

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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DENISE WHITNEY,

Plaintiff,

-against-

JETBLUE AIRWAYS CORPORATION,

Defendants.

NOT FOR PUBLICATION  
**MEMORANDUM & ORDER**  
07-CV-1397 (CBA)

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AMON, United States District Judge:

On April 3, 2007, plaintiff Denise Whitney (“Whitney”) filed this action against JetBlue Airways Corp. (“JetBlue”), seeking damages for injuries allegedly suffered when the passenger sitting behind her repeatedly kicked the back of her seat during the course of a JetBlue flight. By Notice of Motion dated October 7, 2008, defendant JetBlue moved for summary judgment dismissing plaintiff’s claims pursuant to Rule 56(c) of the Federal Rules of Civil Procedure.

This Court referred the motion to the Honorable Cheryl L. Pollak, United States Magistrate Judge, for a Report and Recommendation (“R&R”). On August 20, 2009, Magistrate Judge Pollak issued an R&R recommending that defendant’s motion be granted on the grounds that Whitney’s claims are preempted by the Airline Deregulation Act of 1978, 49 U.S.C. § 41713(b) (2000) (the “ADA”) and, alternatively, that JetBlue did not breach any common law tort duty owed to the plaintiff. Plaintiff timely filed objections to the R&R pursuant to Fed. R. Civ. P. 72(b) and 28 U.S.C. § 636(b)(1). No objections were filed by the defendant.

The Court reviews the R&R de novo. See Fed. R. Civ. P. 72(b); The European Community v. RJR Nabisco, Inc., 134 F. Supp. 2d 297, 302 (E.D.N.Y. 2001). For the reasons set forth below, the Court adopts that portion of the Report and Recommendation that finds plaintiff’s claims preempted by the ADA and dismisses this case.

## DISCUSSION

Whitney objects to the R&R on the grounds that her state law negligence claims are not expressly preempted by the ADA and that “a finding of non-preemption is clearly supported by both the intent of Congress in enacting the ADA as well as by recent Second Circuit decisional authority.” Pl.’s Objs. at 9.<sup>1</sup> As described in the R&R, prior to 1978, the Federal Aviation Act of 1958 (the “FAA”), 72 Stat. 731, as amended, 49 U.S.C. 40101 et seq., permitted airline passengers to pursue state common law or statutory remedies against airlines. See Morales v. Trans World Airlines, Inc., 504 U.S. 374, 378 (1992); Rombom v. United Air Lines, Inc., 867 F. Supp. 214, 218 (S.D.N.Y. 1994). However, in 1978, Congress enacted the ADA, which provides that a state “may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation.” 49 U.S.C. § 41713(b)(1). Congress’ enactment of the ADA was based on an assumption that “maximum reliance on competitive market forces would best further efficiency, innovation, and low prices as well as variety [and] quality . . . of air transportation services . . . .” Abdu-Brisson v. Delta Airlines, Inc., 128 F.3d 77, 85-86 (2d Cir. 1997) (quoting Morales, 504 U.S. at 378 and 49 U.S.C. §§ 40101(a)(6) & 40101(a)(12)). Congress included a preemption clause in order to “ensure that the States would not undo federal deregulation with regulation of their own.” American Airlines v. Wolens, 513 U.S. 218, 222 (1995) (quoting Morales, 504 U.S. at 378). Nonetheless, Congress chose not to repeal the “savings clause” of the original FAA, which states that “[a] remedy under this part is in addition to any other remedies provided by law.” 49 U.S.C. § 40120(c).

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<sup>1</sup> Citations to “Pl.’s Objs.” refer to “Plaintiff’s Objections to Report and Recommendation” submitted September 11, 2009.

In Morales, the Supreme Court broadly construed the words “related to” in the ADA’s preemption clause, finding that a state law or regulation should be preempted when it has “a connection with or reference to” fares, routes or services. 504 U.S. at 384. Plaintiff contends that recent Supreme Court decisions indicate that the Supreme Court “may be veering away from such a rigid stance” on preemption. Pl.’s Objs. at 9. Specifically, Whitney points to Wyeth v. Levine, \_\_\_ U.S. at \_\_\_, 129 S. Ct. 1187, 1194-95 (2009), which held that FDA approval of a prescription drug under the Federal Food, Drug and Cosmetic Act, 21 U.S.C. § 301 et seq., (“FDCA”) does not preempt state tort claims based on a drug manufacturer’s failure to warn of dangerous side effects. See 129 S. Ct. at 1191. In that case’s discussion of preemption doctrine, the Court stated that, in preemption cases, “and particularly in those in which Congress has legislated in a field which the States have traditionally occupied, we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.” Id. At 1194-95 (internal quotations and alterations omitted).

