No. 07-1824

United States Court of Appeals for the First Circuit

JOHN D. CERQUEIRA,
PLAINTIFF-APPELLEE,

v.

AMERICAN AIRLINES, INC.,
DEFENDANT-APPELLANT.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[HON. WILLIAM G. YOUNG, U.S. DISTRICT JUDGE]

PETITION FOR REHEARING EN BANC OF THE PLAINTIFF-APPELLEE JOHN D. CERQUEIRA

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RULE 35 STATEMENT

Plaintiff John D. Cerqueira seeks en banc review because this case involves several questions of exceptional importance. The panel opinion is the first decision of any court to hold that the statutory discretion granted to airlines, in 49 U.S.C. § 44902(b), to refuse to transport a passenger "the carrier decides is, or might be, inimical to safety," is so broad that it immunizes an airline from liability for discrimination even where a jury rejects as pretext the airline's claim that its actions were driven by legitimate safety concerns. The panel correctly recognized that § 44902(b) does not protect decisions that are arbitrary or capricious, but erred by rejecting the well-settled principle that decisions driven by racial animus are *per se* arbitrary and capricious. Indeed, the panel opinion *approved the use of racial profiling* in airline denial-of-service decisions, holding that "[r]ace or ethnic origin of a passenger may, depending on context, be relevant information in the total mix of information raising concerns that transport of a passenger 'might be' inimical to safety." Slip. Op. 38. Consequently, the panel found a conflict between safety and civil rights, putting the panel decision at odds with every other court that has addressed the issue.

The panel opinion further deviated from well-established principles by holding that the burden-shifting framework of *McDonnell Douglas* does not apply to discrimination in aviation, thus allowing the mere incantation of the mantra of

"safety" to insulate an airline from liability for invidious discrimination. The panel further erred by holding that only direct evidence of discrimination by the formal decisionmaker can result in airline liability for discriminatory denials of service, a holding that directly conflicts with *Cordero v. CIA Mexicana de Aviacion, S.A.*, 681 F.2d 669, 672 (9th Cir. 1982). Finally, the panel's decision erroneously construed the facts in the light most favorable to American rather than in the light most favorable to the jury verdict and erred by holding that no properly instructed jury could return a verdict against the airline.

BACKGROUND

On December 28, 2003, American Airlines had Cerqueira removed from American Flight 2237 and questioned by the police. After Cerqueira was released from police questioning and cleared for travel, American refused to rebook Cerqueira on any flight. Cerqueira brought this action under 42 U.S.C. § 1981 (banning discrimination in contractual relations) and Mass. Gen. Laws ch. 272, § 98 (banning discrimination in public accommodations), alleging that American discriminated against him because of his perceived race or ethnicity.

A jury was asked to determine why American removed Cerqueira from his flight and why American refused to rebook Cerqueira on any other flight even after he was cleared by the police. American claimed that both decisions were based on safety concerns; Cerqueira claimed that but for his Middle Eastern appearance, such

concerns would never have been raised. The district court correctly instructed the jury that it was Cerqueira's burden to prove discrimination and that airlines are not liable for denial-of-service decisions based on safety. The jury rejected as pretext American's proffered explanation for its actions and found that discrimination was the real reason.

A panel of this Court vacated the jury verdict and ordered that judgment be entered for American. As explained in detail below, the panel's decision grants airlines a license to discriminate.

ARGUMENT

I. The Panel Erred in Holding That Intentional Discrimination Is Not *Per Se* Arbitrary or Capricious.

The panel and the district court agree that evidence of intentional discrimination must satisfy the arbitrary and capricious standard to overcome § 44902(b)'s grant of immunity for safety-related denial-of-service decisions. Slip Op. 27; 484 F. Supp. 2d at 233-34. But, as the district court explained, an instruction specifically invoking the arbitrary and capricious standard was unnecessary and would have been redundant because actions motivated by discrimination are *always* arbitrary and capricious. Thus, because the district court "did instruct the jury that American's liability depended upon a finding of intentional discrimination on account of race, the jury verdict necessarily satisfied the standard of 'arbitrary and

