RESOLVED, That the American Bar Association urges Congress to amend the Air Carrier Access Act, 49 U.S.C. § 41705 (1986), to establish a private right of action and to provide equitable and legal relief, including compensatory and punitive damages, as well as reasonable attorneys’ fees, reasonable expert fees, and the costs of the action to plaintiffs who prevail in civil discrimination actions.
I. Introduction

In today’s global economy, air travel is vital for everyone—including individuals with disabilities—to fully participate in society, compete in the job market, and enjoy traveling for recreation and for visiting family and friends. The U.S. Census Bureau estimates that approximately 56.7 million people in the United States have one or more disabilities—18.7 percent of the population. People with disabilities experience discrimination by air carriers on the basis of their disabilities.

People with disabilities routinely report problems in gaining equal access to travel by commercial aviation. The most recent report from the Department of Transportation (DOT) indicates that in 2017, 34,701 complaints were filed with 35 domestic carriers and 155 foreign air carriers regarding disability-related incidents. The 35 U.S. carriers reported receiving 29,662 disability-related air travel complaints; the 155 foreign carriers, 5,039 complaints during the same time period. This compares with the previous year’s report showing 32,445 complaints, with 34 domestic carriers receiving 27,842 complaints and 150 foreign carriers receiving 4,603 complaints—an increase of 2,256 (6.5 percent). As in 2016, nearly half of the complaints reported (15,206) concerned the failure to provide adequate assistance to persons using wheelchairs. Other top complaints received by domestic carriers included seating accommodations and service animals. Since 2005, the number of complaints filed has been on the rise.

In 1986, Congress passed the Air Carrier Access Act (ACAA), which prohibits disability-based discrimination in air travel. The Act was passed in response to the U.S. Supreme Court’s ruling in Department of Transportation v. Paralyzed Veterans of America that air carriers are not subject to Section 504 of the Rehabilitation Act of 1973, as amended, unless they receive direct federal financial assistance. The need for widespread civil rights protections for people with disabilities in air travel led Paralyzed

Veterans of America and the broader disability community to advocate for the passage of a statute that would end disability-based discrimination.

Although the ACAA has improved the air travel experience of people with disabilities, they continue to encounter frequent and significant violations of their civil rights.\(^7\) Substantial barriers include

- damaged assistive devices;
- inaccessible aircraft, lavatories, and communication media;
- delayed assistance;
- inequitable treatment of service animals;
- inadequate disability cultural competency; and
- a lack of suitable seating accommodations.\(^8\)

For many years, federal courts recognized an implied private right of action to enforce the ACAA.\(^9\) This changed, however, in 2001 when the U.S. Supreme Court decided *Alexander v. Sandoval*.\(^10\) This decision served as the catalyst for several federal court's rulings that Congress's express provision of specific administrative and judicial methods of enforcing the ACAA indicates that Congress did not intend to create a private cause of action.\(^11\)

Currently, efforts are underway to amend the ACAA in order to create a private right of action. Legislation introduced in the 116th Congress (2019-2020) includes a private right of action for any person aggrieved by an air carrier’s violation of the ACAA or its regulations, and allows courts that find in favor of the plaintiff to award equitable and legal relief, including compensatory and punitive damages, as well as reasonable attorneys’ fees, reasonable expert fees, and the cost of the action to the plaintiff.\(^12\) This legislation finds that a private right of action is critical to the enforcement of civil rights.

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\(^8\) Id.


\(^10\) Id.; *Segalman v. Southwest Airlines Co.*, 895 F.3d 1219 (9th Cir. 2018); *Stokes v. Southwest Airlines*, 887 F.3d 199, 202–03 (6th Cir. 2018); *Lopez v. Jet Blue Airways*, 662 F.3d 593, 597 (2d Cir. 2011); *Boswell v. Skywest Airlines, Inc.*, 361 F.3d 1263, 1270 (10th Cir. 2004); *Love v. Delta Air Lines*, 310 F.3d 1347, 1354 (11th Cir. 2002).

\(^11\) Id.

\(^12\) Air Carrier Access Amendments Act of 2019, H.R. 1549, 116th Cong. (Introduced Mar. 6, 2019, referred to the Subcommittee on Aviation Mar. 7, 2019), Sec. 2(b)(6) & Sec. 4(e)(1)(B); Air Carrier Access Amendments Act of 2019, S. 669, 116th Cong. Sec. 2(b)(6) & Sec. 4(e)(1)(B) (Introduced Mar. 6, 2019, read twice and referred to the Committee on Commerce, Science, and Transportation on Mar. 6, 2019); Airline Passengers’ Bill of Rights S. 2341, 116th Cong. Title II, Sec. 210(d)(1) & Sec. 210(d)(1) & (2) (Introduced June 30,
This resolution calls for the same legal and equitable relief as the proposed legislation. A private right of action is essential to provide persons with disabilities meaningful redress for their losses, and for enforcement to have a deterrent effect. Otherwise these are rights without a remedy, which are not rights at all. Civil penalties levied against an airline do nothing to provide redress for individuals who have suffered a loss as a result of discrimination.

