



If You See Something . . . Say Something Materially True: *Air Wisconsin v. Hoeper* and Immunity Under the Aviation and Transportation Security Act

By Steven L. Osit

The Aviation and Transportation Security Act (ATSA or Act),¹ passed in the aftermath of the terrorist attacks of September 11, 2001, established a comprehensive scheme for the management and mitigation of threats to the civil air transportation system. Among other things, the Act created the Transportation Security Agency (TSA) to “receive, assess and distribute intelligence information related to transportation security.”² In support of this function, the Act implemented the now-familiar mantra of public security agencies across the country—“if you see something, say something”—by encouraging air carriers and their employees to report suspicious activity to federal, state, and local law enforcement agencies. In order to eliminate a potential inhibitor of such disclosures, ATSA provided for disclosing parties to receive immunity from civil liability.³ This immunity, extending to any “voluntary disclosure of any suspicious transaction relevant to a possible violation of law or regulation, relating to air piracy, a threat to aircraft or passenger safety, or terrorism,” is subject to a single narrow exception: the disclosure may not be knowingly false, inaccurate, or misleading or made with reckless disregard as to its truth or falsity.⁴ This familiar standard, also known as “actual malice,” finds its origins in the seminal case of *New York Times v. Sullivan*. There, the U.S. Supreme Court held the First Amendment prohibits a public official from recovering damages for a defamatory falsehood without first demonstrating the falsehood was made in such a fashion.⁵

In *Air Wisconsin v. Hoeper*, decided January 27, 2014, the Supreme Court unanimously ruled that when Congress selected the *New York Times* “actual malice” standard to define the scope of ATSA immunity, it meant to also incorporate its well-settled progeny. Thus, to defeat ATSA immunity, a plaintiff not only must demonstrate actual malice, but also that the disclosure to law enforcement was “materially false.”⁶ In so doing, the Court set aside a \$1.2 million defamation award in favor of William Hoeper, a former Air Wisconsin pilot, that the state courts of Colorado had repeatedly upheld. As the first case to deny ATSA immunity in the statute’s 12-year existence, *Hoeper’s*

path through the courts is particularly instructive. While significantly advancing the protection afforded to air carriers and affirming their vital role in securing the safety of the traveling public, the Court’s decision and those of the lower courts highlight the pitfalls that may be associated with litigating ATSA immunity in the future.

The Facts of the *Hoeper* Case

Hoeper was a pilot with Air Wisconsin for approximately six years when, in late 2004, the airline discontinued the use of his aircraft, the CL-65, on flights originating from Hoeper’s home base of Denver, Colorado. In order to continue flying for Air Wisconsin out of Denver, Hoeper was required to transition to the British Aerospace 146 and underwent the required training. After failing a simulated flight test three times, however, Hoeper was given one final opportunity to pass a proficiency check subject to a “last chance agreement” in which he understood he would likely lose his job if he was again unsuccessful. In early December 2004, Hoeper traveled from Denver to Virginia for additional training and this last attempt. Again, Hoeper encountered difficulty.⁷

According to testimony adduced at trial, a dispute arose between Hoeper and Mark Schuerman, the instructor pilot responsible for Hoeper’s training, when, after failing to properly respond to a scenario, Hoeper exhausted the fuel, flamed out both engines, and nearly crashed. Hoeper threw his headset onto the glare shield, slid his chair back, and profanely accused Schuerman of “railroading the situation.”⁸ When Hoeper left to contact his union’s legal representative, Schuerman called Patrick Doyle, Air Wisconsin’s fleet manager at headquarters, to discuss the incident. Still upset over what he described as an “outburst,” Schuerman relayed that Hoeper had “blown up” and was “very angry,” and told Doyle he was “uncomfortable” remaining at the simulator with Hoeper.⁹ Although he did not convey the sentiment to Doyle, at trial Schuerman testified “that he feared for his physical safety during the confrontation, but not after the confrontation ended.”¹⁰

Doyle instructed Schuerman to leave and arranged for Hoeper to return to Denver on a United Airlines flight later that same afternoon. Doyle then approached Scott Orozco, his immediate supervisor

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and Air Wisconsin's managing director of flight operations, but their discussion was postponed until after Orozco returned from a lunch meeting. By the time they spoke, Orozco had spoken with Hoepfer briefly by phone, noting that he was "not exactly calm,"¹¹ and they were joined by the airline's vice president of operations and its assistant chief pilot.

