



U.S. Department  
of Transportation  
**Federal Aviation  
Administration**

Office of Civil Rights

800 Independence Ave., S.W.  
Washington, DC 20591

JUN 5 2001

REC'D JUL 12 2001

Mr. Martin Pion, President  
Missouri GASP, Inc.  
6 Manor Lane  
St. Louis, MO 63135

RE: DOT# 94-928

Dear Mr. Pion:

This letter transmits the Report of Informal Inquiry/Investigation in the reconsideration of the subject complaint against Lambert St. Louis International Airport (STL). As set forth in the report, we do not find that STL has violated regulations implementing Section 504 of the Rehabilitation Act of 1973, as amended, or Title II of the Americans with Disabilities Act of 1990. This determination is administratively final.

If we can be of further assistance, please contact David Micklin, of my staff, at (202) 267-3270.

Sincerely,

*for*  
Fanny Rivera  
Assistant Administrator for Civil Rights

Enclosure

cc: AGC-610 (Beth Newman - with enclosure)

## REPORT OF INFORMAL INQUIRY/INVESTIGATION

Case #: DOT 94-928

COMPLAINANT: Mr. Martin Pion, President  
Missouri GASP, Inc.  
6 Manor Lane  
St. Louis, Mo. 63135

I. INTRODUCTION & BACKGROUND. A request for reconsideration in the subject complaint is before the U.S. Department of Transportation (DOT), Federal Aviation Administration (FAA). In a memorandum dated September 17, 1996, the departmental Office of Civil Rights notified the FAA that it had granted the complainant's request for reconsideration of the FAA's first finding of its July 22, 1996, decision. A letter of the same date notified the Complainant. By memorandum of April 23, 1997, the FAA Office of Civil Rights requested that the Central Region Civil Rights Staff review the case file to determine whether any additional investigation was needed and to conduct an appropriate inquiry. This report constitutes the region's findings from that inquiry.

The Lambert St. Louis International Airport (STL) is a recipient of FAA grants authorized by the Airport Improvement Program (AIP). 49 CFR Part 27, DOT's rule implementing Section 504 of the Rehabilitation Act of 1973 (Section 504), as amended, applies to recipients of Federal financial assistance. 49 CFR Section 27.19(a) also requires that recipients comply with all applicable regulations of the Americans With Disabilities Act (ADA) of 1990. Regulations applicable to airports include 28 CFR Section 35, the Department of Justice (DOJ) rule implementing Title II of the ADA. Accordingly, Lambert St. Louis International Airport is subject to both rules. The findings and recommendations set forth in this report are a result of additional data requested and received from both Mr. Pion, President of GASP, Inc. and Lambert St. Louis International Airport authority. This review was conducted by Mr. David P. Genter, External Program Manager of the Civil Rights Office, FAA Central Region.

## II. ALLEGATION OF COMPLAINT UNDER RECONSIDERATION.

Mr. Pion, President, on behalf of GASP, made the following allegation in his complaint:

"We allege that both the airport authority and St. Louis County Council have violated the requirements of the ADA and would request that you pursue this on behalf of the members we represent and *specifically those parties claiming denial of access.*"

II. APPLICABLE AUTHORITY. The following regulatory provisions are relevant to the complaint.

- a) 28 CFR Part 35.
- b) Appendix A to 28 CFR Part 35.
- c) 49 CFR Part 27.

III. SUMMARY OF FACT-FINDING. Based on interviews conducted, visual inspection, and review of documents, the investigator made the following findings of fact.

- A) An amendment to 49 CFR Part 27 was published in the Federal Register on November 1, 1996, and became effective December 2, 1996 (61 F. R. 56409). As amended, Section 27.71(a) applies to all terminal facilities and services owned, leased, or operated on any basis by a commercial service airport that receives FAA grants. Section 27.71(b) requires the airport owner to ensure that such facilities are readily accessible to and usable by individuals with disabilities. An airport is deemed to comply with this obligation if it meets the requirements of 28 CFR Part 35.
- B) 28 CFR Section 35.130, General Prohibitions against discrimination," states:
  - (a) No qualified individual with a disability shall, on the basis of disability, be excluded from participation on or be denied the benefits or services, programs, or activities of a public entity, or be subjected to discrimination by a public entity.
  - (b)(1) A public entity, in providing any aid, benefit, or service, may not directly or through contractual, licensing, or other arrangements, on the basis of disability--
    - (i) Deny a qualified individual with a disability the opportunity to participate in or benefit from the aid, benefit, or service...
    - (vii) Otherwise limit a qualified individual with a disability in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving the aid, benefit, or service.
  - (1) A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to

avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.