capricious.'" 484 F. Supp. 2d at 234 (citations omitted); *see also Shqeirat v. U.S. Airways, Inc.*, 515 F. Supp. 2d 984, 1004 (D. Minn. 2007) ("[A] refusal to board a passenger that is motivated by a passenger's race is inherently arbitrary and capricious."); *Dasrath v. Continental Airlines, Inc.*, 467 F. Supp. 2d 431, 434 (D.N.J. 2006) ("A decision based on race would be arbitrary and capricious."); *Alshrafi v. American Airlines, Inc.*, 321 F. Supp. 2d 150, 162 (D. Mass. 2004) ("[A]ctions motivated by racial or religious animus are necessarily arbitrary and capricious, and therefore beyond the scope of the discretion granted by Section 44902."); *Bayaa v. United Airlines, Inc.*, 249 F. Supp. 2d 1198, 1205 (C.D. Cal. 2002) (finding "no merit" to airline's argument that civil rights laws conflict with § 44902(b) and holding that § 44902(b) "does not grant [the airline] a license to discriminate"); *Chowdhury v. Northwest Airlines Corp.*, 238 F. Supp. 2d 1153, 1154 (N.D. Cal. 2002) ("[T]here is no apparent conflict between the federal statutes prohibiting racial discrimination and the federal law giving air carriers the discretion to refuse to carry passengers for safety reasons.").

By holding that the omission of an instruction on the arbitrary and capricious standard mandates reversal, the panel decision rejects the well-settled principle that decisions driven by racial stereotypes are irrational. To the contrary, the panel decision endorses racial profiling in airline denial-of-service decisions, holding that "[r]ace or ethnic origin of a passenger may, depending on context, be relevant

information in the total mix of information raising concerns that transport of a passenger 'might be' inimical to safety." Slip. Op. 38. The panel's conclusion that racial profiling is a legitimate security measure is unprecedented.

The panel's approval of racial profiling is driven by its conclusion that there is a conflict between aviation safety and civil rights, and that Congress has assigned a higher priority to aviation safety. Slip. Op. 22, 33. But as every other court to address the issue has held, one goal need not be prioritized over the other because safety and nondiscrimination do not conflict. *See Shqeirat*, 515 F. Supp. 2d at 1004; *Dasrath*, 467 F. Supp. 2d at 434; *Alshrafi*, 321 F. Supp. 2d at 162; *Bayaa*, 249 F. Supp. 2d at 1205; *Chowdhury*, 238 F. Supp. 2d at 1154. If an airline's denial-of-service decision is driven by legitimate safety concerns, the passenger will not be able to prove that discrimination motivated the decision. Likewise, if the passenger proves that discrimination motivated the decision, then the protection afforded by § 44902(b) for safety-related decisions will not save the airline.

II. The Panel Erred in Holding That the Burden-Shifting Framework of *McDonnell Douglas* Cannot Be Applied in Cases of Discrimination Against Airline Passengers.

Courts have long recognized that it is exceedingly rare to find direct evidence of intentional discrimination. As a result, a now-familiar burden-shifting framework has developed by which a plaintiff can prove discrimination using indirect evidence. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-804 (1973). In this case,

the jury did not believe that American's actions against Cerqueira were based on legitimate safety concerns, but instead concluded that but for the perception that Cerqueira was from the Middle East, he would not have been denied service. In holding that the burden-shifting framework of *McDonnell Douglas* does not apply to this case, the panel decision limits airline liability for discriminatory denial-of-service decisions to the rare case where the plaintiff has direct evidence of discriminatory animus. This holding makes it nearly impossible for a plaintiff to prove discrimination in aviation and conflicts with decades of case law approving the use of indirect evidence to prove intentional discrimination.

Contrary to the panel's suggestion that indirect evidence is appropriate only in cases of employment discrimination, the burden-shifting framework of *McDonnell Douglas* has been used in airline denial-of-service cases. *See, e.g., Simmons v. American Airlines*, 34 Fed. Appx. 573, 575-76 (9th Cir. 2002) (unpublished); *Dasrath*, 467 F. Supp. 2d at 445; *Thompson v. Southwest Airlines Co.*, 2006 WL 287850, *5 (D.N.H. Feb. 6, 2006) (unpublished); *Huggar v. Northwest Airlines, Inc.*, 1999 WL 59841, *3-4 (N.D. Ill. Jan. 27, 1999) (unpublished). Moreover, the First Circuit has applied the *McDonnell Douglas* framework in a non-employment § 1981 case. *See T & S Serv. Assocs., Inc. v. Crenson*, 666 F.2d 722, 724 (1st Cir. 1981) ("Though developed in the context of Title VII . . . , this procedural technique 'is merely a sensible, orderly way to evaluate the evidence in light of common