The group discussed Hoepfer's behavior in the simulator and the need to terminate his employment given what was now his fourth and final training failure, but two other topics critically informed Air Wisconsin's ultimate decision to contact TSA.¹² First, Orozco noted that Hoepfer was a federal flight deck officer (FFDO)—a program permitting deputized volunteer pilots of Part 121 operators to carry a firearm while "engaged in providing air transportation" in order to defend the flight deck against acts of violence or piracy.¹³ Second, the officials discussed two prior incidents in which airline employees, under threat of termination or recently terminated, committed acts of violence aloft. In 1994, a deadheading FedEx flight engineer under investigation for misreporting his flight hours attacked the flight crew with the intent of taking control of the plane, ostensibly to carry out a suicide attack.¹⁴ In 1987, a recently terminated flight attendant exploited gaps in airport security protocols to bring a gun aboard his company's plane. He shot his former supervisor and the flight crew, and the ensuing crash killed all 43 people aboard.¹⁵ The FFDO program did not authorize Hoepfer to carry his firearm on the flight to his training in Virginia, but due to security procedures in place at Denver International Airport, the group concluded that they could not rule out the possibility Hoepfer was armed.¹⁶

Air Wisconsin's vice president of operations decided that TSA should be apprised of the situation and Doyle offered to make the call. As determined by the Colorado jury sitting on the defamation action that ensued, Doyle told TSA that Hoepfer "was an FFDO who may be armed," that the airline was "concerned about his mental stability and the whereabouts of his firearm," and, as conveyed by the subject line of an internal TSA e-mail, "unstable pilot in FFDO was terminated today."¹⁷ TSA officers boarded the plane and seized Hoepfer but, finding no weapon, permitted him to return to Denver on a later flight. Air Wisconsin terminated Hoepfer's employment the next day.

The Lower Courts

Hoepfer sued Air Wisconsin in Colorado state court for defamation, false imprisonment, and intentional infliction of emotional distress. The trial judge denied Air Wisconsin's motion for summary judgment asserting ATSA immunity, as well as its motion for a directed verdict at the close of evidence on the same basis. Reasoning that "words like 'reckless disregard' [are]

rarely an issue of law," the judge instead sent the case to the jury and directed it to resolve the availability of ATSA immunity on instructions tracking the statutory language.¹⁸ The jury found in favor of Hoepfer and awarded \$849,625 in compensatory damages. Because the jury also found by special verdict that Air Wisconsin "made one or more defamatory statements knowing that they were false, or so recklessly as to amount to a willful disregard of the truth," it additionally awarded \$391,875 in punitive damages.¹⁹

On appeal to the Colorado Court of Appeals, Air Wisconsin argued that it was improper to submit the question of ATSA immunity to the jury in the first instance, that the allegedly defamatory statements were not actionable because they were substantially true, and that there was insufficient evidence to support the verdict. The court disagreed on all points. Noting a split in the federal circuits as to the proper allocation between judge and jury in other qualified immunity contexts,²⁰ the court held that where issues of immunity turn on disputed issues of material fact, the question is properly submitted to the jury under Colorado procedural law. And even if it were error, the court continued, it was rendered harmless when the jury, on evidence the court of appeals deemed "clear and convincing," found the statements so reckless as to amount to a willful disregard of the truth.²¹ Because this standard for punitive damages and the standard for abrogation of ATSA immunity are essentially the same, a finding of the former demanded application of the latter. Crucially, the court also rejected Air Wisconsin's argument that its disclosure was substantially true and therefore not actionable. While acknowledging that "slight inaccuracies of expression are immaterial provided the defamatory charge is true in substance," the court held the statements "taken as a whole . . . connoted that this FFDO was so unstable as to threaten the safety of the aircraft he was boarding."²² The court affirmed, unwilling to allow the "partial truth" behind this "negative factual connotation" to excuse liability.²³

The Colorado Supreme Court unanimously disagreed that Colorado procedural law should govern the allocation of decision making between judge and jury. In language belying its ultimate affirmance of the court of appeals, it reasoned that "ATSA grants immunity to private air carriers . . . to encourage those carriers to take action on issues of . . . air piracy and other threats to national security, without fear of consequences."²⁴ Therefore, Congress must have intended to confer the "greatest possible degree of protection by enacting the immunity provision of ATSA": immunity from suit, determined as a matter of law before subjecting the carrier to the vagaries of litigation.²⁵

