Forum on Air & Space Law
2016 UPDATE CONFERENCE
Case Summaries

Mocek v. TSA

At a TSA security checkpoint, Mocek did not show identification and filmed the encounter. He was arrested, but acquitted on all charges. Mocek filed suit in district court against the City, the arresting officers and the TSA agents for unlawful arrest under the Fourth Amendment and First Amendment retaliation. The district court granted qualified immunity for the defendants. The Tenth Circuit affirmed on December 22, 2015. On unlawful arrest, the court found that even if Mocek had not concealed his identity such that arrest was proper, the officer made a reasonable mistake of law and was entitled to qualified immunity. On the First Amendment retaliation claim, the court of appeals noted that an airport was not a "public forum" for the purpose of the First Amendment. Furthermore, to state a retaliation claim, a plaintiff must allege that the government's actions were substantially motivated as a response to his constitutionally protected conduct. Here, Mocek's arrested was based on arguable probable cause of violations of New Mexico law, so qualified immunity was also appropriate for the First Amendment claim.

Shimomura v. TSA

Shimomura was arrested at the airport for assault when an officer thought Shimomura hit a TSA agent with his roller bag. The prosecutor dismissed the criminal complaint. Shimomura brought suit against a Denver police officer and TSA agents for arrest without probable cause and conspiracy to fabricate grounds for the arrest. The district court dismissed all claims against the TSA agents and dismissed or granted summary judgment in favor of the officer on all claims. The Tenth Circuit affirmed on December 29, 2015. On the Fourth Amendment claim against the officer, the Tenth Circuit found that the officer enjoyed qualified immunity because probable cause was at least arguable. On the Fourth Amendment claim against the TSA agent, the court found that any conduct after the arrest (fabricating evidence) could not have caused the arrest. The court also affirmed dismissal of the procedural due process claim because the Fourth Amendment generally governs pre-trial deprivations of liberty, so the Fifth and Fourteenth Amendment do not apply.

Joshi v. NTSB and FAA

In 2006, Petitioner's daughter died in a private airplane crash. The NTSB, with the help of the FAA, conducted an investigation and issued a probable cause report identifying the pilot, Petitioner's daughter, as the most likely cause of the accident. Joshi petitioned the NTSB to reconsider its Probable Cause Report and submitted evidence from a separate investigation by an engineering firm he hired. The NTSB denied the petition for reconsideration and Joshi petitioned the D.C. Circuit to review the reports and the denial. On June 19, 2015, the D.C. Circuit refused to take up his petition for lack of jurisdiction on grounds that the NTSB's reports were not final agency actions and therefore not reviewable by the courts. Joshi petitioned for writ of certiorari, and the Supreme Court denied the petition on January 25, 2016.

Helicopters, Inc. v. NTSB

In March 2014, two people were killed in an accident involving a news helicopter owned and operated by Helicopters, Inc. The NTSB began an investigation and issued a Factual Report on September 1, 2015. Helicopters requested that the Board rescind the Factual Report and refrain from releasing its Probable Cause Report until it addresses inaccuracies in the Factual Report. The Board responded that it would issue its final report and Helicopters could file a petition for reconsideration upon reviewing the final report. Helicopters filed a petition for review with the 7th Circuit. On October 13, 2015, the 7th Circuit dismissed the petition for lack of jurisdiction, finding that neither the Factual Report nor the Probable Cause Report are reviewable final orders because the reports do not create any legal repercussions for Helicopters.

Nat'l Fed. of the Blind v. United Airlines

The Federation sued United, asserting that United's policy of using automatic ticketing kiosks that are inaccessible to the blind violates two California antidiscrimination statutes. Following the filing of a Statement of Interest by the United States that the Federation's claims were preempted, the district court granted United's motion to dismiss. On January 19, 2016, the Ninth Circuit affirmed. The Ninth Circuit held that the claims were impliedly field preempted by the Air Carrier Access Act, an amendment to the Federal Aviation Act that blocks air carriers from discriminating against the disabled. The DOT had promulgated detailed ACAA regulations regarding accessibility of airport kiosks and a timeline for compliance. Given this great detail and pervasive extent, the Ninth Circuit found that the regulation preempts any state regulation of that same field. The Ninth Circuit did not agree with the district court on express preemption by the Airline Deregulation Act because it found that United's kiosks fall outside the statutory definition of "services."

