07-1824

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

JOHN D. CERQUEIRA

***Plaintiff - Appellee*,**

v

AMERICAN AIRLINES, INC.

Defendant – Appellant.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

[Hon. William G. Young, U.S. District Judge]

Reply Brief of the Defendant - Appellant
AMERICAN AIRLINES, INC.

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES:

STATUTES, RULES AND REGULATIONS:

Code of Federal Regulations

SUMMARY OF THE ARGUMENT

Mr. Cerqueira's brief never answers the observation of the Air Transport Association, as *amicus curiae*, that the district court's jury instructions "stated the law as it applies outside the airline context, as if this were a run-of-the-mill case of employment discrimination or refusal of service in a hotel or restaurant." (ATA Amicus Br. p. 6).[1]

The ATA's observation crystallizes the problem with these jury instructions. If these instructions were correct, then 49 U.S.C. § 44902(b), which states that an air carrier may, consistent with federal regulations, "refuse to transport a passenger the carrier decides is, or might be, inimical to safety," becomes meaningless in any action alleging intentional discrimination, as all relevant anti-discrimination laws require intent. If these jury instructions were correct, the law will regard a jetliner before takeoff the same as if it were a factory floor, a hotel, or a restaurant insofar as unlawful discrimination claims are concerned. By enacting § 44902(b), Congress clearly recognized that an aircraft preparing for flight is not like a factory floor, hotel, or restaurant. Once the aircraft is in flight, there is no escape from security failures. The lives of the airline's other passengers, crew, and possibly hundreds on the ground are at stake.

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[1] Brief of Air Transport Association of America, Inc., as Amicus Curiae in Support of Defendant-Appellant American Airlines, Inc., and Reversal of the District Court's Decision, filed in this appeal.

The test first provided by *Williams v. TWA*, 509 F.2d 942, 948 (2d Cir.1975), captures the crucial distinctions. Juries in cases such as this should be instructed to consider only the information a Pilot-in-Command had at the time he made a decision to deny service, and they should be instructed there is no liability unless the pilot's decision was arbitrary or capricious. Mr. Cerqueira's entire argument, notwithstanding the case law eschewing hindsight in § 44902(b) cases, is fundamentally predicated on that notion. *See* the instruction given by the district court in *Cordero v. Cia Mexicana de Aviacion, S.A*., 681 F.2d 669, 671 n.2 (9th Cir.1982). American requested such an instruction, Req. Inst. 12; App. I: 170, but the district court declined to give it.

The rules proposed by Cerqueira and *amici* supporting him are simply unworkable. This is not a case in which Captain Ehlers came on board and arbitrarily ordered all Middle Eastern-looking passengers off. Captain Ehlers had his own unsettling experience with the pony-tailed man before boarding, which prompted him to ask a flight attendant to observe that passenger. Flight attendant Walling, with 37 years of experience, had her own troubling contact with Cerqueira before flight. During and immediately after the boarding of Flight 2237, the three passengers later removed for questioning came to the attention of each of the three flight attendants because of some display of unusual passenger behavior. Two other passengers reported their own concerns about these men to flight

attendants, who passed the concerns on to the pilot. Regardless whether there ultimately was an innocent explanation, the fact remains that the three passengers who had called attention to themselves through their own behavior were seated together in an exit row of the aircraft and reasonably seemed to be traveling together.

It may be true, as Cerqueira argues, that if one granulates each event in the unusual behavior of the three passengers and examines each event in isolation, no one particular behavior flashes danger. But that cannot be the test if aircraft are to be as safe as is feasible. A captain is entitled to take an unusual confluence of events into account. *See* Judge Weinfeld's opinion in *Zervignon v. Piedmont Aviation, Inc.*, 558 F.Supp. 1305, 1306 (S.D.N.Y.), *aff'd*, 742 F.2d 1433 (2d Cir. 1983) (table) (captain's decision "cannot be viewed in isolation separate from events that preceded it but in proper perspective as of the time of their occurrence and in relationship to one another").

Captain Ehlers did what he should have done. Likely remembering the events of another early morning at Boston Logan, he consulted about the unusual events of this particular morning at Boston Logan with crew members and ground personnel and then made a prudent decision to have these three passengers removed for questioning by police personnel trained in such tasks. He also had all other passengers and all baggage deplaned from Flight 2237 for re-screening and

the empty aircraft searched by dogs. Had Captain Ehlers' good faith concern that Flight 2237 faced a security threat proven accurate, American would not be before this Court and Captain Ehlers would have been hailed as a hero.

Cerqueira and *amici* supporting him suggest that Captain Ehlers should have departed the cockpit to confront the three passengers and conduct his own investigation of their backgrounds, intentions, and perhaps belongings. *First*, pilots are not trained for that. Rather, they are trained to complete checklists and other tasks in the cockpit that are necessary to prepare for safe flight. *See* App. II: 320, Tr. 47; 304, Tr. 142-45. *Second*, assume these three passengers had, in fact, been prepared to seize or destroy the aircraft. Would it be safer for the other passengers to have the pilot, or alternatively the State Troopers, confront the suspicious passengers and ask them to deplane for interrogation?

