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Supreme Court Grounds Pilot's Defamation Claim

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On January 27, 2014, in *Air Wisconsin Airlines Corp. v. Hoeper*, the U.S. Supreme Court overturned a former pilot's $1.4 million defamation judgment against Air Wisconsin Airlines. The high court held that airlines are protected from defamation claims if they make a materially true statement to the Transportation Security Administration (TSA) under the Aviation and Transportation Security Act (ATSA). The Court further clarified an ambiguity in the "actual malice" standard in *New York Times v. Sullivan*, 376 U.S. 254 (1964). As a result, employers now have clearer guidance on what statements would be entitled to qualified immunity in response to employees' defamation claims.

Factual and Procedural History

The plaintiff was a pilot for Air Wisconsin Airlines. He was also a participant in the Federal Flight Deck Officer program and therefore was permitted to carry a firearm on the aircraft. When the airline ceased operating the aircraft on which the plaintiff was qualified at his home base, he needed to become qualified on a different type of aircraft to remain employed. In training, he failed his first three qualification attempts on a different aircraft; however, he agreed with Air Wisconsin that he would have a fourth—and final—chance. He performed poorly during the final simulator session (away from his base), ultimately "flaming out" the aircraft's engines and running out of fuel. The plaintiff compounded this failure by shouting at his instructor, throwing his headset, using profanity, and accusing the instructor of railroading him.

His training instructor reported the failure as well as the plaintiff's outburst to an Air Wisconsin manager. In the meantime, the plaintiff boarded a flight back to his base, as a passenger. The manager discussed the plaintiff's behavior with others in Air Wisconsin's corporate office, and they ultimately decided to notify the TSA that: 1) the plaintiff was a Federal Flight Deck Officer who might be armed, and that the airline was concerned about the plaintiff's mental stability at the time and the whereabouts of his firearm; and 2) an unstable pilot in the Federal Flight Deck Officer program was terminated that day. In response to the airline's report, the TSA removed the plaintiff from his flight home prior to takeoff, searched him, and questioned him about the location of his gun. Air Wisconsin terminated him the next day.

Based on the airline's statements to the TSA, the plaintiff sued Air Wisconsin for defamation in Colorado state court. Relying on the Aviation and Transportation Security Act exemption for statements made when reporting security concerns to the proper authorities, the airline argued that it was immune from civil liability for alleged defamatory statements unless the plaintiff proved that the defendant made the statements with "actual malice." To prove "actual malice," the

plaintiff must demonstrate that: 1) the statements were made with actual knowledge that the disclosures were false, inaccurate, or misleading; or 2) the statements were made with reckless disregard as to the truth or falsity of the disclosure. After a trial, the jury sided with the plaintiff on the defamation claim and awarded him $1.4 million in damages. The Colorado Supreme Court affirmed the decision, assuming that even true statements would not qualify for immunity if the airline made the statements recklessly. The State Supreme Court therefore held that Air Wisconsin was not entitled to immunity because its statements to the TSA were made with reckless disregard for their truth or falsity.

The U.S. Supreme Court Reverses the Judgment

Noting that the "actual malice" standard in the Aviation and Transportation Security Act is patterned after the immunity exception in *New York Times v. Sullivan*, the U.S. Supreme Court held that, to defeat immunity, the plaintiff must prove that the alleged statements were materially false. In its opinion, the Court addressed an ambiguity in the traditional "actual malice" standard: whether a defendant commits defamation if it says something recklessly that was true but without a basis for believing that it was true. Noting that denying immunity for substantially true reports would defeat the purpose of immunity, the Court held that, to prove defamation under the *Sullivan* standard and defeat immunity, the plaintiff must prove that the statements were materially false.

The Court further held that, under the correct analysis, Air Wisconsin was entitled to immunity under the ATSA exemption. Noting that any possible inaccuracies in Air Wisconsin's statements about the former pilot to the TSA were not material, and the "gist" of the statements was accurate, Air Wisconsin was immune from the pilot's defamation claims.

While all of the Justices agreed on the "actual malice" standard, Justice Scalia dissented—joined by Justices Thomas and Kagan—and explained that he would have remanded the case to the trial court to determine whether the statements made by Air Wisconsin were materially correct.

What This Means for Employers

Outside of the ATSA and communications to the TSA, employers are often protected from state-law defamation claims by the principle of "qualified immunity." For example, plaintiffs sometimes allege defamation if they receive a less-than-positive reference from a former employer. Under some state laws, references are not defamatory if they are made without "actual malice" and made regarding a current or former employee's job performance to a prospective employer who requests the information. Even in these jurisdictions, many employers avoid risk by providing only skeletal information limited to dates of employment, job title, and salary. In certain situations, however, other considerations or moral imperatives – such as protecting the safety of innocent third parties – may prompt an employer to be more forthcoming with information (whether to the TSA or to a prospective employer).

Internal investigations of complaints made to Human Resources have also led to allegations of defamation when the plaintiff was the subject of the internal complaint. These statements are also protected if they are made without actual malice and if they are only communicated to others with corresponding interests—such as other employees involved in the investigation. But given that this privilege is only a "qualified"—and not absolute—protection, employers must remain careful in communicating potentially risky information, and restricting it to a narrow audience.

A defamation plaintiff can only defeat this qualified immunity if he or she proves that the alleged statements were made with actual malice—which is governed by the same basic standard that the Court addressed here and in *New York Times v. Sullivan*. Consequently, the *Air Wisconsin* decision reinforces the idea that, while truth may be a defense to nearly any defamation claim, the ultimate burden to prove "material" falsity falls on the plaintiff for any situation governed by the principle of "qualified immunity."

Likewise, if an employer makes a statement "recklessly" that ultimately turns out to be true, even though there was no real basis at the time for believing that the statement is true, it is still entitled to immunity under the "actual malice" standard in the limited instances when that more stringent standard applies. The Court emphasized that speech is only defamatory if it is *materially* false. Thus, if an employer's alleged defamatory statement is otherwise protected by a qualified immunity and the substance or gist of the statement is accurate, then that immunity will not be undermined by an immaterial inaccuracy.

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