This Court is not persuaded by Whitney’s reliance on Wyeth. Unlike the ADA, the FDCA does not contain any express preemption clause. See 129 S. Ct. at 1200 (“If Congress thought state-law suits posed an obstacle to its objectives, it surely would have enacted an express pre-emption provision at some point in the FDCA’s 70-year history. But despite its 1976 enactment of an express pre-emption provision for medical devices . . . Congress has not enacted such a provision for prescription drugs.”) Because Congress has not explicitly authorized federal preemption over state law claims, the Wyeth Court’s analysis of preemption does not impact the analysis this Court must undertake in determining whether the state law tort claims at issue here constitute a “service” under the express preemption clause of the ADA.

Further, contrary to plaintiff's claims that the Supreme Court has distanced itself from the preemption analysis in Morales and Wolens, another recent, more relevant decision suggests exactly the opposite. In Rowe v. N.H. Motor Transp. Ass'n, \_\_\_ U.S. \_\_\_, 128 S. Ct. 989 (2008), the Supreme Court broadly construed the preemption clause in the Federal Aviation Administration Authorization Act of 1994 (the "FAAA"), 108 Stat. 1605-1606, 49 U.S.C. § 14501(c)(1), a provision that borrowed identical language from the preemption clause of the ADA. Rowe, 128 S. Ct. at 993.<sup>2</sup> That case expressly followed the analysis in Morales, finding that state enforcement actions "having a connection with, or reference to carrier rates, routes, or services are pre-empted," and that "such pre-emption may occur even if a state law's effect on rates, routes or services is only indirect." Id. At 995 (quoting Morales, 504 U.S. at 386-87) (internal quotation marks omitted). The Court's explicit reaffirmation of the Morales analysis to a nearly identical preemption clause hardly indicates that the Court is "veering away" from its prior decisions.

As Whitney correctly observes, neither the Supreme Court nor the Second Circuit has provided a per se rule with regard to the ADA's preemption of state tort claims. See Abdu-Brisson, 128 F.3d at 81 ("The Supreme Court has not drawn any distinct preemption lines for guidance, and that may not be possible."); see also In re: Nigeria Charter Flights Contract Litigation, 520 F. Supp. 2d 447, 469 (E.D.N.Y. 2007). This Court notes with approval the well-researched and detailed recitation of case law concerning preemption of state tort claims under the ADA in Magistrate Judge Pollak's R&R, see R&R at pp. 9-14, and agrees that the three-part test elaborated by then District Judge Sotomayor in Rombom v. United Air Lines, 867 F. Supp. 214, 221-222 (S.D.N.Y. 1994), appropriately balances the relevant factors necessary to

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<sup>2</sup> The FAAA preemption clause states, in pertinent part, "[A] State . . . may not enact or enforce a law . . . related to a price, route, or service of any motor carrier . . . with respect to the transportation of property." See also 49 U.S.C. § 41713(b)(4)(A) (similar preemption provision applying to combined motor-air carriers.)

determine whether a state tort action is preempted under the ADA.<sup>3</sup> Under Rombom, the Court first inquires whether the activity at issue is an “airline service.” Id. At 221. If it is, the next step is to determine whether the claim affects the airline service “directly or tenuously, remotely or peripherally.” Id. at 222 (citing Morales, 504 U.S. at 390). If the state claims have only an incidental or tenuous effect on a service, there is no preemption and the state tort action should continue. If, however, there is a direct effect on a service, then the court must determine if “the underlying tortious conduct was reasonably necessary to the provision of the service.” Id. at 222.

Whitney contends that defendants fails to meet the first prong of the Rombom test because her claims “cannot be characterized as a service subject to competitive market forces and in turn do not trigger preemption by federal law.” Pl.’s Objs. at 11. In support of this position, Whitney argues that the Second Circuit’s unpublished decision in Weiss v. El Al Airlines, 309 Fed. App. 483 (2d Cir. 2009) has “articulated a new test for determining whether an activity is a ‘service’ invoking ADA preemption.” Pl.’s Objs. at 11. According to Whitney, the “new test” provides that “the ‘relation’ of an activity to an ADA preempted ‘service’ must be considered from within a commercial context of ‘competitive market forces.’” Id.

