SUPREME COURT UPDATE

December 2, 2013

WHEN IN DOUBT, REPORT: U.S. Supreme Court Set To Weigh-In On Aviation And Transportation Security Act Immunity

By: Steven L. Boldt

In *Air Wisconsin Airlines Corp. v. Hoeper*, William Hoeper was a pilot for Air Wisconsin and also a Federal Flight Deck Officer authorized to carry a TSA-issued firearm. He had previously failed three aircraft proficiency tests and was aware that a fourth failure could result in his termination at the option of Air Wisconsin. During the final test, Mr. Hoeper allegedly exhibited irrational behavior and directed angry outbursts at his test administrator, accusing him of undermining his ability to pass the test. The test administrator reported the confrontation to an Air Wisconsin manager, who subsequently called TSA a few hours later following further deliberation with Air Wisconsin management and reported that: (1) Mr. Hoeper was about to travel and had been terminated from his job, (2) there was concern about his mental stability, and (3) that he might be armed. Following Air Wisconsin's disclosure, Mr. Hoeper was removed from his flight by the TSA; however, he was ultimately released and returned home on the next flight that evening. Based upon Air Wisconsin's statements to the TSA, Mr. Hoeper filed suit against Air Wisconsin in Colorado state court for defamation.

Air Wisconsin, in turn, sought protection for its statements under the *Immunity for Reporting Suspicious Activity* provision of the Aviation and Transportation Security Act (ATSA), which provides qualified immunity to an airline who makes a voluntary disclosure to government officials of any suspicious activity relevant to a possible threat to aircraft, passenger safety, or terrorism. Passed in the aftermath of the 9/11 attacks, the only limitation of ATSA immunity is for: "(1) any disclosure made with actual knowledge that the disclosure was false, inaccurate or misleading; or (2) any disclosure made with reckless disregard as to the truth or falsity of that disclosure." 49 U.S.C. § 44941(b).

Recognizing that airlines often have critical information which could assist TSA to confront threats, the ATSA immunizes airline employees for reports of any possible security threats, including borderline cases, and comports with the TSA's "when in doubt, report" policy. Nevertheless, the jury found that Air Wisconsin's statements to the TSA were made with reckless disregard as to their truth or falsity; thereby falling outside the purview of ATSA immunity. As a result, the jury awarded Mr. Hoeper a verdict in the amount of $1.4 million. This verdict was upheld twice on appeal, most recently by the Colorado Supreme Court in a 4-3 decision, finding that there was "clear and convincing evidence" that Air Wisconsin acted with actual malice in its communications to the TSA

This Supreme Court Update is intended for informational purposes only. It is not intended to provide legal advice, and you should not act on the information contained herein without first consulting legal counsel and obtaining advice with respect to your particular issue or problem.

about Mr. Hoeper. The court specifically found that Air Wisconsin "overstated" the facts to the TSA and should have alternatively stated: (1) that Hoeper "knew he would be terminated soon" instead of he was "terminated today"; (2) Hoeper "was an FFDO pilot" instead of "he was an FFDO who may be armed"; and (3) Hoeper "had acted irrationally at the training three hours earlier and 'blew up' at the test administrators" rather than "we were concerned about his mental stability." According to the Colorado Supreme Court, the proposed language above would have given Air Wisconsin immunity under the ATSA. 2012 CO 19 (2012), *cert. granted*, No. 12-315, 2013 U.S. LEXIS 4555 (U.S., June 17, 2013).

Now on appeal to the United States Supreme Court, Air Wisconsin seeks to have the judgment reversed because: (1) ATSA immunity may not be denied without a determination by the court that the Air Wisconsin's disclosure was materially false; and (2) Air Wisconsin's disclosure to the TSA was substantially true. Air Wisconsin further argues that the Colorado Supreme Court's ruling may have a "chilling effect" on an airline's willingness to promptly report suspicious activities in fear of being exposed to costly defamation judgments whenever the perceived threat turns out to be a false alarm.

Mr. Hoeper argues that Air Wisconsin essentially forfeited the issue on appeal (i.e., whether ATSA immunity may be denied without a determination that the air carrier's disclosure was materially false), because Air Wisconsin failed to ask the court to instruct the jury that it would be entitled to immunity if its statements were "reckless but materially true." In fact, Air Wisconsin "did not request a materiality instruction at all." The remaining arguments of Mr. Hoeper's brief focuses on the procedural history in his favor and the "overwhelming" evidence that the statements to the TSA were false and made with actual malice.

The perceived threat in the *Hoeper* case, however, is certainly not the first of its kind. On December 7, 1987, Pacific Southwest Airlines Flight 1771 was hijacked by a former USAir employee, David Burke, who had been recently terminated by USAir for petty theft. Angered at his supervisor for not reinstating him, Burke boarded his supervisor's flight home to San Francisco and used his USAir credentials to bypass Los Angeles International Airport security with a firearm. As the aircraft, a British Aerospace 146 (BAe-146), cruised at 29,000 feet, the cockpit voice recorder (CVR) captured the sound of two gunshots being fired in the cabin, which is when Burke shot and killed his supervisor. The cockpit door was then opened and a flight attendant told the pilots, "We have a problem." The captain asked, "What kind of problem?" Another shot was fired, presumably killing the flight attendant, and Burke coldly stated, "I'm the problem," and fired two more shots killing the pilots. Soon thereafter, Burke pushed the control column

This Supreme Court Update is intended for informational purposes only. It is not intended to provide legal advice, and you should not act on the information contained herein without first consulting legal counsel and obtaining advice with respect to your particular issue or problem.

forward and sent the aircraft into a steep dive, crashing it near Cayucos, California and killing all 43 people onboard.

It was exactly this tragedy that the Air Wisconsin personnel discussed before deciding to report Mr. Hoeper to the TSA. Airline management also understood their TSA-ordered Aircraft Operator Standard Security Program stated that a report should be made, even if there was doubt. As succinctly stated by the dissent in Hoeper, "The post-9/11 policy was known as 'when in doubt, report.'" Information of a potential security threat is likely to be imperfect, the amount of time available to prevent an attack is short, and the potential consequences of not reporting the information to the proper authorities can be catastrophic, as illustrated in the PSA 1771 case. The ATSA immunity provision is meant to protect airlines under these difficult situations, and promote the safety of the travelling public. The Supreme Court will have to consider the potential chilling effect of the Colorado judgment in deciding the case.

A decision in *Hoeper* is expected in the spring of 2014. To view the briefs filed with the U.S. Supreme Court, please **click here**.

* * *

Adler Murphy & McQuillen LLP has a seasoned team of attorneys experienced at resolving a variety of aerospace litigation matters. For more information about our Firm's practice, please **click here**.

This Supreme Court Update is intended for informational purposes only. It is not intended to provide legal advice, and you should not act on the information contained herein without first consulting legal counsel and obtaining advice with respect to your particular issue or problem.