Cerqueira's attempted defenses of the district court's jury instructions miss the mark rather widely, and his attempted defense of the district court's admission of the DOT Consent Order proves American's points more than it helps Cerqueira.

ARGUMENT

I. THE DISTRICT COURT'S INSTRUCTIONS TO THE JURY WERE PREMISED UPON INCORRECT LEGAL PRINCIPLES.

A. Omission of § 44902(b) Instructions.

Mr. Cerqueira first claims the district court "instructed the jury to return a verdict for American if its treatment of Mr. Cerqueira was motivated by rational safety concerns rather than discrimination." (Cerqueira Br. p. 1). That simply is wrong. The jury instructions are in the Appendix Volume II at pages 390-398 and 412-414. American knows this Court will read them for itself, and those instructions plainly did not include the essential elements of the immunity granted air carriers by § 44902(b). In order to give full effect Congress' intent in enacting § 44902(b), a jury should be instructed to avoid hindsight bias and not let the fact that it turned out that plaintiff was not a terrorist affect the evaluation of whether the decision-maker held a good faith concern for safety.

The district court's instructions-even the portions of those instructions quoted in Mr. Cerqueira's brief-presented the question to the jury as an either-or situation. Was Cerqueira "treated differently" from other passengers on the plane because American discriminated against him because of an American employee's *perception* that he was Middle Eastern, *or* was he treated differently for safety reasons? *See* App. II: 394, Tr. 18-21; 412, Tr. 3. Despite both parties' requests for § 44902(b) instructions, the district court declined to instruct the jury that

American could not be held liable if Captain Ehlers acted from a non-arbitrary or capricious belief, based on the information the Captain had at the time, that the three passengers presented a safety risk, even if that later proved to be wrong.

The district court did mention American's obligations to operate safely, but it never instructed the jury how to give effect to those obligations in this factual setting as required by § 44902(b). Rather, the district court told the jury only that it was "entitled to consider" American's obligation to operate safely, without any mention of the deference given to the airline's safety decisions in the context of an airliner preparing to take off. The district court also mixed the mention of American's safety obligations with incorrect instructions on "cat's paw" liability and burden-shifting that effectively negated any fair opportunity for American to prevail. The most pertinent passage from the district court's instructions was as follows:

> And now we get to another issue. Not that he was treated differently by employees of American Airlines, but why. And in analyzing that why, you're entitled to consider that American Airlines is expected to operate its airlines with the primary goal of the safety and well-being of the traveling public; not just to make money, not just to keep a schedule, but to ensure the safety and well-being of the traveling public. Not only the people it invites on the plane and charges, but its flight crews and the people who it deals with. Those should be—we expect it and there's a bunch of government regulations that require it, those have to be the primary goals of the operation of the airline.
>
> Now, the airline wants to make a profit. Sometimes it does, sometimes it doesn't. That's perfectly lawful. We're all in business

of one sort or another. But we expect of American Airlines that they're going to behave themselves in a way that puts the safety of the traveling public and their employees first. But they cannot, they're forbidden by the law from acting to discriminate—let's use that word—to discriminate against someone based on their perception that that person is a certain race or certain ethnic heritage. If that's why they did what they did, that's forbidden by the law. And let's say that's why a lower-level person acted as she did in respect to this.

If that action is transformed into the action of the higher corporate people, if that's what drives the action of the higher corporate people, American's stuck with it because American should take care that they're not acting against a person based upon the perceived race or ethnicity. The law forbids that.

So, it's a factual issue. We have evidence on the one hand, we have the evidence on the other hand as to why people did what they did. Mr. Cerqueira bears the burden of proving by a fair preponderance of the evidence that he was intentionally discriminated against because of the perception of his race or ethnicity. That's the nub of it.

Now I'm going to come to the one piece that American Airlines may have to prove. Let's say that you come to think that one of the reasons—one of the reasons—not the only reason, maybe, but one of the reasons that was actuating, driving, informing people, persons, employees of American Airlines, one of the reasons was that person's perception of Mr. Cerqueira's race or ethnicity. That was one of the reasons.

Now, once you think that, if you really do think that, then American Airlines has got to prove by the same fair preponderance of the evidence, but now they've got to do the proving by the same fair preponderance, more likely to be true than not true, American Airlines has to prove to you: We would have done it anyway. There's other legitimate reasons, other appropriate reasons, reasons that had to do with the safety and care of the airline travelers and the American Airlines employees. If you think there was a forbidden reason in there.