C) 28 CFR Section 35.149, "Discrimination prohibited" states:

Except as otherwise provided in Section 35.150, no qualified individual with a disability shall, because a public entity's facilities are inaccessible to or unusable by individuals with disabilities, be excluded from participation in, or be denied the benefits of the services, programs or activities by a public entity, or be subjected to discrimination by a public entity.

D) 28 CFR 35.150, "Existing facilities," states:

(a) General. A public entity shall operate each service, program, or activity so that the service, program, or activity, when viewed in its entirety is readily accessible to and usable by individuals with disabilities. This paragraph does not --

(1) Necessarily require a public entity to make each of its existing facilities accessible to and usable by individuals with disabilities:

...

(3) Require a public entity to take any action that it can demonstrate would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens. In those circumstances where personnel of the public entity believe that the proposed action would fundamentally alter the service, program or activity or would result in undue financial and administrative burdens, a public entity has the burden of proving that compliance with Section 35.150(a) of this part would result in such alteration or burdens...

E) Appendix A to 28 CFR Part 35 includes pertinent information, which is summarized below.

The DOJ has declined to state categorically that allergy or sensitivity to cigarette smoke is a disability because the determination as to whether an impairment is a disability depends on whether, given the particular circumstances at issue, the impairment substantially limits one or more major life activities (or has a history of, or is regarded as having such an effect). The DOJ states that sometimes respiratory or neurological functioning is so severely affected that an individual will satisfy the requirements to be considered disabled under the regulation. In other cases, individuals may be sensitive to environmental elements or to smoke but their sensitivity will not rise to the level needed to constitute a disability. For example, their major life

activity of breathing may be somewhat, but not substantially impaired. In these cases, the individuals are not disabled and are not entitled to the protections of the statute despite their sensitivity to environmental agents. In sum, the determination as to whether allergies to cigarette smoke (as well as environmental illness, also known as multiple chemical sensitivity) are disabilities covered by 28 CFR Part 35 must be made using the same case-by-case analysis that is applied to all other physical or mental impairments.

F) 28 CFR Part 35.132 states that this rule does not preclude the prohibition of, or the imposition of restrictions on, smoking in transportation.

G) Current regulations under Title II of the ADA or Section 504 do not establish a quantitative compliance standard pertaining to the level of nicotine at airports.

H) By letter dated May 13, 1997, the Central Region Civil Rights Staff notified the Director of STL that the request for reconsideration of the complaint filed by Mr. Martin Pion, President Missouri GASP, had been partially granted. Specifically, the Departmental Office of Civil Rights referred the complaint to the FAA for reconsideration of the first finding of the July 22, 1996, decision.

I) As part of the investigation STL was asked to submit the following information:

- 1) Any updates to their January 26, 1993, self-evaluation pertaining to tobacco smoke in public areas of the airport.
- 2) A copy of their transition plan.
- 3) A diagram and description of the seven smoking rooms.
- 4) Any available data which measures levels of tobacco smoke in the public areas of the airport and a comparison of these levels with health standards, including any evidence that the smoking rooms are effective in ensuring that persons with disabilities are not denied access to the airport.
- 5) A description of any other steps taken by STL or any steps it plans to take to ensure that individuals with disabilities are not excluded from the airport.

J) In response, on June 13, 1997, STL provided the following information.

- Certified Test, Adjust and Balance Report of the Lambert St. Louis Airport Smoking Lounges. This report contains information regarding the construction of seven smoking lounges strategically located throughout STL including diagrams of the location and size of the lounges. (Attachment 1).
- Air Sampling Results conducted on February 10, 1997, by engineering consultants hired by the Airport to test the air quality and

make recommendations. Specifically, the test results determined that each lounge is equipped with a sufficient supply of makeup air (outdoor air) to allow the exhaust and filtration systems to function properly and to maintain a negative pressure in each lounge. A negative pressure in each room assures that the smoke generated inside the lounges will not migrate or vent in to the outer concourse areas. Additionally, the report includes surveys of flow rate measurement with actual occupancy. (Attachment 2).

