

BEFORE THE UNITED STATES DEPARTMENT OF TRANSPORTATION
OFFICE OF AVIATION ENFORCEMENT AND PROCEEDINGS

ALLERGY & ASTHMA NETWORK,)
ASTHMA AND ALLERGY)
FOUNDATION OF AMERICA,)
FOOD ALLERGY & ANAPHYLAXIS)
CONNECTION TEAM, NO NUT)
TRAVELER,)
)
Complainants,)
)
v.)
)
SOUTHWEST AIRLINES, CO.)
)
Respondent.)

Docket DOT-OST-2022-_____

COMPLAINT

Comments with respect to this docket entry should be directed to:

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Dated: November 16, 2022

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COMPLAINT

ALLERGY & ASTHMA NETWORK, ASTHMA AND ALLERGY FOUNDATION OF AMERICA, FOOD ALLERGY & ANAPHYLAXIS CONNECTION TEAM, and NO NUT TRAVELER are national non-profit organizations that advocate for the rights of individuals with food allergies. These organizations file this joint Formal Complaint on behalf of passengers with food allergies who require pre-boarding to be seated safely against SOUTHWEST AIRLINES, CO. for flagrant violation of the Air Carrier Access Act, 49 U.S.C. § 41705, and the Airline Passengers with Disabilities Bill of Rights. In support thereof, these organizations who advocate on behalf of individuals with food allergies and whose missions are directly impacted by SOUTHWEST AIRLINES, CO.'s refusal to comply with federal law, state as follows:

1. ALLERGY & ASTHMA NETWORK is a leading national patient advocacy organization that specializes in making accurate medical information relevant and understandable to all while promoting proven standards of care. We believe that

integrating prevention with treatment helps reduce emergency healthcare visits, keeps children in school and adults at work, and allows participation in sports and other activities of daily life. We represent the more than 100 million Americans living with allergic and respiratory diseases.

2. ASTHMA AND ALLERGY FOUNDATION OF AMERICA (“AAFA”) is a leading patient organization for people with asthma and allergies, and the oldest asthma and allergy patient group in the world. AAFA is dedicated to saving lives and reducing the burden of disease for people with asthma and allergies through support, advocacy, education, and research. Kids With Food Allergies (KFA) is a division of AAFA that serves as a vital lifeline to families raising children with food allergies.
3. FOOD ALLERGY & ANAPHYLAXIS CONNECTION TEAM (“FAACT”) is a nonprofit organization with the mission to educate, advocate, and raise awareness for all individuals and families affected by food allergies and anaphylaxis. Through its Civil Rights Advocacy Division, FAACT educates and advocates for the legal right of full and equal access and participation of individuals with food allergies, a condition that substantially impacts the major life activities of breathing and eating and the major bodily functions of the immune, digestive, respiratory, and circulatory systems.
4. NO NUT TRAVELER is a non-profit organization that uses grass roots organizing, advocacy and education to improve the safety and quality of life of individuals with food allergies both in the air and on the ground and is at the forefront of advocacy in airline travel.
5. Passengers with food allergies qualify as individuals with disabilities within the meaning of the Air Carrier Access Act because food allergies cause substantial limitation in major

life activities including, but not limited to, eating and breathing, and impact major bodily systems including the immune, respiratory, circulatory, and digestive systems.

6. Critically, any individual with a food allergy for whom an allergen can cause anaphylactic shock or respiratory distress or otherwise require emergency treatment, is an individual with a disability. The law protects individuals with life threatening food allergies without regard to what the substance is that causes a reaction, ie. a person who is at risk of anaphylaxis due to a peanut allergy is an individual with a disability as is a person who is at risk of anaphylaxis due to a dairy allergy.
7. Passengers with food allergies need pre-boarding in order to secure their seating area for a safe flight. For passengers with food allergies, pre-boarding is a critical accommodation that allows such passengers to wipe down their seating area and surrounding surfaces. Wiping down seating areas and surfaces reduces the risk of an allergic reaction during flight as the result of allergen residue and also reduces the significant anxiety that passengers with food allergies face in air travel. Such wiping down of surfaces cannot be effectively accomplished other than during pre-boarding.
8. Air carriers must “offer pre-boarding to passengers with a disability who self-identify at the gate as needing additional time or assistance to board, stow accessibility equipment, or be seated.” 14 C.F.R. § 382.93.
9. Air carriers not only must provide pre-boarding as an accommodation to passengers who need additional time to be seated safely, but also are specifically prohibited from imposing a surcharge on individuals with disabilities who need to pre-board because of disability. 14 C.F.R. § 382.31(a).

10. In *FARE v. American Airlines*, DOT-OST-2017-0026, and *White v. American Airlines*, DOT-OST-0204, the United States Department of Transportation (“DOT”) specifically noted that when a passenger with a food allergy requests to pre-board to wipe down surfaces they are requesting to do so because the seating area cannot be safely accessed until they have wiped it down or otherwise secured it.
11. Likewise in *FARE v. American Airlines* and *White v. American Airlines*, DOT held that an air carrier violates 14 C.F.R. § 382.93 when it denies a passenger with a food allergy disability the opportunity to pre-board so that the individual can secure the seating area.
12. In its Investigative Finding Sheet in *Mackenzie v. American Airlines* (May 21, 2019), the DOT found that American Airlines violated the Air Carrier Access Act by denying pre-boarding to a passenger with a food allergy. By the time of its decision, American Airlines had withdrawn its discriminatory policy but DOT nevertheless warned American Airlines not to engage in discrimination of this type going forward.
13. In these DOT actions, DOT did not distinguish between different types of allergies. Individuals with allergies are individuals with disabilities regardless of their specific allergens.
14. SOUTHWEST AIRLINES, CO. recently changed its policies and practices and now denies pre-boarding to individuals with food allergies who need pre-boarding to secure their seating area due to food allergy.
15. As the result of this policy change, passengers who need pre-boarding because of food allergy are categorically and routinely being denied necessary accommodations to ensure that they have an opportunity equal to that of individuals without disabilities to fly.