> Now, if there's no forbidden reason in there, you're going to find for American Airlines, an end. But if you think there's a forbidden reason in there, then the burden shifts over to American Airlines. And if they would have done it anyway, if they would have behaved exactly the same way anyway for legitimate reasons, if they, American Airlines proves that, well, your verdict must be for American Airlines.

App. II: 394, Tr. 18-21.

The last three paragraphs quoted above told the jury, in effect, that if one of Flight 2237's flight attendants took her perception of Mr. Cerqueira's race or ethnicity into account in being suspicious of him, then the burden shifted to American to prove by a preponderance of the evidence that it did not act because of the flight attendant's perception. That burden simply cannot be reconciled with § 44902(b) or the *Williams* test, which give deference to the decision of the air carrier and require the plaintiff to prove that denial of passage was arbitrary or capricious. *See Williams*, 509 F.2d at 948.[2] The instruction the Ninth Circuit approved in *Cordero* placed the burden as follows: "On the other hand, if the passenger is excluded because the opinion of the pilot is arbitrary and capricious

[2] Mr. Cerqueira insists that the District Court's burden-shifting instructions "closely tracked the jury instruction approved by the Supreme Court in *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 96-97 (2003)." (Cerqueira Br. p. 25). Maybe so, but his argument provides another example showing how in this case, Title VII employment discrimination law was imported, without critical examination, into the different setting of this case, where more deference should have been given to the strong public policy stated in § 44902(b). The Supreme Court's opinion in *Desert Palace* was based on specific statutory language within Title VII, particularly 42 U.S.C. §§ 2000e-2(m) and 2000e-5(g)(2)(B). Those statutes do not apply outside the employment context.

and not justified by any reason or rational appraisal of the facts, then the denial of passage is discriminatory." 681 F.2d at 671 n. 2.

Pages 20 through 23 of Mr. Cerqueira's brief contend that the instructions the district court gave were more favorable than a *Williams* instruction because these instructions required Cerqueira to prove intentional discrimination. Again, Cerqueira would have had to prove intentional discrimination had he been denied service at a restaurant, and there were no safety concerns. Thus, Cerqueira's argument proves too much - it writes § 44902(b) off the books. Moreover, Cerqueira's argument ignores the burden-shifting and "cat's paw" aspects of the district court's instructions in this case. Under those instructions, when Cerqueira convinced the jury that one of the flight attendants took her perception of his race or ethnicity into account in forming her own opinion that he might be a safety risk, he thereby shifted the burden of proof to American.[3]

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[3] Cerqueira argues that he presented "direct evidence" of discriminatory intent by American's flight attendants. (Cerqueira Br. p. 54 & *see* p. 40). He cites "flight attendant reports making observations about foreign appearances, Middle Eastern passports, Arabic names, and heavy accents." (Cerqueira Br. p. 54). The flight attendants' reports, written after the incident was over, are in the record at App. II: 452-54 (longer report of Lois Sargent); 428-29 (Sally Walling); 431-33 (shorter report of Lois Sargent); and 434-36 (Amy Milenkovic). Milenkovic's report states that the pony tail man had a "heavy accent" (App. II: 435). Sargent's shorter report states the passengers "seemed to be foreign nationals (later confirmed/Middle East passports)," and Sargent's longer report states: "Review of the PAX manifest revealed that these 3 PAX's had Israeli passports but Arabic names" (App. II: 453). These statements in crew incident reports are merely *descriptions* of persons, like "Black Male" or "Hispanic female" in a police report.

Mr. Cerqueira asserts American failed to preserve error to the district court's refusal to instruct the jury to consider only the facts known by Captain Ehlers when his decision was made. *See* Cerqueira Br. pp. 22-24. That is plainly wrong. American requested an instruction, based on *Williams*, stating the precise point, Req. Inst. 12; App. I: 170 ("You must not rely on any facts disclosed in hindsight."). American also requested a supplemental instruction, based on *Dasrath v. Continental Airlines*, 467 F.Supp.2d at 446 & 447, stating: "If Captain Ehlers reasonably believed that something had taken place that warranted his actions -even if it had not - his reasonable belief is what is critical, not what actually took place." Req. Inst. 33, App. I: 204. American's counsel brought *Dasrath* and American's supplemental instruction based on *Dasrath* to the district court's attention at the end of a charge conference on the last day of evidence. App. II: 371, Tr. 83. The district court declined American's request to release charge to counsel for the parties before delivering it to the jury. App. II: 371, Tr. 83.

After the district court instructed the jury, but before the jury retired, American's counsel, Mr. Fitzhugh, objected to the absence of American's requested instructions:

They do not provide evidence that the flight attendants were motivated by discriminatory animus. *See Dasrath v. Continental Airlines, Inc.*, 467 F.Supp.2d 431, 446-47 (D.N.J. 2006).

MR. FITZHUGH: * * * I think the Court instructed that if there was information that flowed over to a decision-maker that was inaccurate or discriminatory, that American would be liable.

That's the cat's-paw, I believe, and we disagree with that.