experience as it bears on the critical question of discrimination.'") (quoting *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978)); *see also Loeb v. Textron, Inc.*, 600 F.2d 1003, 1015 (1st Cir. 1979) (noting that "*McDonnell Douglas* meets a problem of proof that may be present in any case where motivation is in issue."). Several other Circuits have done the same. *See, e.g., Lizardo v. Denny's, Inc.*, 270 F.3d 94, 101-05 (2d Cir. 2001); *Murrell v. Ocean Mecca Motel, Inc.*, 262 F.3d 253, 257 (4th Cir. 2001); *Christian v. Wal-Mart Stores, Inc.*, 252 F.3d 862, 868 (6th Cir. 2001); *Hampton v. Dillard Dep't Stores, Inc.*, 247 F.3d 1091, 1107-08 (10th Cir. 2001). Because the panel decision rejects the use of indirect evidence, it allows an airline to immunize itself from liability for discrimination simply by proffering a safety-related explanation for its actions, no matter how implausible. In this case, the jury had ample reason to reject as pretext the claim that Cerqueira was removed and denied rebooking for safety-related reasons.

A. The Jury Had a Strong Basis for Rejecting the Captain's Proffered Explanation for the Removal Decision.

The jury was entitled to disbelieve the Captain's proffered explanation for the removal decision because it was "unworthy of credence." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 143 (2000); *see also Hodgens v. General Dynamics Corp.*, 144 F.3d 151, 168 (1st Cir. 1998) (holding that a plaintiff may demonstrate pretext by showing "such weaknesses, implausibilities, inconsistencies,

incoherencies, or contradictions in the [defendant's] proffered legitimate reasons for its action that a reasonable factfinder could rationally find them unworthy of credence and, with or without additional evidence and inferences properly drawn therefrom, infer that the [defendant] did not act for the asserted non-discriminatory reasons.") (citations and internal quotation marks omitted).

First, the evidence showed that Cerqueira did not engage in any behavior that is uncommon or that ordinarily results in denial of service. The Captain claimed that the decision to have Cerqueira removed from the flight was based on Flight Attendant Two's allegations that Cerqueira 1) requested a seat change in an insistent manner; 2) might have boarded early; and 3) used the lavatory. App. 300, Tr. 128; App. 363, Tr. 50. But Flight Attendant Two admitted that 1) she did not think her exchange with Cerqueira about the seat change was a security issue (App. 366, Tr. 65); 2) she did not hear the boarding announcements and thus did not know if Cerqueira had boarded out-of-turn (App. 367, Tr. 68); and 3) passengers often use the lavatory upon boarding (App. 368, Tr. 71). She further admitted that nothing she reported to the Captain about Cerqueira ordinarily results in removal and denial of service. App. 366-70, Tr. 62-71. The Captain also admitted that he knew Flight Attendant Two was not in a position to know whether Cerqueira boarded early, and he admitted that passengers commonly use the lavatory upon boarding. App. 299-300, Tr. 123-26. Moreover, the co-pilot had checked the lavatory and found nothing wrong. App. 299-

300, Tr. 124-26. Thus, it was reasonable for the jury to disbelieve that the removal decision was motivated by a flight attendant's reports of Cerqueira having engaged in common passenger behavior.[1]

Second, the Captain lacked credibility in general, because his testimony was often at odds with that of other American Airlines employees, his own deposition testimony, and American's judicial admissions. For example, the Captain claimed that he did not see Cerqueira before deciding to have him removed from the flight

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[1]American claimed that the two other men seated in Cerqueira's row were removed and denied rebooking because: 1) one of them had a conversation with the pilot that the pilot considered odd; 2) they wished other passengers a "happy new year" and were heard "speaking in a different language;" and 3) they joked with the flight attendant who gave the exit row briefing. It was undisputed that Cerqueira did not engage in any such behavior. Indeed, because nothing other than his Middle Eastern appearance linked Cerqueira to the other two men, the fact that the flight attendants perceived Cerqueira to be traveling with the other two men provided the jury with evidence that but for his protected characteristics, Cerqueira would not have been removed and denied rebooking. Moreover, the jury was presented with substantial evidence that the flight attendants became concerned about the exit row passengers only because the passengers had a Middle Eastern appearance. Flight Attendant Two thought the three men looked similar because they were "dark" and, in her written report of the incident, she referred to the three passengers collectively as "them" and "they." App. 372, Tr. 89-90; App. 428-30, Trial Exh. 17. Similarly, Flight Attendant Four grouped the three men together in her reports and wrote that they "seemed to be foreign nationals (later confirmed/Middle East passports)," and noted (incorrectly) that "these 3 passengers had Israeli passports but Arabic names." App. 431-33, Trial Exh. 18; App. 452-54, Trial Exh. 25. Flight Attendant One testified that all three men had dark hair, and she thought the man with the ponytail might be Middle Eastern. App. 378-79, Tr. 113-14. Her report noted that the man with the ponytail spoke with a "heavy accent," and she testified that since the terrorist attacks of September 11th, she has paid close attention to whether a passenger has an accent. App. 376-77, Tr. 105-08; App. 434-36, Trial Exh. 19.