16. SOUTHWEST AIRLINES, CO. is denying pre-boarding to all passengers with food allergies.
17. National organizations advocating on behalf of individuals with food allergies are being inundated with reports from passengers with food allergies who have been denied pre-boarding and who have been told they will only be allowed to pre-board if they pay for “Upgraded Boarding” which is a fee any passenger can pay on each leg of their flight to be seated in Group A1-15, but even this “Upgraded Boarding” occurs after pre-boarding for individuals with disabilities.
18. SOUTHWEST AIRLINES, CO. is refusing to permit passengers with food allergies to pre-board with other passengers with disabilities. Passengers who are allergic to peanuts are allowed to board only after pre-boarding of passengers with disabilities and after boarding for Group A. Restricting passengers who need to pre-board due to food allergies to boarding after Group A means that one third to one half of passengers are already on board the plane at the time individuals with food allergy disabilities are permitted to board. This is therefore, by definition, not pre-boarding and does not allow for wiping down of the seating area which requires a person to block the aisle and/or other passengers’ seats in order to wipe down and secure the seating area. Passengers with food allergies to foods other than peanuts are not even permitted to board in-between Group A and B.
19. Scores of reports from passengers with food allergy disabilities confirm that SOUTHWEST AIRLINES, CO. is denying pre-boarding to passengers with food allergies and instead encouraging passengers with food allergies to pay an extra fee for

Upgraded Boarding. Upgraded boarding is available to passengers with financial means and occurs after pre-boarding for passengers with disabilities.

20. The blatantly discriminatory actions of SOUTHWEST AIRLINES, CO. are harming passengers with food allergies on a daily basis and requires immediate intervention by DOT.

**COUNT I
VIOLATION OF THE AIR CARRIER ACCESS ACT AND THE AIR
PASSENGERS WITH DISABILITIES BILL OF RIGHTS**

21. The Air Carrier Access 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. *See* 49 U.S.C. § 41705.
22. Discrimination includes the failure to make necessary accommodations in order to allow safe and equal transport of individuals with disabilities.
23. Discrimination also includes maintaining policies that single out specific disability groups for lesser protection.
24. Discrimination includes requiring passengers with disabilities to pay for Upgraded Boarding.
25. The Airline Passengers with Disabilities Bill of Rights specifically includes the Right to Pre-Board and the Right to Seating Accommodations in addition to the Right to be Treated with Dignity and Respect.
26. SOUTHWEST AIRLINES, CO. is an air carrier required to comply with the Air Carrier Access Act.
27. An individual with a disability is any individual who has a physical or mental impairment that, on a permanent or temporary basis, substantially limits one or more major life

activities. A physical or mental impairment means any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems.

28. Individuals with life-threatening food allergies are individuals with a disability because their food allergies substantially impair the major life activities of breathing and eating. During an anaphylactic reaction, an allergic individual experiences a complex immune response involving many body systems and resulting in compromise of multiple body systems, including the respiratory system, digestive system, and circulatory system. An unchecked response can be fatal. Avoidance of known allergens is critical not only to physical wellbeing of allergic individuals but to their emotional wellbeing as well.

29. ALLERGY & ASTHMA NETWORK, ASTHMA AND ALLERGY FOUNDATION OF AMERICA, FOOD ALLERGY & ANAPHYLAXIS CONNECTION TEAM, and NO NUT TRAVELER advocate on behalf of individuals with food allergies who are negatively impacted by the discrimination of SOUTHWEST AIRLINES, CO. These individuals have food allergies of different kinds – dairy, nut, wheat, soy, sesame to name just a few – but all are at risk of life-threatening reaction if exposed to their allergen.

30. SOUTHWEST AIRLINES, CO. is in violation of the Air Carrier Access Act, its implementing regulations, and the Airline Passengers with Disabilities Bill of Rights insofar as it has, and continues to, deny pre-boarding to passengers with food allergies who need additional time to wipe down and secure their seating area.

RELIEF REQUESTED

31. Therefore, ALLERGY & ASTHMA NETWORK, ASTHMA AND ALLERGY FOUNDATION OF AMERICA, FOOD ALLERGY & ANAPHYLAXIS

CONNECTION TEAM, and NO NUT TRAVELER request immediate action by the DOT to terminate SOUTHWEST AIRLINES, CO.'s policies and practices of discrimination against travelers with food allergies who require additional time to pre-board. Specifically, Complainants seek the following:

- a. Issue an immediate CEASE AND DESIST order against SOUTHWEST AIRLINES, CO. to prevent it from denying pre-boarding as an accommodation for passengers with food allergies;
- b. Impose civil penalties against SOUTHWEST AIRLINES, CO. in light of the wonton disregard by SOUTHWEST AIRLINES, CO. for its obligations, imposition of civil penalties against SOUTHWEST AIRLINES, CO.;
- c. Mandate re-training of all front-facing SOUTHWEST AIRLINES, CO. employees and/or agents regarding SOUTHWEST AIRLINES, CO.'s obligation to provide pre-boarding at no additional cost to individuals with food allergies who require additional time to be seated safely.
- d. Provide for any and all other relief that may be available including, but not limited to, attorneys' fees and costs.

DATED: November 16, 2022

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was served upon the following via electronic mail on November 16, 2022:

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