But, like the court of appeals before it, the majority went on to find the error harmless. Applying the U.S. Supreme Court's jurisprudence on "reckless

disregard as to truth or falsity” in the context of *New York Times* and its progeny, the Colorado Supreme Court found Doyle had a “high degree of awareness of . . . probable falsity” or “entertained serious doubts as to the truth of his publication.”²⁶ Specifically, the majority found that Doyle had virtually no reason to believe that Hoyer was armed, knew Hoyer had not yet been terminated, and had insufficient information from his phone call with Schuerman to form an opinion as to Hoyer’s mental stability. The majority recognized the “important policy considerations under[ly]ing the grant of immunity,” and that “early, tentative information from airlines is vital” to TSA’s tasking, but reasoned the ATSA only immunizes reports of what an airline “actually know[s].”²⁷ Drawing what three partially dissenting justices characterized as “hair-splitting distinctions that make no difference to the analysis,”²⁸ the majority explained that Air Wisconsin would have likely been immune if “Doyle had reported that Hoyer was an Air Wisconsin employee, that he knew he would be terminated soon, that he had acted irrationally at the training three hours earlier and ‘blew up’ at test administrators, and that he was an FFDO pilot.”²⁹ Finding reckless disregard as to falsity in the difference, the majority held Air Wisconsin unentitled to ATSA immunity.

Importantly, the majority did not inquire whether Doyle’s statements were true or false. Rather, in what the U.S. Supreme Court regarded as a “key footnote,” it wrote that Air Wisconsin was not entitled to ATSA immunity simply because the statements were made with reckless disregard as to falsity; it was for the jury to determine whether the statements were defamatory (i.e., false).³⁰ In light of its holding that ATSA immunity is a legal question for the trial judge, the Colorado Supreme Court ostensibly believed that even a true statement, recklessly made, would require an air carrier to proceed through litigation. Thus, in reviewing the jury verdict for clear and convincing evidence, the majority, like the court of appeals, found sufficient evidence for the jury to conclude Doyle’s statements were false. In particular, the necessary implication of Doyle’s statements—that “Hoyer was so mentally unstable that he might constitute a threat to aircraft and passenger safety”—was not so substantially true as to excuse liability.³¹

On this point, the partial dissent criticized the majority for “toss[ing] up the overblown ‘implication’ just to have something to swat down as false.”³² The dissenting justices were particularly alarmed by the majority’s reasoning in the context of ATSA immunity because the necessary implication of any air carrier report to TSA is that there may, in fact, be a legitimate threat. Thus, “[u]nder the majority’s rationale, a person who makes a report to the TSA would be exposed to a defamation judgment whenever the possible threat

turned out to be false.”³³ Instead, the majority should have recognized Doyle’s actual statements to TSA were substantially true, particularly in light of the context in which they were made; the airline *was* concerned about Hoyer’s mental stability and the whereabouts of his weapon. Moreover, the dissenting justices would have made this determination in the context of deciding ATSA immunity in the first instance. When Congress seized upon the *New York Times* standard for ATSA immunity, they suggested, it also meant to require the statement be materially false.³⁴

The U.S. Supreme Court

The U.S. Supreme Court granted certiorari to resolve whether ATSA immunity may be denied without a finding that the disclosure was materially false. All nine justices had little difficulty concluding that such a finding was required. Presuming that Congress meant to adopt “the cluster of ideas that were attached to each borrowed word in the body of learning” from which the immunity standard was taken, the Court noted that the *New York Times* standard had always required proof of material falsity.³⁵ Such a requirement was particularly appropriate in this context because, in passing the ATSA, Congress intended to shift the responsibility “for assessing and investigating possible threats to airline security” away from the airlines and onto the TSA.³⁶ “Deny[ing] immunity for substantially true reports on the theory that the person making the report had not yet gathered enough information to be certain of its truth . . . would restore the pre-ATSA state of affairs. . . .”³⁷

The Court also rejected Hoyer’s argument that the Colorado Supreme Court performed the requisite material falsity analysis, albeit in the context of reviewing the jury verdict. In that context, the Court explained, “a materially false statement is generally one that ‘would have a different effect on the mind of the reader [or listener] from that which the . . . truth would have produced.’”³⁸ Thus, an exaggerated statement that causes no greater reputational harm than would its unadulterated counterpart is not typically actionable. In the context of ATSA immunity, however, “courts cannot decide whether a false statement produced a different effect on the mind of a hypothetical TSA officer without considering the effect of that statement on TSA’s behavior.”³⁹ Writing for the Court, Justice Sotomayor summarized the distinction with an example:

