.*

65. 881 F.2d at 570.

66. 42 U.S.C. § 1983 (1982).

67. Carey v. Piphus, 435 U.S. 247, 263-64 (1978).

lowed under 42 U.S.C. § 1982,[68] which ensures all citizens equal rights with regard to ownership of property,[69] and under the Fair Housing Act,[70] which prohibits discrimination in the provision of housing.[71] The *Tallarico* appellate court concluded that: "We believe that the purpose and operation of the ACAA are more closely analogous to section 1983 than Title VII, the ADEA and the Rehabilitation Act. Consequently, we conclude that emotional distress damages are allowable under the ACAA."[72]

Having concluded that emotional distress damages were legally cognizable under the Air Carrier Access Act, the court next discussed the burden of proof necessary to establish such damages. Relying primarily on Missouri state law, the district court had held that the Tallaricos failed to meet their burden of proof for damages.[73] The trial court stated that, in order to prove emotional damages, the plaintiff must introduce expert medical testimony establishing that the emotional injury was of sufficient severity as to be medically significant.[74] The appellate court found that the lower court's standard was overly restrictive, noting that " '[b]ecause of the difficulty of evaluating emotional injuries, courts do not demand precise proof to support a reasonable award of damages for such injuries.' "[75] Rather, the court reasoned, damages for emotional distress need only be supported by competent evidence, which may take the form of a third party's observation of the plaintiff's behavior.[76] The court concluded that sufficient evidence existed to support the jury's original award to the Tallaricos of $80,000.[77] This holding eliminates the often impossible burden of proving the existence of medically diagnosable trauma in order to recover damages for emotional distress under the Act. It is significant that the Eighth Circuit evaluated the plaintiff's burden of proof for emotional damages by referring to federal stan-

68. 42 U.S.C. § 1982 (1982).

69. Seaton v. Sky Realty, Inc., 491 F.2d 634 (7th Cir. 1974).

70. 42 U.S.C. §§ 3601-3631 (1982).

71. 42 U.S.C. § 3604 (1982); Stewart v. Furton, 774 F.2d 706 (6th Cir. 1985). The court in *Stewart* stated that "damages from constitutional torts would lie for a wide array of intangible 'dignitary interests.' " *Id.* at 710 (quoting Brandon v. Allen, 719 F.2d 151, 155 (6th Cir. 1983), *rev'd on other grounds sub nom.* Brandon v. Holt, 419 U.S. 464 (1985)).

72. 881 F.2d at 571.

73. *Tallarico I*, 693 F. Supp. at 791.

74. *Id.* (citing Bass v. Nooney, 646 S.W.2d 765, 772-73 (Mo. 1983)); State *ex rel.* Benz v. Blackwell, 716 S.W.2d 270 (Mo. Ct. App. 1986).

75. 881 F.2d at 571 (quoting Block v. R.H. Macy & Co., 712 F.2d 1241, 1245 (8th Cir. 1983)).

76. 881 F.2d at 571.

77. *Id.*

dards.[78] The decision to apply federal law will ensure that plaintiffs suing under the Act face a uniform burden of proof on this issue, thus avoiding the uncertain and inconsistent results that occur if damages depended on the law of the forum state.

V. Remaining Questions

Although the Eighth Circuit opinion in *Tallarico* clarifies several major issues relating to the Air Carrier Access Act, important questions remain unanswered. For instance, the court declined to determine whether or not punitive damages are available under the Act.