- STL's Tobacco Smoking Policy. The policy prohibits smoking in all parking shelters, covered areas approaching the building and elevators in the parking garage; all non-public areas on the concourse and ticketing levels are non-smoking and any area utilizing the common air handling system is non-smoking. (Attachment 3).
- Comments responding to the Complainant's allegations including assurances by STL management that all disability complaints received, both written and verbal, are investigated; and information regarding their response to special requests from individuals. Specifically, Ms. Vivian Dietemann, who has severe allergic reactions to tobacco smoke, requested accommodations to assist her in moving through the airport. STL responded by transporting her in an airport vehicle to the plane via the outside ramp area.

K) Letter dated July 15, 1997, from the Central Region Civil Rights Staff offered the Complainant, Mr. Pion, the opportunity to provide additional comments/information to the responses proffered by the airport.

L) In reply, Mr. Pion submitted comments including the following arguments. (Attachment 4).

- STL had not complied with self-evaluation requirements in that STL had not included and consulted with parties of all disabilities, including members of the Complainant's group in "identifying problems and proceeding to correct them."
- The smoking rooms installed by STL are inadequate because they do not ensure that tobacco smoke does not migrate to adjoining parts of the airport.
- Because STL has not prohibited smoking at the Airport, they have "elevated smokers rights above those of non-smokers."

#### IV. ANALYSIS/CONCLUSION

Mr. Pion alleged in his complaint that the airport authority and the St. Louis County Council violated the requirements of the ADA and requests that the matter be pursued on behalf of the members of his organization, including those claiming denial of access. These charges can not be substantiated.

Under current regulations, the Airport has a duty to accommodate individuals to avoid discrimination on the basis of disability. STL has taken several steps to accommodate individuals allergic or sensitive to environmental tobacco smoke. Specifically, STL has a) constructed and tested smoking lounges located throughout the Airport; b) enacted a smoking policy restricting smoking throughout the airport premises; c) investigated all complaints filed, on the basis of disability; d) and responded to requests by individuals.

Secondly, the Complainant has offered no cases indicating that a *disabled* individual, as defined under the ADA, has been denied access to STL as a result of sensitivity to tobacco smoke. As set out in the regulations, the determination as to whether an impairment, i.e. allergy or sensitivity to tobacco smoke, is a disability depends on whether, given the particular circumstances at issue, the impairment substantially limits one or more major life activity. One who suffers from respiratory or neurological impairments does not automatically qualify as disabled, and a Complainant must show that an individual meets the requirements to be considered disabled under the regulation. Further, there are no regulations establishing a quantitative compliance standard pertaining to the level of nicotine at airports. Accordingly, the Complainant's argument that the smoking rooms at STL are inadequate because they do not prevent the smoke from migrating to other areas of the Airport is not persuasive. In fact, in the absence of a standard, the onus is upon the Complainant to present cases of *disabled* individuals, to prove that STL has denied persons with disabilities access to the airport. Consequently, a violation of current regulations can not be established.

The Complainant's additional arguments (a) that STL did not consult with parties of all disabilities, including the Complainant's own group, in completing its self evaluation and (b) that STL elevated smokers rights above those of nonsmokers, factual or not, do not constitute a violation of the regulations implementing Title II of the ADA and Section 504. Though 49 CFR Section 27.11(c)(2)(v) does require a recipient to consult with interested persons, including handicapped persons and organizations representing the handicapped when establishing a system for periodically reviewing and updating their evaluation of compliance with the regulations, they do not require that persons of all disabilities be consulted. The Complainant has offered no corroboration that STL has shown preferential treatment to one group over another.

#### VI. RECOMMENDATIONS:

1) The Airport should continue implementing the following actions: a) self-evaluation of existing policies by monitoring the air quality in the smoking rooms to ensure the best

possible air quality in the Airport; b) policing and enforcing its smoking policy; c) acknowledging and investigating all complaints; and d) responding to individual requests for accommodation.

2) The Airport should include GASP as one of the organizations that it consults with in conducting future self-evaluations.