Awarding reasonable attorneys’ fees, reasonable expert fees, and costs are essential in order to minimize the cost of litigation to plaintiffs and maximize the incentive of potential defendants to stop discriminatory policies and practices. The reality is that the legal and financial resources of the air carriers are far beyond those of the aggrieved person. Thus, these amendments are necessary to bring the ACAA in line with its original spirit and purpose: the protection of the civil rights of air travelers with disabilities.

II. Current System for Enforcement of ACAA

Under the ACAA, the Aviation Consumer Protection Division (ACPD)—part of the DOT’s Office of the Assistant General Counsel for Aviation Enforcement and Proceedings (Enforcement Office)—is primarily responsible for enforcing the ACAA. The Act provides that aggrieved individuals may seek informal resolution of a complaint by contacting an airline carrier’s Complaint Resolution Official (CRO), filing a complaint with the airline, or filing a complaint either online or via letter with the ACPD.

At each airport a U.S. carrier services, and during all times the carrier is operating at the airport, it must make a CRO available, either in person or via telephone, to address complaints. Carriers are responsible for making passengers aware of the availability of a CRO if the passenger raises a disability-related concern and the carrier’s personnel do not immediately resolve the issue to the customer’s satisfaction. CROs that find that a violation has occurred must provide the complainant with a written statement setting forth a summary of the facts; what steps, if any, the carrier proposes to take in response to the violation; and the right of the complainant to pursue a DOT enforcement action. CROs who find no violation must provide the complainant with a written statement including a summary of the facts, the reasons for the determination, and the right to pursue a DOT

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2019, read twice and referred to the Committee on Commerce, Science, and Transportation on June 30, 2019).

13 NATIONAL COUNCIL ON DISABILITY, LEX FRIEDEN, POSITION PAPER ON AMENDING THE AIR CARRIER ACCESS ACT TO ALLOW FOR PRIVATE RIGHT OF ACTION 2, 4-6 (July 8, 2004), https://ncd.gov/publications/2004/July82004.


15 Id. § 382.151(b).

16 Id. § 382.151(c)(1).

17 Id. § 382.154(b).
enforcement action. Written statements must be provided to the complainant within 30 calendar days of the complaint.

Passengers may file a written complaint with the carrier within 45 days of the alleged incident. The carrier has 30 days to admit or deny that a violation occurred. The response must inform the complainant of the right to pursue a DOT enforcement action.

Air travelers who want to file a formal complaint with the DOT must do so in accordance with 14 C.F.R. Part 302’s administrative enforcement procedure. Those dissatisfied with the DOT’s response may file a petition for review with the United States Court of Appeals for the District of Columbia or in the United States Court of Appeals for the district in which the person lives. The reviewing court has “exclusive jurisdiction to affirm, amend, modify, or set aside any part” of the Secretary’s order, may order the DOT “to conduct further proceedings” and may “grant interim relief by staying the order or taking other appropriate action when good cause for its action exists.”

The Secretary of Transportation may issue an order to compel compliance with the ACAA, revoke an air carrier’s transportation certificate, and/or impose a penalty of up to $10,000 per violation payable to the government. Civil fines are rare and typically invoked only in cases involving a pattern or practice of discrimination. Particularly noteworthy for purposes of this resolution, the DOT is not authorized to order an air carrier to make restitution to a person with a disability who has suffered a physical or economic injury caused by disability-based discrimination in violation of the ACAA.

Initially, federal courts interpreted the ACAA as providing individuals with disabilities aggrieved by the actions of air carriers with an implied private right of action. However, that changed in 2001 when the U.S. Supreme Court decided Alexander v. 18 Id. § 382.154(c).
19 Id. § 382.154(d).
20 Id. § 382.155(c).
21 Id. § 382.155(d).
22 Id. § 382.155(d)(3).
23 Id. § 382.159(b); 14 C.F.R. pt. 302.
25 Id. § 46110(c).
26 Id. § 46101(a)(4).
27 Id. § 41110(a)(2)(B).
28 Id. § 46301(a)(5)(B).
29 Letter from Paralyzed Veterans of America and Allied Organizations (American Council of the Blind, Bazelon Center for Mental Health Law, Disability Rights Education & Defense Fund, Easterseals, National Council on Independent Living, National Disability Rights Network, National Multiple Sclerosis Society, United Spinal Association) to The Honorable Frank LoBiondo, Chairman, and Honorable Rick Larsen (Ranking Member), House Transportation and Infrastructure Committee, Subcommittee on Aviation, at 2-3 (Mar. 23, 2017).
Sandoval, which restricted the circumstances in which a court could determine the existence of an implied private right of action under a federal statute. Sandoval held that private rights of action to enforce federal law must be created by Congress, and statutory intent is determinative in deciding whether a statute creates not just a right but also a private remedy. Based on Sandoval, the Eleventh Circuit held that the ACAA does not grant litigants a private right of action. The Tenth Circuit agreed. The Second Circuit, Fifth Circuit, and Ninth Circuit have also held that the ACAA does not provide a private right of action.