Suppose the TSA receives the following tip: “My adulterous husband is carrying a gun onto a flight.” Whether the husband is adulterous will presumably have no effect on the TSA’s assessment of any security risk that he poses. So if the word “adulterous” is false, the caller may still be entitled to ATSA immunity. But any falsity as to

that word obviously would affect the husband's reputation in the community, so it would be material in the context of a defamation claim.⁴⁰

Thus, the Court concluded that “any falsehood cannot be material, for the purposes of ATSA immunity, absent a substantial likelihood that a reasonable security officer would consider it important in determining a response to the supposed threat.”⁴¹

Over a partial dissent, the majority went on to conclude that Doyle's statements were not materially false as a matter of law.⁴² Regardless of whether Doyle disclosed that Hoyer “may be armed,” that Air Wisconsin was “concerned . . . about the whereabouts of his firearm,” or, in the Colorado Supreme Court's formulation, that Hoyer was simply “an FFDO pilot,” the majority suspected a reasonable TSA officer would want to verify that Hoyer was not carrying a weapon aboard his return flight. The majority also saw no distinction in the mind of a reasonable TSA officer whether Hoyer was already terminated, as reported by Doyle, or whether he was certain to be terminated the following day. With respect to Doyle's statements about Hoyer's mental stability, the majority acknowledged that Doyle arguably “could have chosen a slightly better phrase than ‘mental stability’ to articulate [his] concern” but refused to deny ATSA immunity on that basis.⁴³ “If such slips of the tongue could give rise to major financial liability, no airline would contact the TSA (or permit its employees to do so) without running by its lawyers the text of its proposed disclosure—exactly the kind of hesitation that Congress aimed to avoid.”⁴⁴

In a partial dissent joined by Justices Thomas and Kagan, Justice Scalia accused the majority of “decid[ing] a factbound question better left to the lower courts, and then proceeding to give the wrong answer.”⁴⁵ He agreed that material falsity from the perspective of a reasonable TSA agent was the proper inquiry but thought it improper to hold, as a matter of law, that the jury would be reasonable in finding Doyle's statements false but unreasonable were it to find them materially false under the standard announced. Noting the “alarming degree of unpredictably and aggressiveness” that the term “mentally unstable” conveys, Justice Scalia refused to accept that a reasonable TSA officer would not respond differently to a report of a brief, and perhaps justifiable, outburst of anger. That Hoyer was an FFDO and about to be fired “enhanced, rather than diminished, the likelihood that the false ‘mentally unstable’ designation would have a material effect on the TSA's response.”⁴⁶

ATSA Immunity After *Hoyer*

For Air Wisconsin, the opinion marks the end of over five years of vexing litigation, but *Hoyer* stops somewhat short of providing the industry with complete repose. Despite the Court's assurance that the announced standard is an objective one, “involving the

[hypothetical] significance of an omitted or misrepresented fact to a reasonable” security official, rather than the actual significance of that fact to a particular security official,”⁴⁷ litigants on both sides of future ATSA immunity cases will likely wrestle over its application. In his brief, Hoyer noted the “impossible task” of proving law enforcement officials would have acted differently given the secrecy of security protocols. Indeed, the U.S. government as amicus curiae acknowledged the sensitivity of TSA's security protocols and opined that the statutory mechanism exempting them from public disclosure in cases where private litigants have a “substantial need” would not likely extend to cases involving ATSA immunity.⁴⁸ Without objective threat assessment guidelines, litigants will have significant latitude in arguing the degree of falsity that a reasonable TSA officer would have found material.

The contrary views of the partial dissent demonstrate not just the potential for reasonable jurists to disagree in this assessment, but also the compounding difficulty of analyzing a “disclosure” that is itself composed of multiple, potentially misleading statements. Ironically, while criticizing the Colorado Supreme Court for “parsing so finely the distinctions between [its] hypothetical statements and the ones Air Wisconsin actually made,” the majority concluded that Doyle's disclosure was not materially false only by testing each of the relayed statements individually. The partial dissent, on the other hand, concludes that the sum of Doyle's statements would operate quite differently on the mind of a reasonable TSA officer than would have an account of what a reasonable jury may have countenanced as nothing more than a “run-of-the-mill” display of anger of an FFDO that knew he was about to lose his job. The choice between perspectives is likely to significantly influence the outcome, as seen in both of these opinions and in the Colorado Supreme Court's review of the jury verdict.