Dallas Love Field gates litigation: *Southwest Airlines v. DOT* (D.C. Circuit No. 15-1036); *Southwest Airlines v. DOT* (D.C. Circuit No. 15-1276)

These lawsuits arise from attempts by Delta Air Lines to maintain service at Love Field airport in Dallas, Texas. The City of Dallas asked DOT for guidance regarding Delta's request to other airlines and the City to accommodate its continued operation of flights following termination of its sublease. The DOT sent two guidance letters dated December 17, 2014 and June 15, 2015 regarding how the City should address accommodation requests. Southwest petitioned for review of each of these letters in the D.C. Circuit. Southwest alleges that the letters were directives to the City to ensure Southwest accommodates Delta. The 15-1036 case involves the December 2014 letter. The 15-1276 case involving the June 15, 2015 letter was held in abeyance pending decision in the 15-1036 case. On February 12, 2016, oral argument was held in the 15-1036 case. Southwest asserted that the letter was a final agency action subject to review, while the government argued that the letter has no legal effect because it was not a consummation of the agency's decision-making.

Air Transport Association v. Jordan et al (Case No. 3:16-CV-00230 (D. Or.))

The complaint was filed on February 5, 2016 and a motion for preliminary injunction was filed on February 10, 2016. Defendants (City of Portland, Bureau of Environmental Services of Portland, the mayor and the director of the Bureau) have until March 4, 2016 to appear in response to the complaint and respond to the motion for preliminary injunction. Plaintiffs argue that Defendants violate the Anti-Revenue Diversion Provision by requiring the Portland International Airport and airlines serving the Airport to pay money to the Port of Portland, which the Port remits to the City for off-site stormwater management and Superfund cleanup. They argue that the funds constitute airport revenue and are being unlawfully diverted from the airport.

Friends of East Hampton Airport v. Town of East Hampton (2d. Cir. No. 15-2334-CV(L))

Plaintiffs, a group of aviation companies and aviation service companies that use the East Hampton Airport, sought to enjoin the Town of East Hampton from enforcing three local laws aimed at reducing aircraft noise through curfews and a one-trip limit. The district court granted a preliminary injunction as to the one-trip limit law but denied the motion as to the two curfew laws. The district court found that the Airport Noise and Capacity Act did not displace the proprietor exception to preemption, which permits a local municipality to adopt reasonable, nonarbitrary and non-discriminatory regulations of noise and other environmental concerns at the local level. The court did not enjoin the two curfew laws, but enjoined the One-Trip Limit as not reasonable, because it is a drastic measure and there is no indication that a less restrictive measure would not satisfactorily alleviate the noise problem. The Town appealed to the Second Circuit the decision on the one-trip limit and the Plaintiffs cross-appealed the decision on the curfew laws. The Town's reply brief is due April 4, 2016.

Metroplex/NextGen Litigation

City of Phoenix v. FAA (D.C. Circuit No. 15-1158): The City filed suit over flight path changes that have led to aircraft noise. The FAA moved to dismiss for lack of jurisdiction based on expiration of the sixty day requirement to file suit on an order of the FAA. The motion to dismiss was referred to the merits panel. The petitioner's brief is due March 18, 2016 (the briefing schedule was modified to accommodate mediation).

Citizens Association of Georgetown et al. v. FAA (D.C. Cir. No. 15-1285): Georgetown University, its student association and seven neighborhood associations petitioned the D.C. Circuit to review FAA's decision to implement new arrival and departure procedures, which they assert were in violation of the National Environmental Policy Act. The FAA brought a motion to dismiss the case for lack of jurisdiction, petitioners responded, and the reply is currently due March 3, 2016. The motion to dismiss is based on expiration of the sixty day requirement to file suit on an order of the FAA.

Lyons et al. v. FAA (9th Cir. No. 14-72991): Petitioners argued that the FAA's July 31, 2014 Finding of No Significant Impact ("FONSI") regarding environmental and noise effects of the Northern California Optimization of Airspace and Procedures in the Metroplex was arbitrary and capricious because the FAA relied on inadequate flight track information and failed to analyze

and consider cumulative noise impacts.. The FAA responded that Petitioners waived these arguments during the administrative process. All briefing completed as of November 23, 2015.