In Weiss, the plaintiff passenger brought a state tort claim against El Al Israel Airlines after he and his wife were “bumped” from a flight to Israel from John F. Kennedy International Airport. In a summary order, the Second Circuit panel affirmed the District Court’s judgment that the claim was preempted by the ADA. Following Air Transport Association of America, Inc. v. Cuomo, 520 F.3d 218 (2d Cir. 2008) (“ATA”), the Court noted that the majority of circuits had found the term “service” to “refer [] to the provision or anticipated provision of labor

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<sup>3</sup> Although the Second Circuit has never cited Rombom, the three-part test described therein has become the standard test for preemption in both the Southern and Eastern districts of New York. See, e.g., Farash v. Continental Airlines, Inc., 574 F. Sup. 2d 356, 363 (S.D.N.Y. 2008); In re Nigeria Charter Flights Contract Litigation, 520 F. Supp. 2d 447, 469 (E.D.N.Y. 2007); In re Jet Blue Airways Corp. Privacy Litigation, 379 F. Supp. 2d 299, 315 (E.D.N.Y. 2005); Ruta v. Delta Airlines, Inc., 322 F. Supp. 2d 391, 400 (S.D.N.Y. 2004).

from the airline to its passengers and [to] encompass[] matters such as boarding procedures, baggage handling, and food and drink.” Weiss, 309 Fed. Appx. At 485 (quoting ATA, 520 F.3d at 223). Holding that the decision to bump a passenger directly related “to the provision or anticipated provision of labor from the airline,” the Circuit court found the claims preempted. Contrary to Whitney’s objections, Weiss did not purport to create a new test for “service” tied directly to whether the action complained of is subject to “competitive market forces”. Rather, in finding that the claims were preempted, the Weiss court simply observed that the “case falls squarely within the rationale of ATA,” which stressed the Congressional goal of “assur[ing] that transportation rates, routes, and services reflected maximum reliance on competitive market forces, thereby stimulating . . . efficiency, innovation, and low prices.” Weiss, 309 Fed. Appx. At 485 (quoting ATA, 520 F.3d at 222-23.)<sup>4</sup> It is highly unlikely that the Second Circuit would fashion a “new test” in an unpublished opinion with no precedential value. See 2d Cir. R. 32.1(b). In any event, assuming a “service” needed to be “subject to competitive market forces” as Whitney argues, an airline’s ability to provide a safe environment for its passengers is the type of service about which airlines are likely to compete. Airlines must compete to hire and train competent and skilled flight attendants who are attuned to the safety of its passengers, and passengers who feel less secure onboard particular airlines may well choose to fly elsewhere. Applying the first prong of the Rombom test, this Court concludes that the crew’s role in regulating in-flight passenger conduct is part of the ordinary services rendered by airline personnel. Alternatively, under the Second Circuit’s recent guidance in ATA, the flight

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<sup>4</sup> Whitney argues that Magistrate Judge Pollak “[s]urprisingly . . . neither cites nor discusses” the approach cited in Weiss. Pl.’s Objs. at 12. The Court observes, however, that the Weiss decision was issued after this Motion was fully briefed and oral argument was complete, and that Whitney apparently never brought this case to the Magistrate Judge’s attention, instead raising it for the first time in these Objections. Why the Magistrate Judge’s failure to cite to this unpublished decision should be considered “surprising” is therefore unclear.

attendants' in-flight duties constitute part of the "anticipated provision of labor from the airline to its passengers." ATA, 520 F.3d at 223.

Applying the second prong of the Rombom test, the R&R correctly concluded that the flight attendant's reaction or lack of reaction to the kicking passenger directly affected this service. Under Rombom's final prong, the Court agrees that the flight attendant's response to the kicking passenger, including speaking with the passenger after the incident and moving her to a different seat, or, assuming plaintiff's facts, her lack of response, were "reasonably necessary to the provision of the service" of ensuring the safety and comfort of passengers.

Accordingly, the Court adopts as the opinion of the Court that portion of the well-reasoned R&R dismissing plaintiff's claims as preempted by the ADA. Defendant's motion for summary judgment is granted. In light of the resolution of this Motion, the Court does not address whether JetBlue breached any duty of care under state tort law or the admissibility of Dr. Hynes' opinion.

SO ORDERED.

Dated: Brooklyn, New York  
September 29, 2009

/s/ Carol B. Amon (electronically signed)

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Carol Bagley Amon  
United States District Judge