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U.S. Supreme Court Decision in *Air Wisconsin Airlines Corp. v. Hoeper* in Alignment with DRI Amicus Brief

Court Supports Immunity for Air Wisconsin in Employee Firing and Remands Case

CHICAGO – (January 27, 2014)—The Supreme Court today ruled that the statements of Air Wisconsin officials in reporting information concerning one of their pilots to the Transportation Security Agency were protected under the immunity provisions of the Aviation and Transportation Security Act. The decision was in alignment with an amicus brief submitted to the Court by DRI's Center for Law and Public Policy on September 5, 2013. The decision reversed an opinion of the Colorado Supreme Court and remanded the case, *Air Wisconsin Airlines Corp*. *v. Hoeper,* to the lower court.

"National security depends on timely communications of possible threats," said Jerry Ganzfried, author of DRI's brief. "Congress was fully aware of that need in writing ATSA. It understood that we don't have the luxury of running everything through an internal legal review to fine-tune an urgent report to TSA when a person whose actions arouse security-related concerns is heading to the airport to board a flight. The Court's decision recognizes that this is an area of law in which constitutional standards, statutory language and common sense are all in harmony."

The case raises fundamental questions concerning a critical national security statute, the Aviation and Transportation Security Act (ATSA).

In the wake of the September 11, 2001, terrorist attacks, Congress enacted ATSA to overhaul and improve the safety and security of the nation's aviation system. Among other changes, the Act transferred responsibility for assessing and investigating security threats from airlines to the federal government. At the same time, however, Congress recognized that airlines and their employees are uniquely positioned to acquire some of the most useful threat information. Accordingly, air carriers are encouraged and required to report relevant threat information promptly to TSA.

To help ensure disclosure of all relevant threat information, Congress provided airlines and their employees with broad immunity from suit. Borrowing considerably from language in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), the statute strips immunity only for statements made "with actual knowledge that the disclosure was false, inaccurate, or misleading" or "with reckless disregard as to the truth or falsity of that disclosure."

Despite all of this, the Colorado Supreme Court upheld a $1.2 million defamation verdict against an airline that did exactly what Congress would have wanted it to do. The plaintiff was a pilot for Air Wisconsin, and was also a federal flight deck officer, meaning that he was allowed to carry a TSA-issued firearm. He had failed three aircraft proficiency tests, and knew a fourth failure would result in his termination. In a training session in preparation for the fourth test, the plaintiff became very angry and accused the test administrator of "railroading the situation." After consultation

among the leadership of Air Wisconsin's Flight Operations, the airline reported to TSA that the plaintiff had been terminated from his job, there was concern about his mental stability, and that he might be armed.

In a 4–3 decision, the Colorado Supreme Court held that Air Wisconsin was not entitled to immunity. The Colorado Supreme Court did not independently assess whether Air Wisconsin's statements were true.

In its amicus brief on the merits, DRI argued that ATSA's language and purpose require that Air Wisconsin's immunity should be upheld and that the judgment of the Colorado Supreme Court should be reversed.

In its brief, DRI maintained that the judgment is incompatible not only with the views of Congress in passing ATSA, but also with the views expressed by the government in its amicus briefs to the Colorado Supreme Court and the U.S. Supreme Court in support of certiorari:

"Is there any responsible way that Air Wisconsin could have decided not to inform TSA? Failure to report this potential security threat could have been a mistake with catastrophic ramifications. Indeed, the majority opinion of the Colorado Supreme Court does not say that Air Wisconsin should have remained silent patently recognizing that Air Wisconsin had sufficient basis for concern and sufficient reason for reporting its concern to TSA…

"Withholding immunity in the circumstances presented in this case would thwart ATSA's statutory objective to encourage employees on the front lines to report aviation security concerns promptly…. The Colorado Supreme Court relied instead on "hair-splitting distinctions" between the wording of Air Wisconsin's report and the slightly different language that the majority held would qualify for immunity…."

Writing for the majority, Justice Sotomayor held that ATSA immunity may not be denied to materially true statements and that "…It would be inconsistent with the ATSA's text and purpose to expose Air Wisconsin to liability because the manager who placed the call to the TSA could have chosen a slightly better phrase to articulate the airline's concern. A statement that would otherwise qualify for ATSA immunity cannot lose that immunity because of some minor imprecision, so long as "the gist" of the statement is accurate."

DRI brief authors Jerrold J. Ganzfried of Holland & Knight, Washington, D.C., and Judith R. Nemsick of Holland & Knight, New York City, are available for interview or for expert comment through DRI's Communications Office.

For the full text of the amicus brief, click here.

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