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

Issued by the Department of Transportation
on the 17th day of July, 2006

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| **Complaint of**<br><br>**Irvin Rosenfeld *v.***<br>**American Airlines, Inc.**<br><br>**Violations of 49 U.S.C. § 41705** | **OST 2003-15270** |

## ORDER DISMISSING COMPLAINT

On May 23, 2003, Irvin Rosenfeld filed a third-party complaint pursuant to 14 CFR § 302.401 against American Airlines, Inc. (American), alleging that the carrier discriminated against him as a disabled passenger during his travel in April 2003. The complaint alleged that the carrier violated 14 CFR § 382.53, a provision of the Department's rule prohibiting discrimination against disabled travelers, and 49 U.S.C. § 41705, the Air Carrier Access Act, by requiring that Mr. Rosenfeld present a medical certificate prior to his travel.

The complainant uses marijuana, alleging that smoking marijuana cigarettes helps to relieve the pain of a congenital bone disorder.[1] The complainant also holds an exemption under a federal Investigational New Drug (IND) experimental program, through which he is provided government-issued marijuana cigarettes for research purposes. The Department of Health and Human Services discontinued this program in 1992, but "grandfathered" a number of persons so that they could continue to receive marijuana while encouraging them to seek alternative treatment. At present, only seven persons, including the complainant, retain such exemptions.

According to Mr. Rosenfeld's complaint, he contacted American well prior to his flight, advising the carrier of the nature of his disability, his intent to travel with "medical marijuana," and his participation in the IND program. He also requested American to provide him an aisle seat and make available a room during a layover between flights if he needed to take his "medication." He claimed that American stated that it would not

[1] Mr. Rosenfeld has a rare disorder diagnosed as multiple congenital cartilaginous exostosis, as well as a variant of the syndrome Pseudo Pseudo Hypoparathyroidism, which cause tumors to grow on the ends of the long bones of his body.

allow him to travel unless he provided a medical certificate stating that his use of marijuana would not impair his ability to understand and respond to safety instructions. Mr. Rosenfeld provided certificates from two physicians and completed his travel without incident. He asserts in the complaint, however, that the carrier was precluded from requiring such documentation under the provisions of 14 CFR § 382.53 and claims that American's imposition of such a requirement reflects a failure to train its personnel adequately as required by § 382.61. American's action, the complaint further asserts, violates the general requirements of § 382.7(c), which mandate that carriers modify policies and practices to ensure nondiscrimination.

In its answer, American contended that its requirement that Mr. Rosenfeld present medical documentation was based on its concerns for the safety of the flight and did not represent an instance of discrimination against the complainant as a disabled person. American was entitled, it argues, to obtain assurance that Mr. Rosenfeld's comprehension and ability to follow safety instructions would not be impaired by his use of the marijuana in question. American also cites general authority in the Department's rules and 49 U.S.C. § 44901 to justify the refusal to transport a person for reasons related to safety. In particular, the carrier points to § 382.31(d), which states that carrier personnel may refuse transportation when such refusal is consistent with statutory and regulatory provisions regarding the maintenance of operational control of aircraft in flight. In a supplemental letter, the carrier repeats its claim that its insistence on medical documentation was not based on Mr. Rosenfeld's disability but on the asserted need to use marijuana in connection with that disability.

Both complainant and carrier cite to Part 382, which implements the Air Carrier Access Act of 1986, 49 U.S.C. § 41705. That Act provides that no air carrier may discriminate against any otherwise qualified individual with a disability, by reason of such disability, in the provision of air transportation. Accordingly, among other matters the Part prescribes aircraft accessibility requirements, including stowage space for wheelchairs, movable aisle armrests, and accessible lavatories (§ 382.21); sets out the limited circumstances in which a carrier may impose requirements for advance notice and accompaniment by attendants (§§ 382.33 and .35); and addresses when and how carriers must provide assistance in enplaning, deplaning, and making flight connections (§ 382.39). There is nothing in Part 382 that relates to marijuana as a medicine or pain reliever, or addresses otherwise whether or when it may be possessed or used in air transportation.

Mr. Rosenfeld's complaint asserted that he receives "*medical* marijuana to *treat*" his condition,[2] and that in making his reservations, he had requested that American provide a room during his layover "in the event he needed to take his *medication*" (emphases supplied).[3] However, Mr. Rosenfeld's participation in the IND program is for research, not medical purposes. The Drug Enforcement Administration (DEA) has strongly emphasized to the Department that the marijuana under the IND program is intended not

[2] Verified Complaint, at 1.
[3] Id., at 3.

for "medical purposes" but for experimental research as a Schedule I controlled substance under the Controlled Substances Act (CSA), 21 U.S.C. §§ 801-971.[4]

The CSA explicitly provides that marijuana has no currently accepted medical use in treatment in the United States. 21 U.S.C. §812(b)(1)(B), Schedule I (c)(10). As a drug listed on Schedule I, Congress has further found that marijuana has a high potential for abuse and a lack of accepted safety for use under medical supervision. 21 U.S.C. §812(b)(1)(A), (C).