(App. 312, Tr. 17), but the Captain's testimony was directly contradicted by that of two other airline employees who testified that, on two separate occasions, the Captain pointed out the passengers in the exit row. App. 326, Tr. 70; App. 334, Tr. 103. When confronted with that testimony, the Captain testified that he "may or may not have done that." App. 301, Tr. 132. Similarly, at trial the Captain testified that Flight Attendant Two reported that the exit row passengers were "staring" at the flight attendants, but he never mentioned this at his deposition despite repeated inquiries (App. 315-16, Tr. 26-32), and the flight attendant did not claim to have made such a report. Indeed, the Captain admitted at trial that several elements of his testimony had changed since the time of his deposition. App. 320, Tr. 46. Further, the Captain denied that he made the decision to have Cerqueira removed from flight 2237 (App. 317, Tr. 36), but American made a judicial admission that he did (App. 295, Tr. 109). The Captain also testified that his interaction with the passenger with the ponytail was in the terminal, and the Captain did not notice an accent. App. 297, Tr. 114. But Flight Attendant One testified that the passenger spoke to the Captain onboard the airplane, in the presence of the flight attendant, and that he spoke with a heavy accent. App. 377, Tr. 106.

B. The Jury Had a Strong Basis to Conclude That the Denial of Rebooking Was Discriminatory, Because American Offered No Rational Explanation for the Decision.

The error of the panel's rejection of *McDonnell Douglas* burden-shifting as a means to prove discrimination against airline passengers is revealed most starkly with regard to American's refusal to rebook Cerqueira on any other flight even after he was cleared for travel by the police.[2] American's decisionmaker testified that he has no recollection of the reasons for his decision, and an entry in Cerqueira's computerized Passenger Name Record states only that Cerqueira was denied boarding on Flight 2237 due to unspecified "security issues" and should not be rebooked. App. 321-23, Tr. 51-59; App. 423, Trial Exh. 9. American's conclusory assertion that Cerqueira was denied rebooking for "security issues" should not be sufficient to justify treating Cerqueira differently from passengers who were not perceived to be Middle Eastern, but the panel's rejection of the burden-shifting framework allows the mere invocation of "security" to shield American from liability.

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[2]No evidence supports the panel's assumption that the decision to deny rebooking was made "within minutes" of the Captain's decision to have Cerqueira removed for questioning. Slip Op. 4, 36. The police were called to remove Cerqueira shortly after 7:00 am, but the first computer entry reflecting the decision to deny rebooking was not made until shortly after 9:00 am, by which time Cerqueira had been cleared by the police. *See* Slip Op. 17; App. 443, Trial Exh. 22.

III. The Record Contains Ample Evidence From Which the Jury Could Find Discrimination Without Relying on *Respondeat Superior*; Thus, Even If Agency Principles Do Not Apply in Denial-of-Service Cases, the Case Should Be Remanded for a New Trial.

According to the panel, "[p]laintiff's theory of discrimination was that Flight Attendant Two was motivated by discriminatory bias" (Slip Op. 7 n.3), and the district court's *respondeat superior* instruction erroneously "permitted liability of the air carrier to turn on the purported bias of non-decisionmakers" (*id.* at 38). Although the panel explicitly declined to address "the scope of any respondeat superior liability in § 1981 claims generally" (*id.* at 39), the panel held that the district court's *respondeat superior* instruction was reversible error because "[t]he biases of a non-decisionmaker may not be attributed to the decisionmakers" (*id.* at 29) and the removal decision would have to have been "*based only on the Captain's bias* toward persons who appeared to be of Middle Eastern descent" to result in liability (*id.* at 36) (emphasis added).