Punitive damages serve an important deterrent function, especially vital in the area of antidiscrimination statutes,[79] and should be allowed under the Act. In the past, courts have recognized the importance and propriety of affording discrimination victims the right to punitive damages. For instance, under the Federal Aviation Act,[80] the precursor to the Air Carrier Access Act, courts acknowledged the role of punitive damages in the discrimination context. One California federal court noted that "it is the vindication of [a plaintiff's rights] as a passenger, and the need to protect the rights of every air passenger from future encroachment, which warrants the assessment of damages over and above the passenger's actual injury."[81]

A second question left unanswered by *Tallarico* is, assuming that punitive damages are recoverable under the Act, what must the plaintiff prove in order to recover those damages? The appellate court upheld the trial court's decision that, as a matter of law, the Tallaricos had presented insufficient evidence to present the issue of punitive damages to the jury.[82] In so holding, the court of appeals implicitly concluded that, based on the evidence presented, no reasonable inference could sustain a finding that TWA acted with " 'malice, gross negligence, willful or wanton misconduct, or reckless disregard' for the rights of the plaintiff."[83] This result ig-

78. *Id.* (citing Carey v. Piphus, 435 U.S. 247, 264 (1978)).

79. *See infra* text accompanying note 81.

80. 49 U.S.C. § 1374(b) (1982). This statute provides that: "No air carrier or foreign air carrier shall make, give, or cause any undue or unreasonable preference or advantage to any particular person . . . or subject any particular person . . . to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

81. Wills v. Trans World Airlines, Inc., 200 F. Supp. 360, 367 (S.D. Cal. 1961).

82. 881 F.2d at 572.

83. *Id.* at 571 (quoting Garza v. City of Omaha, 814 F.2d 553, 556 (8th Cir. 1987) and citing Mississippi Lofts, Inc. v. Lexington Ins. Co., 841 F.2d 251, 253 (8th Cir. 1988)).

nores the fact that TWA did not even try to follow its own written regulations.[84] Certainly the fact that an air carrier establishes written procedures for treatment of handicapped travelers, and then ignores those procedures when they become inconvenient,[85] should be sufficient to allow a jury to find at least gross negligence, and therefore award punitive damages.

Punitive damages should not be awarded as a matter of course. However, air carriers must be made to realize that they cannot ignore the rights of any passenger with impunity. Punitive damages serve the important function of punishing the offender, while deterring future discriminatory conduct.[86] When a plaintiff presents substantial evidence tending to establish the air carrier's reckless or willful indifference to the passenger's rights, the issue should be submitted to the jury in order to carry out the important deterrent purposes of the Act. Too often, the rights, needs and personal worth of individuals are ignored because people choose not to look beyond a wheelchair or a cane. If appeals to human decency and equality go unheeded, at least an appeal to the pocketbook, in the form of punitive damages, will force the offenders to take notice and, like it or not, begin to treat people as individuals, not as handicaps.

VI. Conclusion

The promise of equal access to air transportation in the Air Carrier Access Act can never be realized unless the courts are willing to send a strong message to the airlines that the type of discriminatory treatment inflicted on Polly Tallarico and countless other physically and mentally challenged air travelers will not be tolerated. That message must include the real possibility that in cases of willful or reckless disregard of the individual's rights, the air carrier will be subject to substantial sanctions, including both

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84. For instance, TWA's own Passenger and Services manual provides:

> in case of any doubt as to the passenger's capability of expeditiously moving to an exit without assistance, the passenger will be required to demonstrate privately the capability of moving from one chair to another. If he/she can do so he/she will be deemed capable of expeditiously moving to an exit without assistance.

At trial it was undisputed that TWA did not even attempt to comply with this regulation. The new rule, promulgated by the Department of Transportion on March 6, 1990, requires air carriers to document the steps taken to evaluate a passenger's ability to comply with safety rules. *See supra* note 46.

85. There was some evidence that the TWA personnel did not go to greater lengths to ascertain Polly's ability to travel unaccompanied because they did not want to be bothered with such matters during the Thanksgiving Day holiday rush. Trial Transcript Vol. 1, at 117, 168.

86. Memphis Community School Dist. v. Stachura, 477 U.S. 299, 306 n.9 (1986).

damages for emotional distress and punitive damages. The *Tallarico* decision has made great strides towards effectuating the purposes of the Act. It remains to be seen whether the statute's guarantee of equal access to air transportation will be fully enforced.