THE COURT: Your rights are saved, but I do think that's the law.

MR. FITZHUGH: But Dasrath, your Honor, says even if the captain relied upon erroneous information –

THE REPORTER: I'm sorry?

MR. FITZHUGH: Dasrath. We'd like a Dasrath instruction.

THE COURT: I'm satisfied with the instruction.

MR. FITZHUGH: And 44902, your Honor, the arbitrary and capricious standard.

THE COURT: I'm not going to mention arbitrary and capricious. I've emphatically instructed about the duty of American to preserve its passengers and air crews. And that was a very forceful instruction and that's all you're getting.

MR. FITZHUGH: If you give a mixed motive instruction, your Honor, would you also relay the captain's decision-making authority?

THE COURT: I'm not going to pick out any particular person, but I am going to give a further mixed motive instruction.

MR. FITZHUGH: My rights are preserved?

THE COURT: They are.

App. II: 397, Tr. 31-32.

American adequately preserved its objections to the omission of all elements of § 44902(b) as described in *Williams* and *Dasrath* from the charge. Throughout his brief, Cerqueira relies on this Court's opinion in *Gray v. Genlyte Group, Inc.*, 289 F.3d 128, 133 (1st Cir.2002), for his claims of waiver of objections to the jury charge. He fails to note that *Gray* was decided under the pre-December 1, 2003, version of Fed.R.Civ.P. 51. American's requesting of instructions and objection to the absence of those instructions after the district court gave its charge preserved American's objections to the omission under Rule 51 as it existed in January 2007, the time of this trial. *See, e.g., Jelmoli Holding, Inc. v. Raymond James Fin. Serv., Inc.*, 470 F.3d 14, 20 (1st Cir.2006). *See* Fed.R.Civ.P. 51(d)(B).

B. The "Cat's Paw" Instructions.

Mr. Cerqueira and the *amici* supporting him have attempted to create straw men by contending that American seeks to have this Court hold that the doctrines of vicarious liability and *respondeat superior* do not apply to airlines. Clearly, American's argument, far more focused, is that the "cat's paw" instructions should not have been given in this situation, which should have been governed by § 44902(b).

As recently described by the Tenth Circuit, the term "cat's paw," in the employment discrimination context, "refers to a situation in which a biased subordinate, who lacks decision-making power, uses the formal decision maker as

a dupe in a deliberate scheme to trigger a discriminatory employment action." *EEOC v. BCI Coca-Cola Bottling Co.*, 450 F.3d 476, 484 (10th Cir.2006), *cert. dism'd*, 127 S.Ct. 1931 (2007). As stated by the Tenth Circuit, the cat's paw doctrine appears almost exclusively in employment discrimination cases.[4] Cerqueira has not cited any case, other than this one, in which the doctrine was applied in an airline refusal of service case, so Cerqueira seeks to have this Court approve the district court's extension of the doctrine into a new field.[5]

American's argument is that the "cat's paw" doctrine should not be applied in the circumstances presented here, where a Pilot-in-Command of a commercial aircraft, loaded and prepared for flight, makes a decision to deny service to an

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[4] Recent opinions, all of which involved employment discrimination, include *Brewer v. Bd. of Trustees*, 479 F.3d 908, 916-91 (7th Cir.2007), *petition for cert. filed* (No. 06-1694); *BCI Coca-Cola Bottling*, 450 F.3d at 484-488; *Cariglia v. Hertz Equipment Rental Corp.*, 363 F.3d 77, 87 (1st Cir.2004); *Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277, 286-91 (4th Cir.2004) (en banc); *Santiago-Ramos v. Centennial P.R. Wireless Corp.*, 217 F.3d 46, 55 (1st Cir.2000).

[5] Cerqueira points to authority stating that the cat's paw doctrine is based on common law agency principles, rather than negligence. Cerqueira Br. p. 30. So as so avoid distraction that would only serve to obscure the salient issues, American will not further engage in that theoretical debate except to point out that the district court's explanation of the doctrine to the jury in this case certainly sounded in negligence. The district court instructed: "If that action [of a lower-level employee] is transformed into the action of the higher corporate people, if that's what drives the action of the higher corporate people, American's stuck with it because *American should take care that they're not acting against a person based on the perceived race or ethnicity*. The law forbids that." App. II: 394, Tr. 20 (emphasis added). Mr. Cerqueira concedes that he never pursued a negligence theory. Cerqueira Br. at 31.

airline passenger in the moments before flight. The authority to make that decision resides, by law, in the Pilot-in-Command of the aircraft. *See* 14 C.F.R. § 91.3 ("The pilot-in-command of an aircraft is directly responsible for, and is the final authority as to, the operation of that aircraft.").

