Client Alert

January 28, 2014

SCOTUS: Airlines Are Entitled to Immunity under the Aviation and Transportation Security Act Unless Statements Are Materially False

By Joanna Simon, Ellen Adler, William O'Connor and Brian Matsui

Yesterday, the Supreme Court issued its decision in *Air Wisconsin Airlines Corp. v. Hoeper*, 571 U.S. ---, No. 12-315 (2014), holding that immunity for an air carrier under the Aviation and Transportation Security Act, 49 U.S.C. § 44941(b) (ATSA), may not be denied without a determination that a statement by the carrier was materially false. This pivotal decision is a victory for air carriers, giving airlines necessary "breathing space to report potential threats to security officials without fear of civil liability for a few inaptly chosen words."

THE AVIATION AND TRANSPORTATION SECURITY ACT

ATSA directs that air carriers and their employees who have "information . . . about a threat to civil aviation shall provide the information promptly to the Transportation Security Administration." 49 U.S.C. § 44905(a). Failure to report can result in civil penalties. *Id.* § 46301(a)(1)(A). This policy has been aptly called "when in doubt, report." ATSA also provides air carriers with immunity from civil liability for disclosure of suspicious activity, provided that the air carrier does not report information that it knows to be false or misleading. 49 U.S.C. §§ 44941(a)-(b).

BACKGROUND FACTS

From 1998 to 2004, William Hoeper was a commercial pilot for Air Wisconsin. In late 2004, Air Wisconsin required Hoeper to undertake training and pass a proficiency test for piloting a new aircraft. Despite multiple opportunities to take the test, he did not pass. During Hoeper's final attempt at the proficiency exam, he became angry with the test administrators, ended the test abruptly, raised his voice, and used profanity.

After Hoeper left the testing facility, the test administrator contacted Air Wisconsin manager Patrick Doyle, described the confrontation, and said that Hoeper "blew up." Doyle was aware that Hoeper was authorized to carry a firearm under the Federal Flight Deck Officer program.

Under ATSA's reporting mandate, Doyle called the TSA to report Hoeper as a possible threat. Doyle informed the TSA that Hoeper was a disgruntled employee who might be armed, and expressed concern about the whereabouts of Hoeper's weapon and about Hoeper's mental stability. In response, the TSA removed Hoeper from his booked flight to Colorado, searched him, and questioned him regarding his firearm, which Hoeper had left at home. Hoeper was cleared by TSA officials and permitted to travel later that evening.

PROCEEDINGS BELOW

Hoeper brought suit in Colorado state court against Air Wisconsin for defamation arising out of Doyle's statements to the TSA. He alleged that Doyle's report to the TSA was false and defamatory. Air Wisconsin moved for summary judgment based on ATSA immunity.

The trial court denied summary judgment, finding disputed issues of fact regarding the falsity of Doyle's statements. At trial, Air Wisconsin moved for a directed verdict based on ATSA immunity, which was also denied. The jury returned a $1.4 million verdict in Hoeper's favor.

On appeal, the Colorado Supreme Court held that ATSA immunity – like many other federal immunities – is immunity *from suit*, not just from damages. *Air Wisconsin Airlines Corp. v. Hoeper*, ---P.3d---, 2012 WL 907764, at *4 (Colo. 2012). Accordingly, it found that the issue of whether ATSA immunity applied should have been determined by the trial court as a matter of law, and not submitted to the jury. However, the Colorado Supreme Court also performed a review of the record, with deference to the jury's findings, and found that Doyle did not actually believe Hoeper "to be so unstable" that he might pose a threat to aircraft safety. Therefore, the Court found that the incorrect ATSA immunity analysis constituted harmless error because Air Wisconsin was not entitled to ATSA immunity.

Air Wisconsin petitioned for a writ of certiorari to the Supreme Court on two issues: (1) whether a court can deny ATSA immunity without deciding whether the airline's report was true; and (2) whether the First Amendment requires a reviewing court in a defamation case to make an independent examination of the record before affirming that a plaintiff met his burden of proving the statement false. After inviting and then receiving the view of the Solicitor General, the Supreme Court granted review to decide "whether ATSA immunity may be denied under § 44941(b) without a determination that a disclosure was materially false."

THE SUPREME COURT'S DECISION

Yesterday, the Supreme Court reversed the Colorado Supreme Court and held that "ATSA immunity may not be denied to materially true statements." The Court reasoned that denying immunity for substantially true reports based on the theory that the person making the report had not yet gathered enough information to be certain of its truth would defeat the purpose of ATSA immunity – "encouraging airline employees to report suspicious activities."

The Court also held that the Colorado Supreme Court erred in giving deference to the jury's findings concerning falsity, noting that deferential review "cannot substitute for the court's own analysis" and that the jury did not find any "material" falsity because it was not instructed to do so. Finally, the Court held that, in the context of determining materiality for purposes of ATSA immunity, the issue is "whether a falsehood affects the authorities' perception of and response to a given threat," not whether a falsehood "affects the subject's reputation in the community." Applying these standards to the facts of Hoeper's case led the Court to the only logical outcome: Air Wisconsin was entitled to immunity under ATSA.

Justices Scalia, Thomas, and Kagan concurred in the decision to the extent that the Court required a finding of material falsity to avoid ATSA immunity. They dissented insofar as the Court went on to apply the materiality standard to the facts of Hoeper's case, stating that the "factbound question [was] better left to the lower courts" and that the majority's decision – when viewing the facts in the light most favorable to Hoeper – "proceeds to give the wrong answer" as to whether Doyle's statements were materially false. The dissent stated that this portion of the majority's decision "demonstrates the wisdom of preserving the jury's role[.]"

CONCLUSION

The *Air Wisconsin* decision is a positive development for air carriers, vindicating the need for airlines and their employees to have open communications with the TSA and other federal agencies about perceived threats to aviation safety, even before complete information concerning the threat is available.

* * *

Recognized as being among the top aviation litigation practices in the United States, we have more than three decades of complex aviation case experience. Many of our attorneys have military or civil aviation backgrounds, and know and understand the technical aspects of aviation litigation. This firsthand experience helps us devise creative and innovative approaches to extraordinarily complex matters, and deliver winning results. For more information regarding our aviation practice, click here.

To read our other aviation-related client alerts, please click here.

Contact:

Brian Matsui
(202) 887-8784
bmatsui@mofo.com

William O'Connor
(213) 892-5341 or (858) 720-7932
woconnor@mofo.com

About Morrison & Foerster:

We are Morrison & Foerster—a global firm of exceptional credentials. Our clients include some of the largest financial institutions, investment banks, Fortune 100, technology and life science companies. We've been included on *The American Lawyer*'s A-List for 10 straight years, and *Fortune* named us one of the "100 Best Companies to Work For." Our lawyers are committed to achieving innovative and business-minded results for our clients, while preserving the differences that make us stronger. This is MoFo. Visit us at www.mofo.com.

Because of the generality of this update, the information provided herein may not be applicable in all situations and should not be acted upon without specific legal advice based on particular situations. Prior results do not guarantee a similar outcome.