

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

KERRY FOX <i>et al.</i> ,	:
	:
Plaintiffs,	:
	: Civil Action No.: 02-2069 (RMU)
v.	:
	: Document No.: 5
AMERICAN AIRLINES, INC.,	:
	:
Defendant.	:

**MEMORANDUM OPINION**

**GRANTING THE DEFENDANT’S MOTION TO DISMISS THE FIRST AMENDED COMPLAINT**

**I. INTRODUCTION**

The plaintiffs in this action are family members who flew on an American Airlines’ flight from Baltimore-Washington International Airport (“BWI”) to Laredo, Texas. The plaintiffs allege that American Airlines acted in a grossly negligent manner and thereby caused serious physical injuries to plaintiff Kerry Fox and severe mental anguish and distress to the other plaintiffs. This matter is before the court on the defendant’s unopposed motion to dismiss the plaintiffs’ first amended complaint pursuant to Federal Rule of Civil Procedure 12(b)(1) and (6). Because the plaintiffs, who are represented by counsel, failed to respond to this motion, the court grants the motion as conceded.

**II. BACKGROUND**

In November 2001, the plaintiffs were on an American Airlines flight from BWI to Laredo, Texas, where they attended a funeral. First Am. Compl. (“Compl.”) ¶ 7. According to the first amended complaint, plaintiff Kerry Fox, who suffers from

advanced diabetes, experienced life-threatening insulin shock during the flight. *Id.* ¶ 18. By the time his sister could check on him, the insulin shock was so advanced that his medication would not have improved his status. *Id.* ¶¶ 10-19. The plaintiffs allege that this occurred because they could not sit near him and because food carts in the aisle prevented the flight attendants from checking on him in a timely manner. *Id.* As a result of Mr. Fox's condition, the pilot made an emergency landing in Nashville, Tennessee. *Id.* ¶¶ 21-22.

After emergency personnel and a hospital physician successfully treated Mr. Fox, the family continued its flight to Laredo. *Id.* ¶¶ 24-29. American Airlines personnel allegedly searched the plaintiffs at the gate before their flight to Laredo and before their return flight to BWI. *Id.* ¶¶ 28-30. The plaintiffs allege that the defendant targeted them for these searches because of the medical emergency on the earlier flight. *Id.* ¶ 31.

On October 23, 2002, the plaintiffs filed a complaint alleging gross negligence, intentional infliction of emotional distress, breach of contract and violations of the Americans with Disabilities Act ("ADA") and regulations implementing the ADA. In response, the defendant filed a motion ("first motion") to dismiss the complaint pursuant to Federal Rule of Civil Procedure 12(b)(1) and (6). The court issued its Standing Order on November 21, 2002, which alerts the parties to required compliance with the local and federal rules. On December 2, 2002, the plaintiffs filed both an opposition to the first motion and a first amended complaint. The amended complaint includes four counts: Count I alleges gross negligence, Count II charges intentional infliction of emotional distress, Count III claims breach of contract, and Count IV asserts violations of the Air Carrier Access Act ("ACAA"), 49 U.S.C. § 41705. *Id.* ¶¶ 8-69.

The plaintiffs' opposition to the defendant's first motion addresses the defendant's Rule 12(b)(6) argument pertaining to Count IV, but fails to address the defendant's Rule 12(b)(1) and (6) arguments pertaining to Counts I-III. On December 6, 2003, the defendant filed a motion ("second motion") to dismiss the first amended complaint. The defendant's second motion addresses the differences between the complaint and the first amended complaint and argues that the changes to the complaint do not cure the jurisdictional and pleading problems. The second motion contends that the court should dismiss Counts I through III for lack of subject-matter jurisdiction, Count III and Count IV, each for failure to state a claim. The plaintiffs did not file an opposition to the defendant's second motion.

### **III. ANALYSIS**

#### **A. Legal Standard for Treating a Motion as Conceded**

Local Civil Rule 7.1(b) requires an opposing party to file a memorandum of points and authorities in opposition to a motion within 11 days of the filing of the motion, or the court may treat the motion as conceded. *Giraldo v. Dep't of Justice*, 2002 U.S. App. LEXIS 13685, at \*2 (D.C. Cir. July 8, 2002) (per curiam) (citing *Fed. Deposit Ins. Corp. v. Bender*, 127 F.3d 58, 68 (D.C. Cir. 1997)). A party who fails to file a timely response "is deemed to have waived his opposition to the [motion]." *Weil v. Seltzer*, 873 F.2d 1453, 1459 (D.C. Cir. 1989) (discussing a motion in limine) (cited by *Bender*, 127 F.3d at 67-68, in the context of a motion for summary judgment). Accordingly, the D.C. Circuit has stated, "Where the district court relies on the absence of a response as a basis for treating the motion as conceded, we honor its enforcement of the rule." *Twelve John*