III. Need for Resolution

Private Right of Action

Generally, the DOT pursues an enforcement action against a carrier on the basis of a number of complaints from which it can infer a pattern or practice of discrimination. As resources permit, the DOT will pursue an enforcement action where one or a few complaints describe particularly egregious conduct that is supported by adequate evidence.

This enforcement system provides no redress to the individual who suffers discrimination under the ACAA. Although a complaint to the DOT may eventually result in the carrier being fined—which is rare—it does not reimburse the individual complainant for their loss. For instance, in 2017 the DOT issued a consent order finding that American Airlines had violated the ACAA by failing to properly document the fact that a passenger was traveling with a service animal, and ordered the airline to implement new training for all gate and reservation agents within 30 days to avoid similar documentation problems in the future. The passenger, who had reserved an airline ticket as a passenger with a service animal, was asked to deboard the plane, which he claimed aggravated his post-traumatic stress disorder. Yet, he received no remedy.

In contrast to the ACAA, other federal civil rights statutes include both a private right of action by aggrieved individuals, as well as a fee-shifting provision to serve as incentive for the enforcement of important legal rights. As set forth in this resolution, the ACAA should be amended to provide a private right of action. By doing so, Congress will not only strengthen the protection of civil rights of persons with disabilities, but also bring the ACAA into conformity with similar civil rights laws. As the National Council on Disability

32 Id. at 286.
33 Love v. Delta Air Lines, 310 F.3d 1347, 1359 (11th Cir. 2002).
34 Boswell v. Skywest Airlines, Inc., 361 F.3d 1263, 1265 (10th Cir. 2004).
35 Lopez v. Jet Blue Airways, 662 F.3d 593 (2d Cir. 2011).
36 Stokes v. Southwest Airlines, 887 F.3d 199 (5th Cir. 2018).
37 Segalman v. Southwest Airlines Co., 895 F.3d 1219 (9th Cir. 2018).
38 Id.
aptly noted in 1999, “[t]he ultimate test of any civil rights law is the extent to which people in the protected class can count on the law for real protection.”41 By amending the ACAA to allow for a private right of action, “Congress will be ensuring that meaningful redress is available to victims of discrimination,” and that disability-based discrimination by air carriers will be deterred.42

**Fee-Shifting Provision**

More than 150 federal statutes include provisions entitling a successful plaintiff in litigation to recover attorneys’ fees to encourage lawsuits considered in the public interest.43 “If successful plaintiffs were routinely forced to bear their own attorneys’ fees, few aggrieved parties would be in a position to advance the public interest by involving the injunctive powers of the federal courts.”44 In the civil rights context, fee-shifting statutes provide for complete enforcement of rights Congress has deemed worthy of special protection.

Unless the ACAA is amended to authorize an award of reasonable attorneys’ fees, reasonable expert fees, and costs to plaintiffs who succeed on a private right of action, the cost of filing an ACAA lawsuit will serve as a deterrent to potential plaintiffs. People with disabilities live in poverty at more than twice the rate of people without disabilities.45 The legal and financial resources of the air carriers are far beyond those of people with disabilities.

Civil rights lawsuits of this nature often involve significant legal issues, but relatively small monetary amounts. As a result, lawyers have little financial incentive to take such cases on a contingency basis absent an ability by a prevailing plaintiff to recover attorneys’ fees. “The importance of private rights of action as a means of implementing and enforcing public policy has long been recognized in a wide variety of areas. Where the interests advanced by private litigation vindicate important public policies, Congress often authorizes attorney fee awards to remove some of the disincentives for public interest litigation.”46 Amendment of the ACAA to include a provision allowing a successful complainant to recover reasonable attorneys’ fees, reasonable expert fees, and costs would not only encourage individuals protected by the ACAA to enforce their civil rights,

42 **NATIONAL COUNCIL ON DISABILITY, supra** note 13, at 4.
46 Percival & Miller, *supra* note 43, at 239.
but also create a credible threat of enforcement against airlines, encouraging them to comply with the requirements of the ACAA.

IV. Conclusion

There is a dire need for Congress to amend the ACAA, and the ABA can play an instrumental role toward that end by adopting this Resolution.