Cerqueira's attorney emphasized the captain's role in his questioning of Captain Ehlers at trial:

> Q. (By Mr. Godkin): And the captain of the plane is in charge of the plane, is he not?
>
> A. (By Captain Ehlers): Yes, sir.
>
> Q. And the captain is also in charge of the flight crew?
>
> A. Yes, sir.
>
> Q. The captain has ultimate responsibility for determining whether a passenger should be removed from a flight, is that correct?
>
> A. Yes, sir.

App. II: 296, Tr. 110.

There was no evidence that Captain Ehlers harbored, or was motivated by, a discriminatory animus when he made the decision to have the three passengers taken off Flight 2237 for questioning (or that Mr. Marquis harbored such intent when he denied these passengers rebooking based on what Marquis, in Dallas, had learned from Boston). Thus, Cerqueira sought to, and did, rely on the cat's paw doctrine to give Captain Ehlers' decision the appearance of having been infected

with the alleged discriminatory animus of one or more of the flight attendants who reported to him. Cerqueira does *not* assert that an allegedly biased flight attendant made the decision to remove him from the plane or denied him rebooking.

On page 40 of his brief, Cerqueira explains his theory of cat's paw liability as follows:

> [B]ecause the flight attendants thought it was important that their contemporaneous [actually after-the-fact] written reports include their concern that the three men were traveling together and had foreign appearances, Middle Eastern passports, Arabic names, and heavy accents, *the flight attendants likely expressed these concerns to Capt. Ehlers.* (Emphasis added).

For all of the reasons American and the ATA, as *amicus curiae*, have expressed in previously-filed briefs, the cat's paw doctrine cannot co-exist with § 44902(b). The captain is in command of the aircraft. The captain's is the only decision that counts. Flight attendants have no authority to refuse service. The captain must make safety decisions such as the one at issue in this case in a compressed period of time while occupied with other critically important pre-flight tasks. The captain's ability to observe the passengers is very limited, yet the risks of failing to recognize a clue or indication of a safety threat to his or her aircraft is grave, and largely incapable of remedy after the flight has commenced.

For all of these reasons, Congress decided in § 44902(b) to provide that air carriers "may refuse to transport a passenger . . . the carrier decides is, or might be, inimical to safety." The courts have glossed § 44902(b) only by stating that the

pilot must not decide arbitrarily or capriciously based on the information available to him or her at the time the decision is made. To impose the cat's paw doctrine on this decision fundamentally eviscerates § 44902(b). Under the district court's instructions, the pilot may not act on reports of events and concerns he or she receives from subordinate, experienced crew members, who have better opportunities personally to observe the passengers and reported events, for fear those reports may be tainted by some suppressed racial animus. Conversely, there are ample opportunities in the ordinary employment discrimination case for the employer's final decision-making authority to review an employee's file, interview the employee, and investigate subordinates' reports about an employee's alleged failures or misconduct. The busy Pilot-in-Command of a commercial airliner preparing for flight has none of those opportunities, and furthermore is not trained to conduct investigations of potential security threats. American requests the Court to reject use of the cat's paw doctrine in this case.

American would also point out that there exists a wide divergence among the Circuits about the particular circumstances that can raise, and then satisfy, the cat's paw doctrine. Specifically, the circuits differ as to the *degree* to which an allegedly biased subordinate must contribute to a superior's adverse employment decision before an employer may be held liable for the decision under Title VII. The Fourth Circuit, sitting *en banc*, has held that the allegedly biased subordinate

must become, in effect, the one principally or actually responsible for the adverse decision before Title VII liability may be imposed under the cat's paw doctrine. *Hill*, 354 F.3d at 291. The Fourth Circuit relied on the Supreme Court's observations in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), that there was evidence that Chesnut, the subordinate, was "principally responsible," or the "actual decisionmaker" behind the firing. 530 U.S. at 151-52. The Seventh Circuit recently announced a similar test, holding: "For a nominal non-decision-maker's influence to put an employer in violation of Title VII, the employee must possess so much influence as to basically be herself the true 'functional[] . . . decision-maker." *Brewer*, 479 F.3d at 917.

This Court's employment discrimination cases require proof that the allegedly biased subordinate "induced" or "influenced" the final decision-maker to act as he did. *See Azimi v. Jordan's Meats, Inc.,* 456 F.3d 228, 248 n. 14 (1st Cir.2006) ("induced"); *Cariglia,* 363 F.3d at 87 ("influences the decision"); *Santiago-Ramos*, 217 F.3d at 55 ("influence the decision-maker"). *See also Medina-Munoz v. R.J. Reynolds Tobacco Co.*, 896 F.2d 5, 10 (1st Cir.1990) ("The biases of one who neither makes nor influences the challenged personnel decision are not probative in an employment discrimination case.").

If this Court were to forge new ground by approving the use of the "cat's paw" instruction for air carrier denial of service cases such as this, it should impose

the heavier burden that the Fourth and Seventh Circuits, and arguably, the Supreme Court, have adopted for employment cases, which is that the biased subordinate must, in effect, become the principal decision maker. Although in American's view that would be an erroneous holding, it would do less harm to the public policy expressed by § 44902(b) than the lesser standard the district court provided the jury in this case.[6]

There is no evidence that an allegedly biased flight attendant usurped Captain Ehlers' command responsibility in this case to become the effective decision-maker.