It is simply not true that plaintiff's theory of discrimination depended entirely on imputing the flight attendant's bias to the Captain. Rather, there was sufficient evidence for the jury to conclude that the Captain was biased because the Captain took action based on information that—on its face—was insufficient to justify a removal decision. Although the panel held that "[t]he Captain (or other decisionmaker) is entitled to accept at face value the representations made to him by

other air carrier employees," the panel also recognized "an exception to this where no responsible decisionmaker could credit the information provided." Slip. Op. 29 (citations omitted). The exception is applicable here—no rational decisionmaker could conclude that a passenger "might be inimical to safety" based only on a flight attendant's report that the passenger engaged in common behavior. Thus, even if the district court erred by instructing the jury that the flight attendant's bias could taint the Captain's decision, the evidence was sufficient for the jury to conclude that the Captain was biased, and, at the least, the case should be remanded for a new trial.[3]

Finally, the panel's decision that an airline may escape liability where the Captain acts without further inquiry on a flight attendant's report that, if true, would justify removal, directly conflicts with the Ninth Circuit's decision in *Cordero v. CIA Mexicana de Aviacion*. In *Cordero*, a pilot excluded a passenger based on a flight attendant's report that the passenger had uttered an obscenity and had raised his arm

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[3]Despite the Captain's claim that he was not aware of Cerqueira's Middle Eastern appearance, the jury had ample reason to discredit that testimony. First, the evidence showed that the Captain saw and heard the passenger with the ponytail and heavy accent, and knew that the flight attendants thought Cerqueira was traveling with the other two men in his row because Cerqueira looked like them. Second, two American Airlines employees testified that, on two separate occasions, the Captain pointed out the passengers in the exit row (App. 326, Tr. 70; App. 334, Tr. 103), and the Captain did not deny it (App. 301, Tr. 132). Third, because the flight attendants thought it was important that their contemporaneous written reports include their concern that the three men had foreign appearances, Middle Eastern passports, Arabic names, and heavy accents, the jury could infer that the flight attendants conveyed these concerns to the Captain.

as if to strike the flight attendant. 681 F.2d at 671. The passenger claimed that he was the victim of mistaken identity, and the airline was held liable. Although the court found that the pilot had "no duty to conduct an *in-depth* investigation," it concluded that the airline acted unreasonably in excluding the passenger "without even the most cursory inquiry into the complaint against him." *Id.* at 672 (emphasis added).

IV. The Panel Erred by Examining the Evidence in the Light Most Favorable to American, Rather Than in Favor of Preserving the Jury Verdict.

The panel's conclusion "that no properly instructed jury could return a verdict against the air carrier" (Slip Op. 3) was based on the panel's resolution of conflicting evidence in favor of American. *Compare* Slip Op. 4-19 *with* Appellee's Brief 3-14. That view of the evidence was error. This Court reviews *de novo* the denial of a motion for judgment as a matter of law, but must examine the evidence in the light most favorable to preservation of the jury's verdict. This Court "may not consider the credibility of witnesses, resolve conflicts in testimony or evaluate the weight of the evidence," but "must affirm unless the evidence was so strongly and overwhelmingly inconsistent with the verdict that no reasonable jury could have returned it." *McDonough v. City of Quincy*, 452 F.3d 8, 17 (1st Cir. 2006) (citations omitted).

The panel's opinion depends in large part on its resolution of two fact disputes. First, the panel declared that "[t]he first time the Captain ever saw the plaintiff was

at trial." Slip Op. 16. But, the Captain's testimony on that point was directly contradicted by the testimony of two other witnesses, and there was evidence that the Captain was aware of Cerqueira's appearance even if the Captain did not see him. *See* pp. 10 and 13 n.3, *supra*. Second, the panel found that "Flight Attendant Two told the Captain of separate concerns that the plaintiff had an 'obvious interest in flight attendant duties; someone might call it staring.'" Slip Op. 9. But Flight Attendant Two did not testify that she told the Captain such a thing and the Captain's trial and deposition testimony were in conflict on this point. *See* p. 10, *supra*. Because resolution of these fact disputes in Cerqueira's favor would support the jury's verdict even under the legal standards announced by the panel, the jury's verdict should not have been vacated. At the very least, the case should be remanded for a new trial.

CONCLUSION

The Court should rehear this case en banc.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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