*Does v. District of Columbia*, 117 F.3d 571, 577 (D.C. Cir. 1997). Furthermore, when a plaintiff files a response to a motion to dismiss but fails to address certain arguments made by the defendant, the court may treat those arguments as conceded, even when the result is dismissal of the entire case. *Sparrow v. United Air Lines, Inc.*, 1999 U.S. Dist. LEXIS 22054, at \*17 (D.D.C. July 23, 1999), *overruled on other grounds*, 216 F.3d 1111 (D.C. Cir. 2000); *Hanson v. Greenspan*, 1991 U.S. Dist. Lexis 17451, at \*11 (D.D.C. Dec. 6, 1991).

**B. The Court Grants the Defendant’s Motion to Dismiss  
the First Amended Complaint**

Notwithstanding Local Civil Rule 7.1(b)’s requirement that an opposing party file a memorandum of points and authorities in opposition to a motion within 11 days of the filing of the motion, the plaintiff, represented by counsel, failed to respond to the defendant’s motion to dismiss the first amended complaint. This is true despite the fact that the Standing Order states, “Motions and related submissions must comply with Local Civil Rule 7.1.” Standing Order ¶ 12. Accordingly, because the plaintiffs failed to respond to the defendant’s second motion, the court treats the motion as conceded and grants the motion. *Twelve John Does*, 117 F.3d at 577.

Rather than treat the motion as conceded due to the plaintiffs’ failure to respond, the court could search the record to determine if the plaintiffs addressed the defendant’s arguments elsewhere. Judicial economy does not favor such an exercise, nor does the court’s requirement that parties follow the federal and local rules. Standing Order at 1 & ¶ 12; *Cf. Jackson v. Finnegan, Henderson, Farabow, Garrett & Dunner*, 101 F.3d 145, 150-52 (D.C. Cir. 1996) (discussing the role of the district court in controlling its docket

and enforcing deadlines); *but see* 6 FED. PRAC. & PROC CIV. 2D § 1476 (stating that courts are not required to exalt form over substance).

The court, however, recognizes that on November 18, 2002, the defendant filed its first motion, asking the court to dismiss the plaintiffs' original complaint. The plaintiffs filed a timely opposition to the first motion and a first amended complaint. The plaintiffs' opposition addressed the defendant's argument as to Count IV, the count alleging violations of the ADA and its implementing regulations; but fails to address the defendant's other two arguments as to Counts I-III. Thus, even if the court treats the plaintiffs' opposition to the defendant's first motion as an opposition to the defendant's second motion, the plaintiffs still have not responded to the arguments pertaining to Counts I-III. Accordingly, the court's decision to grant as conceded the defendant's second motion as it pertains to Counts I-III is unchanged. *Twelve John Does*, 117 F.3d at 577.

The one remaining count is Count IV. Although the plaintiffs' opposition to the defendant's first motion does address the defendant's argument that Count IV fails to state a viable ADA claim, the plaintiff has not responded to the similar argument as stated in the defendant's second motion.<sup>1</sup> Pl.'s Opp'n at 1-3. In its first motion, the defendant argues that the ADA count fails to state a viable claim because the ADA does not apply to airlines. Def.'s 1st Mot. at 5-6. The defendant further contends that even if the plaintiff intended to assert violations of the ACAA, which does apply to airlines, the claims would still fail to state a claim because the ACAA does not provide a private right of action. *Id.* at 5-9. The defendant renews its ACAA argument in its second motion.

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<sup>1</sup> The first amended complaint replaces the ADA claims in Count IV with claims that the defendant violated the ACAA and its implementing regulations.

Def.'s 2d Mot. at 6. For reasons that follow, even if the court decided to treat the plaintiffs' opposition to the defendant's first motion as an opposition to the defendant's second motion, the court would still grant the defendant's motion to dismiss Count VI because it fails to state a viable claim. *Id.* at 1359; *Twelve John Does*, 117 F.3d at 577.