II. IT WAS HARMFUL ERROR TO ADMIT THE DOT CONSENT ORDER.

As the Court evaluates whether admission of the DOT Consent Order (App. 455-59) was error under Federal Rules of Evidence 408, 404(b), and 403, American asks the Court to consider what Mr. Cerqueira says about the Consent Order on page 16 of his brief. He writes: "[c]ontrary to American's assertion that the punitive damages award should be vacated for insufficient evidentiary support, the Consent Order shows that such an award is necessary to punish and deter

[6] The district court instructed the jury that the burden of proof shifted to American if "one of the reasons—one of the reasons—not the only reason, maybe, but one of the reasons that was actuating, driving, informing, people, persons, employees of American Airlines, one of the reasons was that person's perception of Mr. Cerqueira's race or ethnicity. That was one of the reasons." App. II: 394, Tr. 20.

American's conduct." That statement reveals the use Cerqueira wanted to make, and did make, of the inadmissible DOT Consent Order. Obviously, he agrees the Consent Order was a highly significant piece of evidence in the jury room.

In other parts of Cerqueira's brief, he tries to justify the decision to admit the DOT Consent Order by claiming he needed it to prove that American, as a corporation, "was on notice that the type of discrimination alleged by Mr. Cerqueira is unlawful." Cerqueira Br. at 58. But he never shows how the existence of such "notice" was a disputed factual issue to be resolved by the jury in this case, or an element of any of Mr. Cerqueira's causes of action. There was no evidence that Captain Ehlers, any other member of the crew of Flight 2233, or Mr. Marquis was involved in any of the prior incidents described in the Consent Order, yet their actions were the only actions "by American" at issue before this jury. Furthermore, Cerqueira admits on page 58 of his brief, as is true, that "both of American's formal decision makers - Capt. Ehlers and Mr. Marquis -were aware that if a passenger was refused service because of his perceived race or ethnicity, such a refusal of service would violate civil rights laws." American never claimed before this jury that it was ignorant of the Nation's civil rights laws. Neither Captain Ehlers nor Mr. Marquis sought to justify their decisions at issue in this case by claiming ignorance of the law. There was simply no need to prove that

American, as a corporation, had "notice" of the law by admitting the DOT Consent Order.

Arguing for punitive damages, Cerqueira's counsel cleverly went beyond mere "notice" in his closing argument to the jury:

> Now, during the testimony we asked the decision-makers, Captain Ehlers and Mr. Marquis, whether on December 28, 2003, they were aware that if a passenger was refused service because of his race or ethnicity, would such – that such a refusal would violate civil rights laws. Both of them answered emphatically that they understood that.
>
> *Consider also the Department of Transportation consent order which has been entered as Exhibit 26.*
>
> *It shows that eight months before December 28, 2003, the government brought an enforcement action against American Airlines complaining of 11 separate instances where American Airlines engaged in behavior similar to that here and which the government alleged was unlawful discrimination*; thus, American Airlines was on notice that this kind of discrimination is illegal. American Airlines knew this kind of behavior is illegal but they did it anyway. That's reckless disregard for Mr. Cerqueira's civil rights. (Emphasis added).

App. II: 407-08, Tr. 73-74.

There can be little doubt that Cerqueira's counsel wanted to, and did, use the Consent Order to tell the jury that the Government said American committed, on eleven separate occasions, acts similar to what Cerqueira claimed in this case and that the Government had branded American's acts as unlawful. The Consent Order, itself, says the same thing, but it went even further. As described in American's principal brief, the Consent Order describes (App. II: 455-59), and

then states the DOT Enforcement Office rejected, safety and security defenses similar to those American presented in this case (App. II: 456 and n. 3).

The Consent Order also placed a misleading and incorrect statement of the law into the jury room. It says:

> Even though the Enforcement Office does not dispute that the American employees believed they were acting to ensure the safety and security of passengers and crew, the Enforcement Office believes some passengers were denied boarding or removed from flights in a manner inconsistent with the carrier's non-discrimination obligations under Federal law.

App. II: 457. Reading that, the jury could have concluded that it could and should find for Cerqueira even though it believed Captain Ehlers acted in good faith because it ultimately turned out that their good faith concerns about safety were, on this particular occasion, wrong.

III. THE EVIDENCE PRESENTED AT TRIAL WAS INSUFFICIENT AS A MATTER OF LAW TO PROVE A CASE OF UNLAWFUL DISCRIMINATION IN THE FACE OF § 44902(b).

