



AMERICAN put Mr. Roberts on the next flight to New York but that wasn't until the next morning. Mr. Roberts was inconvenienced, had to get a hotel room and miss some appointments in New York the following day.

He sued the airline. He bases his action on two causes of action premised under New York tort law, that he is entitled to compensation because he was at the gate before 8:00 pm, and that he was caused emotional distress by the actions of AMERICAN that evening in Fort Lauderdale.

The case was filed in state court, removed to this court based on federal question jurisdiction under the Airline Deregulation Act of 1978. Removal has not been challenged. That act states that no state shall enforce any law that relates to the "rates, routes or services" of an airline. That's at 49 United States Code Section 41713, subsection (b)(1).

AMERICAN claims that Roberts's complaint is based on its boarding practices, which are services under the Airline Deregulation Act, and moves to dismiss under Rule 12(b)(6) because Roberts's state law claims are preempted under the ADA. It also claims that the cause of action for infliction of emotional distress fails to state a claim upon which relief can be granted.

12(b)(6) establishes a standard that is favorable to plaintiffs. A court must not dismiss a complaint under that rule unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. See *Conley v. Gibson*, 366 US 41, at pages 45 to 46, 1957. The question is not whether Mr. Roberts might ultimately prevail on his claim but whether he is entitled to offer evidence in support of the allegations in his complaint. I must consider all his allegations as true and review them in the light most favorable to him.

The extent of this preemption under the Airline Deregulation Act has been the subject of some controversy in the courts. In *Morales v. Trans-World Airlines*, 504 US 374, 1992 the Supreme Court instructed the lower courts that the preemption clause in the act should be interpreted as broadly as possible. However, courts have been loathe to preclude all tort claims brought by passengers. Compare, for example, *Smith v. Comair, Inc*, 134 F.3d 254, Fourth Circuit case from 1998, finding preemption of state tort claims where those claims were based on services related to an airline's decision not to allow a passenger to board an airplane. And *Chuckwu v. British Airways*, 889 F. Supp 12, District of Massachusetts, 1995; with *Hodges v. Delta Airlines, Inc*, 44 F.3d 334. It is a Fifth Circuit *en banc* decision from 1995 finding no preemption of state tort law claims where based on services that resulted in physical injuries or property damage resulting from the airline's negligence.

The Second Circuit hasn't directly discussed the issue of the preemption of tort law claims by the Airline Deregulation Act, although it has rejected a preemption argument in a case involving age discrimination claims brought by airline pilots on the ground that the claims were too tenuously related to rates and services. See *Abdu-Brisson v. Delta Airlines*, 128 F.3d 77 Second Circuit 1997.

In this case, Roberts claims are directly related, I find, to AMERICAN's boarding practices and procedures. Any resort to a state's tort law system to regulate these procedures would have a powerful

impact on the airline industry, which is exactly what Congress sought to avoid in enacting the preemption provision.

See also *Rombom v. United Airlines, Inc*, 867 F. Supp 214, 221 to 23, Southern District 1994.

Because Mr. Roberts claims are based on AMERICAN's decision not to let him board the airplane because it was already departing, these claims involve AMERICAN's provision of airline services and, accordingly, I find his claims preempted and dismiss them.

The cause of action regarding infliction of emotional distress must also be dismissed for failure to state a claim. To the extent it seeks to pursue a claim based on negligent infliction of emotional distress, it requires an assertion that the alleged negligence unreasonably threatened the plaintiff's safety or placed him in a "zone of danger." See *DeAguiar v. County of Suffolk*, 734 New York Sup 2d 212 Second Department 2001. The allegations here don't meet that standard.

There is a separate tort under New York law for intentional infliction of emotional distress. It seems like no one has ever been able to actually ever make out this claim. It is such a stringent one; the elements are stringent. It requires extreme and outrageous conduct, an intent to cause or disregard of a substantial probability of causing severe emotional distress, a causal connection between the conduct and the injury, and actually severe emotional distress.

A plaintiff, see *Howell v. New York Post Company*, 81 New York Second 115 at 121, 1993, the Court of Appeals said in *Murphy v. American Home Products Corporation*, 58 New York Second 293 at 303 in 1983 that a plaintiff can only prevail on such a claim "where the conduct has been so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency and to be regarded as atrocious and utterly intolerable in a civilized community."

Taking the allegations as true, Mr. Roberts was told his airline was boarding. His aircraft, his flight was boarding at 8:00 and he was told that when in fact it was leaving at 8:00. It cost him a trip to New York when he needed to be in New York the following morning.

I accept as true that that produced inconvenience on his part, even substantial inconvenience. But that doesn't remotely rise to the level of consequence that's cognizable in an action seeking damages for intentional infliction of emotional distress. So I feel constrained to reach the right result, which is to dismiss the case.