The ACAA prohibits air carriers from discriminating against individuals on the grounds that they have a physical or mental impairment, have a record of such an impairment or are regarded as having such an impairment. 49 U.S.C. § 41705. The ACAA provides for the investigation of alleged violations by the Secretary of the Department of Transportation ("DOT"). *Id.* The Eleventh Circuit recently ruled that the ACAA does not provide individuals with a private right of action. *Love v. Delta Air Lines*, 310 F.3d 1347, 1351-53, 1358-59 (11th Cir. 2002). Instead of providing a private right of action, the ACAA provides an administrative enforcement scheme through the DOT, and the act augments this administrative review by providing "a limited form of judicial review of the DOT's actions in the [United States'] courts of appeals." *Id.* at 1358.

*Love* distinguished Fifth and Eighth Circuit decisions holding that the ACAA does create a private right of action by explaining that both of these decisions relied on a statutory-interpretation test that is no longer applicable. *Love*, 310 F.3d at 1359 (discussing *Shinault v. Am. Airlines, Inc.*, 936 F.2d 796, 800 (5th Cir. 1991); *Tallarico v. Trans World Airlines, Inc.*, 881 F.2d 566, 570 (8th Cir. 1989)). *Shinault* and *Tallarico*

rely on the four-factor test for statutory interpretation set forth in *Cort v. Ash*.<sup>2</sup> 422 U.S. 66, 79 (1975) overruled by *Thompson v. Thompson*, 484 U.S. 174, 189 (1988) (converting one of its four factors, congressional intent, into the determinative factor). In contrast, *Love* relied on *Alexander v. Sandoval*, 532 U.S. 275 (2001), which states that in determining whether a statute provides a private right of action,

The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy. *Statutory intent on this latter point is determinative*. Without it, a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute.

532 U.S. at 286-87 (emphasis added). *Sandoval* explains that the four-factor test espoused in *Cort* is part of the “*ancien regime*.” *Id.* at 287 (“Having sworn off the habit of venturing beyond Congress's intent, we will not accept respondents' invitation to have one last drink.”). The D.C. Circuit has not yet addressed whether the FCA grants a private right of action. *But see Tunison v. Cont'l Airlines Corp.*, 162 F.3d 1187, 1188-89 n.1 (D.C. Cir. 1998) (mentioning that whether there is an implied private right of action under the ACAA was not an issue before the court because the lower court presumed it and the defendant failed to raise it).

The role of this court is not to legislate and create a private cause of action where Congress instead created an enforcement system augmented by a right to appeal the administrative ruling in the United States Courts of Appeals. *Sandoval*, 532 U.S. at 286; *Love*, 310 F.3d at 1356 n.10, 1359-60. Indeed, this court does not seek to usurp the

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<sup>2</sup> The four-part test asks the following questions: (1) does the statute create a federal right in favor of the plaintiff, (2) is there any indication of legislative intent to create such a remedy or to deny one, (3) is implying the remedy consistent with the underlying purposes of the legislative scheme, (4) is the cause of action one traditionally relegated to state law, such as inferring a cause of action based solely on federal law would be inappropriate. *Cort*, 422 U.S. at 79.

power of the circuit courts. *Id.* In sum, the Eleventh Circuit determined, and this court agrees, that, pursuant to the statutory interpretation rules set forth in *Sandoval*, “Congress did not intend to create a private right of action in a federal district court to vindicate the ACAA's prohibition against disability-based discrimination on the part of air carriers.” *Id.* at 1359 (citing *Sandoval*, 532 U.S. at 288). Accordingly, because the defendant’s argument that the ACAA does not create a private right of action is substantively correct, even if the court were to treat the plaintiffs’ opposition to the defendant’s first motion as an opposition to the defendant’s second motion, the court’s decision to grant the defendant’s motion to dismiss Count IV would remain the same. *Id.* at 1359; *Twelve John Does*, 117 F.3d at 577. Thus, the court grants the defendant’s second motion to dismiss.

#### IV. CONCLUSION

For all these reasons, the court grants the defendant’s motion to dismiss the first amended complaint. An order directing the parties in a manner consistent with this Memorandum Opinion is separately and contemporaneously issued this 5th day of August, 2003.

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Ricardo M. Urbina  
United States District Judge

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**ORDER**

**GRANTING THE DEFENDANT’S MOTION TO DISMISS THE FIRST AMENDED COMPLAINT**

For the reasons stated in this court’s Memorandum Opinion separately and contemporaneously issued this 5th day of August, 2003, it is

**ORDERED** that the defendant’s motion [5] to dismiss the first amended complaint is **GRANTED**.

**SO ORDERED.**

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Ricardo M. Urbina  
United States District Judge