Finally, the majority expressly noted it was not taking a position on “the Colorado Supreme Court's unanimous holding ‘that immunity under the ATSA is a question of law to be determined by the trial court before trial’” and, necessarily, whether air carriers under ATSA are immune from suit or simply from damages.⁴⁹ Thus, in future cases under ATSA, the trial judge will be left to determine whether to resolve genuine disputes of material fact in the first instance or send them to a jury.

Endnotes

1. Aviation and Transportation Security Act, Pub. L. No. 107-71, 115 Stat. 597 (2001).
2. *Id.* § 101(a).
3. Such immunity was later similarly conferred on members of the public. *See* 6 U.S.C. § 1104(a).
4. 49 U.S.C. § 44941.
5. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964).
6. *Air Wis. Airlines Corp. v. Hoyer*, No. 12-315, 2014 WL 273239,

at *7–8 (U.S. Jan. 27, 2014).

7. *Air Wis. Airlines Corp. v. Hoepfer*, No. 09SC1050, 2012 WL 907764, at *1 (Colo. Mar. 19, 2012).

8. *See Air Wis.*, 2014 WL 273239, at *4; *Air Wis.*, 2012 WL 907764, at *12 (Eid, J., dissenting).

9. *See Air Wis.*, 2012 WL 907764, at *1–2; *Hoepfer v. Air Wis. Airlines Corp.*, 232 P.3d 230, 234 (Colo. App. 2009).

10. *Air Wis.*, 2012 WL 907764, at *1.

11. *Id.* at *13 (Eid, J., dissenting); *see Air Wis.*, 2014 WL 273239, at *4–5.

12. *See Air Wis.*, 2014 WL 273239, at *4–5.

13. *See* 49 U.S.C. § 44921.

14. *See United States v. Calloway*, 116 F.3d 1129 (6th Cir. 1997); DAVE HIRSCHMAN, *HIJACKED: THE TRUE STORY OF THE HEROES OF FLIGHT 705* (1998).

15. *See Eric Malnic, Report Confirms That Gunman Causes 1987 Crash of PSA Jet*, L.A. TIMES (Jan. 6, 1989), at 2.

16. *See Air Wis.*, 2014 WL 273239, at *4.

17. *Id.* at *5; *see also* Petitioner's Appendix to Petition for Certiorari at 111a, *Air Wis. Airlines Corp. v. Hoepfer*, No. 12-315 (2014), 2014 WL 273239.

18. Petitioner's Appendix to Petition for Certiorari, *supra* note 17, at 101a; *see also Hoepfer v. Air Wis. Airlines Corp.*, 232 P.3d 230, 238 (Colo. App. 2009).

19. Petitioner's Appendix to Petition for Certiorari, *supra* note 17, at 111a. The punitive damage award was reduced to \$350,000 by the court. The jury found for Air Wisconsin on Hoepfer's false imprisonment claim and was unable to reach a verdict on the intentional infliction of emotional distress claim.

20. *See Hoepfer*, 232 P.3d at 237 n.6.

21. *Id.* at 238.

22. *Id.* at 244.

23. *See id.*

24. *Air Wis. Airlines Corp. v. Hoepfer*, No. 09SC1050, 2012 WL

907764, at *5 (Colo. Mar. 19, 2012).

25. *Id.*

26. *Id.* at *6 (quoting *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968); *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 667 (1989)).

27. *See id.* at *8.

28. *Id.* at *13 (Eid, J., dissenting).

29. *Id.* at *8 (majority op.).

30. *Id.* at *6 n.6.

31. *Id.* at *10.

32. *Id.* at *14 (Eid, J., dissenting).

33. *Id.*

34. *See id.* at *11 n.2.

35. *Air Wis. Airlines Corp. v. Hoepfer*, No. 12-315, 2014 WL 273239, at *7–8 (U.S. Jan. 27, 2014).

36. *Id.* at *8.

37. *Id.*

38. *Id.* at *9.

39. *Id.* at *10 (internal quotations omitted).

40. *Id.* at *9 n.3.

41. *Id.* at *10.

42. *See id.* at *10–13.

43. *Id.* at *11.

44. *Id.* at *12.

45. *Id.* at *14 (Scalia, J., dissenting).

46. *Id.* at *16.

47. *Id.* at *10 (majority op.).

48. Brief of the United States as Amicus Curiae Supporting Petitioner 27, n.5, *Air Wis. Airlines Corp. v. Hoepfer*, No. 12-315 (May 2013), 2014 WL 273239 (citing Department of Homeland Security Appropriations Act, 2007, Pub. L. No. 109-295, § 525(d), 120 Stat. 1382).

49. *See Air Wis.*, 2014 WL 273239, at *10.