As the national representative of the legal profession, the ABA has a long history of championing equal rights. In particular, the ABA has a policy that all Americans should have access to the courts. One of the ABA’s missions is to advance the rule of law, which it carries out in part by “assur[ing] meaningful access to justice for all persons”, including access to the courts, “promot[ing] full and equal participation in the justice system by all persons,” and eliminating bias in the justice system.47

The ABA has a responsibility to take a leadership role on the important civil rights issues that are the subject of this resolution. Adoption of this resolution would demonstrate the Association’s commitment to the protection of the civil rights of individuals with disabilities, and set a strong example for other organizations to support legislation to strengthen enforcement of the ACAA. Adoption of the resolution further fosters the ABA’s goal of increasing diversity in the legal system by championing the right under federal law for individuals with disabilities to be free from discrimination during air travel and to have meaningful redress for violations of the ACAA.

Respectfully submitted,

Denise R. Avant
Chair, Commission on Disability Rights
February 2020

47 www.americanbar.org/about_the_abab/aba-mission-goals.html.
GENERAL INFORMATION FORM

Submitting Entity: Commission on Disability Rights

Submitted By: Denise R. Avant, Chair, Commission on Disability Rights

1. Summary of Resolution(s). This resolution calls on Congress to amend the Air Carrier Access Act, 49 U.S.C. § 41705 (1986), to establish a private right of action and provide equitable and legal relief, including compensatory and punitive damages, as well as reasonable attorneys’ fees, reasonable expert fees, and the costs of the action to plaintiffs who prevail in civil discrimination actions.


3. Has this or a similar resolution been submitted to the House or Board previously? Yes in August 2018, but we withdrew the resolution to work with airline representatives from the Tort Trial & Insurance Practice Section and Air & Space Law Forum.

4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption? None

5. If this is a late report, what urgency exists which requires action at this meeting of the House? N/A


7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates. The policy will allow the ABA to comment on and encourage current and proposed legislation amending the Air Carrier Access Act, as well as interpretations thereof.

8. Cost to the Association. (Both direct and indirect costs) None

9. Disclosure of Interest. (If applicable) None
10. **Referrals.**
   - Tort Trial & Insurance Practice Section
   - Air & Space Law Forum
   - Business Law Section
   - Litigation Section
   - Civil Rights and Social Justice Section
   - Commission on Law and Aging

11. **Contact Name and Address Information.** (Prior to the meeting. Please include name, address, telephone number and e-mail address)
    Amy Allbright, Director
    ABA Commission on Disability Rights
    1050 Connecticut Ave., NW, Ste. 400
    Washington, DC 20036
    202-662-1575
    amy.allbright@americanbar.org

12. **Contact Name and Address Information.** Please include best contact information to use when on-site at the meeting. *Be aware that this information will be available to anyone who views the House of Delegates agenda online.*
    Denise R. Avant, Chair
    Commission on Disability Rights
    773-991-8050
    davant1958@gmail.com
EXECUTIVE SUMMARY

1. Summary of the Resolution
   This resolution calls on Congress to amend the Air Carrier Access Act, 49 U.S.C. § 41705 (1986), to establish a private right of action and provide equitable and legal relief, including compensatory and punitive damages, as well as reasonable attorneys’ fees, reasonable expert fees, and the costs of the action to plaintiffs who prevail in civil discrimination actions.

2. Summary of the Issue that the Resolution Addresses
   People with disabilities routinely report problems in gaining equal access to travel by commercial aviation. For many years, federal courts recognized an implied private right of action to enforce the ACAA. This changed when the U.S. Supreme Court decided Alexander v. Sandoval, 532 U.S. 275 (2001). This decision served as the catalyst for several federal circuit courts to find that the ACAA does not provide for a private right of action.

   However, a private right of action is essential to effectively enforcing the civil rights of persons with disabilities who suffer discrimination by providing them with meaningful redress for their losses. Civil penalties levied against an airline do nothing for individuals who have suffered a loss as a result of discrimination. Plaintiffs who prevail in a civil action brought under the ACAA should be entitled to obtain equitable and legal relief, including compensatory and punitive damages. Further, for the private action to benefit claimants, it must be accompanied by a statutory right to reasonable attorneys’ fees, reasonable expert fees, and costs in order to minimize the cost of litigation to plaintiffs and maximize the incentive of potential defendants to stop discriminatory policies and practices.

3. Please Explain How the Proposed Policy Position will address the issue
   The policy position will allow the ABA to comment on and encourage current and proposed legislation amending the Air Carrier Access Act, as well as interpretations thereof.

4. Summary of Minority Views or Opposition Internal and/or External to the ABA Which Have Been Identified
   Tort Trial & Insurance Practice Section and Air & Space Law Forum do not support a private right of action under the ACAA.