For the reasons set forth at pages 52-58 of American's principal brief and pages 25 through 28 of the ATA's *amicus* brief, no reasonable jury, properly instructed, could have found on this evidence that the decisions of Captain Ehlers and Mr. Marquis were "arbitrary and capricious and not justified by any reason or rational appraisal of the facts, [and therefore their] denial of passage is discriminatory." *Cordero*, 681 F.2d at 671 n. 2.

Ultimately, Cerqueira's only arguments that Captain Ehlers acted intentionally with discriminatory animus are that the Captain "saw and heard the ponytailed passenger with the foreign accent and knew that the flight attendants thought Cerqueira was traveling with the ponytailed passenger." That the ponytailed passenger had some unidentified accent proves nothing. For all this record shows, fifty people on Flight 2233 spoke with accents or in a language other than English. That the flight attendants mistakenly believed that Cerqueira was traveling with the other two men proves only that the attendants were wrong in linking him in their minds with the other two men, not that they intentionally discriminated against him because of a perception (also wrong) that he was racially Middle Eastern. The racial discrimination statutes do not provide a cause of action to passengers who are denied passage because crew members make errors about who may be associated with whom.

There is no evidence that Mr. Marquis, in Dallas, had any information about Cerqueira's race or ethnicity when Marquis made the decision to deny reboarding. As a matter of law, Cerqueira failed to prove a case based on Marquis' decision. *See Pourghoraishi v. Flying J. Inc.*, 449 F.3d 751, 757 (7th Cir.2006) ("Of course, the defendants could not have discriminated against Pourghoraishi if they were unaware of his race . . . .").

Indeed, Cerqueira's evidence suffers from a fatal flaw that his brief repeatedly emphasizes. He says he was discriminated against only because the flight attendants *perceived* him to be Middle Eastern, when he was not. He summarized his case as follows: "if I hadn't looked like [the other two passengers] and if I hadn't happened to get seated next to them, it wouldn't have happened to me." (App. II: 278, Tr. 40-41). He says the same in his brief, writing: "In the end, the jury concluded that, but for the perception that Mr. Cerqueira was from the Middle East and traveling with the Middle Eastern men seated next to him, American would not have removed him from Flight 2237 and refused to book him on any other American flight." Cerqueira Br. pp. 55-56.

Cerqueira testified he was born in Portugal (App. II: 256, Tr. 36), but he makes no claim that anyone discriminated against him because he is *Portuguese*. So, Cerqueira failed to prove the basic fact that he is a *member* of the racial group—Middle Eastern—against whom he alleges the American crew exhibited unlawful discriminatory animus. *See Pourghoraishi*, 449 F.3d at 756 (plaintiff first must prove in a § 1981 case that he is a member of a racial minority). American pointed out this fatal flaw in Cerqueira's proof in its principal brief (American Br. pp. 54-58), but Cerqueira did not respond.

In *Saint Francis College v. Al-Khazraji*, 481 U.S. 604 (1987), the Court taught that 42 U.S.C. § 1981 "reaches discrimination against an individual

'because he or she is genetically part of an ethnically and physiognomically distinctive subgrouping of *homo sapiens*." *Id.* at 613. The plaintiff in *Saint Francis College*, a white resident of the United States and a college professor, claimed he was discriminated against because he was of Arabian ancestry. The Supreme Court held that persons of Arabian ancestry are protected by § 1981 and said that if the plaintiff "on remand can prove that he was subjected to intentional discrimination *based on the fact he was born an Arab*, rather than solely on the place or nation of his origin, or his religion, he will have made out a case under § 1981." *Id.* at 613 (emphasis added).

Here, Cerqueira did not prove, and under his testimony cannot prove, that he was *born* a Middle Easterner. As he admitted on his direct examination, other people commonly *mistake* him for a Middle Easterner, as he put it, "Israeli, Lebanese, Iran or Iraq." App. II: 257, Tr. 39. But § 1981 protects against discrimination on the basis of race or ethnicity at birth, not appearances, perceptions, or mistakes. Cerqueira proved that he is *not* a member of "the ethnically and physiognomically distinctive subgrouping" against whom he claimed American's personnel acted with unlawful animus.[7] American is entitled to judgment as a matter of law.

[7]A recent district court opinion discusses a similar issue. Plaintiffs claimed they were denied entry to a banquet at a restaurant because they are American Indians. The court held that alleging that the discrimination occurred because they

IV. AT A MINIMUM, THE PUNITIVE DAMAGES AWARD SHOULD BE VACATED.

This record does not support an award of punitive damages. Mr. Cerqueira's only argument in support of the punitive award is that American and its decision-makers knew of the Nation's civil rights laws, but acted as they did towards Mr. Cerqueira anyway. Cerqueira Br. pp. 57-59. The mere fact that one is aware of the civil rights laws does not prove "reckless indifference." There was a countervailing consideration. There is overwhelming evidence in this record that Captain Ehlers believed he needed to take action to protect his passengers, crew, and aircraft. As the Captain testified about his decision to have the passengers deplaned for questioning by law enforcement authorities:

> I had a number of concerns from three separate employees, and more than one passenger not traveling together. I didn't have one passenger with concerns, I had more than one passenger with concerns. So I have all of the people working for me concerned for numerous reasons, and I have some of my passengers concerned. I would have been derelict in my duty to ignore those concerns and depart with that flight.