In its recent decision in *Gonzales v. Raich,* 545 U.S. 1, 125 S.Ct. 2195, 162 L.Ed2d 1 (2005), the United States Supreme Court observed that, "by characterizing marijuana as a Schedule I drug, Congress expressly found that the drug has no acceptable medical uses." 125 S.Ct. at 2211.[5] That case involved a Federal effort to enforce the CSA's prohibition on possessing, obtaining, or manufacturing marijuana against two California residents whose personal use of marijuana for medical reasons was permitted under that State's Compassionate Use Act. In its decision, the Court held that Congress could constitutionally regulate the local cultivation and use of marijuana under the Commerce Clause, overriding the contravening State law permitting limited use for medical purposes.

In so doing, the Court agreed with the position taken by the Department of Justice that, under the above-noted provisions of the CSA, marijuana has no acceptable medical uses and that FDA had never approved marijuana as safe and effective for any such use. Pet. Br. at 2, 3.

Decision

In Order 2004-3-27, an order dismissing a third party complaint, our Office of Aviation Enforcement and Proceedings interpreted Mr. Rosenfeld's exemption as entitling him to possess government-supplied marijuana during domestic travel, although it concluded that the documentation he tendered to Delta agents to corroborate his exemption was not sufficiently definitive to warrant enforcement action. I affirmed the complaint's dismissal in Order 2004-5-25[6], noting in dicta that the earlier order had endorsed the

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[4] *See also, Gonzales v. Raich*, 545 U.S. 1, 125 S.Ct. 2195, 162 L.Ed2d 1 (2005), which refers to the IND program as follows: "By classifying marijuana as a Schedule I drug, as opposed to listing it on a lesser schedule, the manufacture, distribution, or possession of marijuana became a criminal offense, with the sole exception being use of the drug as part of a Food and Drug Administration preapproved research study." 125 S.Ct. at 2204. *Also see* the thorough discussion on the IND program appearing in *Kuromiya v. United States*, 78 F.Supp. 2d 367 (E.D. Pa. 1999), stating *inter alia* that HHS had discontinued the basic program in 1992, finding it to be "bad public policy and bad medical practice." 78 F.Supp. 2d at 369-370.

[5] *See also, United States v. Oakland Cannabis Buyers' Cooperative,* 532 U.S. 483, 121 S.Ct. 1711, 149 L.Ed.2d 722 (2001), where the Court described the Controlled Substances Act as expressly excluding any useful and legitimate medical use for marijuana. "[That Act] includes no exception at all for any medical use of marijuana. [We are] unwilling to view this omission as an accident, and [we are] unable in any event to override a legislative determination manifest in a statute." 532 U.S. at 493.

[6] Orders 2004-3-27 and 2004-5-25 were issued in Docket OST-2003-14808.

"right" of the complainant to travel with marijuana so long as he had adequate documentation confirming his enrollment in the IND trials. The decision reached in those orders was based on our conclusion at the time that Mr. Rosenfeld's marijuana was a medication. Based on our further review of the law including the most recent Supreme Court cases, we conclude that our earlier conclusions were incorrect. Because marijuana is not a medication and is a Schedule I drug, neither the Air Carrier Access Act nor 14 CFR Part 382 in any way relates to Mr. Rosenfeld's carriage or use of marijuana.[7]

In this case, American required medical documentation from Mr. Rosenfeld for reasons centered on his stated need to carry and use marijuana during his trip on American. Since his carriage and use of marijuana during that trip was not protected by the ACAA or Part 382, neither was he protected by those laws from airline-required documentation related to that carriage or use.

Furthermore, we do not believe this to be a useful forum for adjudicating "medical marijuana" issues. Congress, the Department of Justice, and the Supreme Court have already spoken with one voice on that subject. Moreover, dealing with such issues under our ACAA enforcement authority detracts from our ability to pursue "real" disability rights issues. Therefore, we do not believe that any further pursuit of enforcement action here is in the public interest.

While we do not believe that this particular matter warrants further Department action, our action here should not be interpreted as indicating a lack of Department interest or will in pursuing air carrier abuse of the limited authority to require medical certificates of otherwise qualified individuals with a disability. Section 382.53 specifies only three limited circumstances as to when such certificates can be required. These should be strictly adhered to, and where they are not the Department will not hesitate to bring enforcement action in an appropriate case, whether upon a proper complaint or on its own initiative.

ACCORDINGLY, I dismiss the third-party complaint in this docket.

This order will become a final order of the Department 10 days after its service date unless a timely petition for review is filed or the Department takes review on its own motion.

A copy of this order shall be filed in Docket OST-2003-14808.

By:

**ROSALIND A. KNAPP**
**Deputy General Counsel**

**(SEAL)**

[7] To the extent that Order 2004-3-27 and Order 2004-5-25 are inconsistent with this Order, they shall be of no effect.

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