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NEWSLETTER

Supreme Court to Examine Air Carrier Immunity under the Aviation Transportation Security Act

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After 9/11, the federal government recognized that airlines had to play a "snitch" role in order to strengthen aviation security by reporting suspicious behavior. Congress passed the Aviation and Transportation Security Act (ATSA), which included provisions that gave airlines statutory immunity from liability that could arise from statements they make when reporting security threats. Carriers can lose ATSA immunity under two circumstances: (1) if the statements are knowingly false, inaccurate, or misleading, or (2) the statements are made with reckless disregard as to their truth or falsity.

A recent decision by the Colorado Supreme Court construing this immunity ruled that a disclosure by Air Wisconsin was unprotected by ATSA, thus exposing the airline to liability. In the decision, the Colorado Supreme Court declined to extend ATSA immunity to Air Wisconsin in a defamation claim, resting its decision on a nuanced interpretation of the words that the airline used when reporting the security threat while declining to assess the truthfulness of the statements. The Supreme Court of the United States will review the case in its next session.

In *Air Wisconsin Airlines Corp. v. Hoeper*, the Colorado Supreme Court held that Air Wisconsin did not have the benefit of ATSA immunity from defamation liability for statements its employees made to the Transportation Security Administration (TSA) out of concern that William Hoeper, an Air Wisconsin pilot facing imminent termination, posed a possible security threat. Instead, the court upheld a $1.4 million verdict in favor of Hoeper, finding that Air Wisconsin was liable for defamatory statements it made about Hoeper when reporting him as a security threat. The court found that the statements were made with reckless disregard for their truth or falsity.

According the case pleadings and the court's opinion, Hoeper failed a certification test for a new type of aircraft—his fourth failure of the same test—making him eligible for termination by the airline. Hoeper accused test administrators of sabotaging his test and his demeanor was described as "very upset" by those who saw him during or after the simulator incident. The administrator immediately called an Air Wisconsin fleet manager to report the situation. The fleet manager and his colleagues reported Hoeper—who was a Federal Flight Deck Officer (FFDO) and thus, authorized to carry a firearm on commercial aircraft—to the TSA because

they were concerned that Hoeper, who was scheduled to fly as a passenger that afternoon, would board a plane with his firearm and possibly pose a security threat.

In finding against Air Wisconsin, the Colorado Supreme Court took issue with the way the fleet manager phrased three statements to the TSA, finding that the fleet manager's statements were "overstated" and were made in reckless disregard of their truth or falsity, precluding immunity under the ATSA. First, the Air Wisconsin fleet manager called the TSA to report "an Air Wisconsin pilot in [the] FFDO program who was terminated today." The court pointed out that while Hoeper's termination was imminent, it had not yet officially occurred. The court suggested that if the fleet manager said "Hoeper knew he would be terminated soon," Air Wisconsin may have been immune under the ATSA. Second, the fleet manager described Hoeper as "an FFDO who may be armed." As the court suggested, the statement "Hoeper was an FFDO pilot" may have been protected by the ATSA. Finally, the fleet manager stated that Air Wisconsin was "concerned about ... [Hoeper's] mental stability." The court's preference would have been the following: "[Hoeper] had acted irrationally at the training three hours earlier and 'blew up' at the test administrators." The court's opinion offered little insight into why the court's proposed language would have allowed for immunity, even though Air Wisconsin's statements were essentially the same.

Air Wisconsin also objected to the court's refusal to assess the truthfulness of the Air Wisconsin fleet manager's statements to the TSA. The airline argued that immunity is only precluded under the ATSA if the carrier made false statements with knowledge of their falsity or with reckless disregard as to their truth or falsity, and that the fleet manager's statements were "substantially true." Any other construction "could not have been intended," the airline said, because precluding immunity for truthful statements would undermine the purpose of the ATSA. The Supreme Court's review of the case will address this issue, focusing specifically on "whether ATSA immunity may be denied without a determination that the air carrier's disclosure was materially false."

While this case involves a dispute between an employer and employee, the Colorado Supreme Court's decision may have implications for the aviation industry. It is binding law in courts applying Colorado law, but also illustrative precedent that may be used by other courts to interpret and apply the ATSA. The court's decision arguably applies to any statement made by an air carrier to federal, state, or local authorities regarding any person who is perceived to present an aviation safety or security threat. Unfortunately, the Colorado decision does not offer air carriers much useful guidance on how to avoid liability when reporting future threats, nor does it explain how the truthfulness of the airline's statements will be weighed by the court in the future. Instead, as Air Wisconsin summarized in its appeal, "[this decision] creates a substantial risk that airlines contemplating security threats will decline to call the TSA unless absolutely sure about a threat and only after rigorously scrubbing the wording of a report with their attorneys."

Air Wisconsin and the aviation industry as a whole are hoping for a reversal or remand by the Supreme Court to refine the review of the immunity provisions of the ATSA and to prevent this decision from impeding the intended goal of the ATSA.