App. II: 314, Tr. 25.

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were treated as if they were American Indian was sufficient at the pleadings stage, but that at trial, each plaintiff would be required to prove by competent evidence that they are members of the protected class. The court noted there is no provision in § 1981 protecting individuals "regarded as" members of a protected class. *Leonard v. Katsinas*, 2007 U.S. Dist. LEXIS 27079 at **35-37 (C.D. Ill., Apr. 11, 2007).

Even when one considers Mr. Cerqueira's *own* explanation of what happened to him, there is no evidence of reckless disregard. As already noted, Mr. Cerqueira summarized his case as follows: "if I hadn't looked like [the other two passengers] and if I hadn't happened to get seated next to them, it wouldn't have happened to me." (App. II: 278, Tr. 40-41). In other words, he says the flight crew *made a mistake* by concluding he was with the other two passengers sitting with him in the exit row. At worst, his claim is that the flight crew was negligent in forming its belief or conclusion about him.[8]

Of course, there is also the DOT Consent Order—the proverbial skunk in the jury box. Mr. Cerqueira summarizes his argument supporting the punitive damages award as follows: "the Consent Order shows that [the punitive damages] award is necessary to punish and deter American's conduct." Cerqueira Br. p. 16.

[8] Cerqueira also overlooks that there were specific, identifiable events in his own conduct that caused two members of Flight 2237's crew to single him out for observation, among all the other passengers, that morning and for completely different reasons. Flight Attendant Walling had an encounter with him in the gate area, which although he says was completely innocent, caused her some concern (American Br. pp. 11-12). Shortly after that event, Walling observed that Cerqueira went into the lavatory for several minutes immediately after he boarded the flight (American Br. p. 13). It is true that in and of itself, a passenger's going into the lavatory does not mean the passenger is a safety risk, but in the context of all of the events that early morning at Boston Logan, these events brought Cerqueira, specifically, to Ms. Walling's attention as someone at least to watch. Also, as detailed in American's principal brief at pages 14-15, Flight Attendant Sargent testified that after one of the men in the exit row rang the call button and asked her "where do you want me to put the [emergency] door," she went immediately to Captain Ehlers. App. II: 327-328, Tr. 77-78.

For the reasons American has briefed, the Consent Order should not have been admitted at all; but in any event it was not admitted to prove that punitive damages were "necessary to punish and deter American's conduct." Without question, that was an improper use of other alleged wrongs and alleged acts described in the Consent Order to "prove the character of [American] in order to show action in conformity therewith," in violation of Federal Rule of Evidence 404(b).

Section 44902(b) states very plainly that air carriers may, consistent with federal regulations, "refuse to transport a passenger . . . the carrier decides is, or might be, inimical to safety." The Court must deal in this case with a very narrow, judicially-created exception to § 44902(b) for an arbitrary or capricious decision based on the information available to the decision-maker when he was forced by circumstances to act. There is simply no warrant in the plain language of § 44902(b) to insert another exception into the factors Pilots-in-Command must consider as they make these safety decisions-the specter of punitive damages imposed on him or her, or the pilot's employer, as punishment if a jury later finds, upon a granular examination of the facts, that the pilot's on-the-spot safety decision was tainted by a flight attendant's or passenger's racial bias, or that the information the pilot had was otherwise mistaken or wrong.

In *Cordero*, the Ninth Circuit held when a passenger is denied passage on grounds of safety, punitive damages are permissible only "where the defendant has

acted wantonly or oppressively, or with such malice as implies a spirit of mischief or criminal indifference to civil obligation." 681 F.2d at 672-73 (internal quotations omitted). The evidence in this record certainly fails to show that.

V. PRAYER FOR RELIEF

Appellant American Airlines, Inc. respectfully restates the Prayer for Relief on page 62 of its principal brief.

AMERICAN AIRLINES, INC.,
By Its Attorney,

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1. This brief complies with the type-volume limitation of Fed.R.App.P. 32(a)(7)(B)(ii) in that this brief contains less than 7,100 words, excluding parts of the brief exempted by Fed.R.App.P. 32(a)(7)(B)(iii). *Please see Motion of the Defendant-Appellant, American Airlines, Inc., to File an Oversized ReplyBrief.*

CERTIFICATE OF SERVICE

I, Michael A. Fitzhugh, counsel for the Appellant, hereby certify that on this 2nd day of October, 2007, I served two copies of the foregoing upon opposing counsel of record, David J. Godkin by priority mail, postage prepaid, addressed to 280 Summer Street, Boston, MA 02210.

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