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Airline Security and Employee Immunity: The Second Circuit Promotes Airline Security Interests at All Costs—Even If It Means Throwing Efficiency and Accountability by the Wayside

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**AIRLINE SECURITY AND EMPLOYEE IMMUNITY:
THE SECOND CIRCUIT PROMOTES AIRLINE
SECURITY INTERESTS AT ALL COSTS—EVEN
IF IT MEANS THROWING EFFICIENCY AND
ACCOUNTABILITY BY THE WAYSIDE**

LONDON M. HANKINS*

I. INTRODUCTION

WHEN ROSALINDA BAEZ arrived at John F. Kennedy International Airport to catch her flight to Austin, Texas, she likely had no idea that she was about to utter a phrase that would cause her to lose her job, gain media attention, and embark on a journey to the U.S. Court of Appeals for the Second Circuit.¹ But sometimes life takes an unexpected turn. Upon discovering that she had been waiting for her JetBlue Airways (Jet-Blue) flight in the wrong terminal, Baez arrived at the correct gate only to find that the passengers had already boarded.² She was told by JetBlue agent Tiffany Malabet that Baez had arrived too late and would have to catch a later flight.³ Baez then made a statement in which she mentioned a bomb in connection with her luggage that was on the plane.⁴ Malabet subsequently relayed the exchange to her supervisor, who in turn informed the Transportation Security Administration (TSA).⁵ Security officials rerouted the plane, yet failed to find a bomb on board.⁶ After an investigation, Baez was ultimately ordered to pay Jet-

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¹ *See* Baez v. JetBlue Airways Corp., 793 F.3d 269, 274 (2d Cir. 2015) (*Baez II*).

² Baez v. JetBlue Airways, 745 F. Supp. 2d 214, 218–19 (E.D.N.Y. 2010) (*Baez I*).

³ *Id.*

⁴ *Baez II*, 793 F.3d at 272.

⁵ *Id.* at 272–73.

⁶ *Id.* at 273.

Blue restitution for the rerouting of the plane and sentenced to three years probation for marijuana found in her suitcase.⁷

Baez subsequently filed suit against both JetBlue and Malabet, alleging negligence, defamation, and intentional infliction of emotional distress.⁸ The district court granted the defendants' motion for summary judgment, finding that both JetBlue and Malabet were immune from liability under the Aviation and Transportation Security Act (ATSA).⁹ Baez appealed, arguing (1) that there was a genuine issue of material fact regarding whether Malabet's statement relaying what Baez had said was materially false; and (2) that Malabet's statement was outside the scope of the ATSA because Malabet's supervisor did not fall into any of the categories of individuals enumerated by the statute.¹⁰ The court rejected Baez's arguments, holding that no reasonable jury could have concluded that Malabet's statement was materially false and that the statement was fully covered by the ATSA.¹¹

This casenote will focus on the first issue only and argue the safeguards that the court's opinion provides to airline employees purport to enhance safety but instead advance a policy paradigm that promotes inefficiency and fails to recognize the importance of relaying full and accurate information when reporting security-related incidents.

II. THE COURT FOUND THAT MALABET'S ALLEGED STATEMENT WAS NOT MATERIALLY FALSE

This case centers on Baez's allegation that Malabet misrepresented their verbal exchange in the report to her supervisor. Baez admits that she said, "[i]sn't it a security risk to let a bag go on a plane without a passenger, what if there was a bomb in the bag?" and that when Malabet told her that the TSA would have caught it, Baez replied, "TSA—my ass" and walked away.¹² Baez alleged, however, that Malabet misrepresented the conversation when relaying it to her supervisor, reporting that Baez had affirmatively stated that she had a bomb in her bag.¹³ Malabet, on the other hand, contended that she reported that Baez had

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* at 272.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

posed the hypothetical question, “what if there was a bomb in my bag?”¹⁴ According to the U.S. Federal Bureau of Investigation (FBI) complaint, Baez both posed the hypothetical question and affirmatively stated that there was a bomb in her bag.¹⁵

When the U.S. Congress created the TSA to “assess and manage threats against air travel,” it strove to ensure that airlines and their employees would have no incentive to withhold their suspicions from the TSA, and so it granted airlines and their employees immunity from civil suits arising from such communications.¹⁶ Thus, the ATSA provides that

[a]ny air carrier or . . . employee of an air carrier . . . who makes a voluntary disclosure of any suspicious transaction relevant to a possible . . . threat to aircraft or passenger safety, or terrorism . . . to any employee or agent of the Department of Transportation, the Department of Justice, any Federal, State, or local law enforcement officer, or any airport or airline security officer shall not be civilly liable to any person under [either federal or state law].¹⁷

Congress excepted from this protection statements made with “actual knowledge that the disclosure was false, inaccurate, or misleading” or “reckless disregard as to the truth or falsity of that disclosure.”¹⁸ To recover under this provision, a claimant must show that the statement was “materially false,” defined as a statement that “would have a different effect on the mind of the . . . listener from that which the truth would have produced.”¹⁹

The court based its holding that no reasonable jury could find Malabet’s statement materially false on its conclusion that a reasonable security officer would have investigated Baez’s hypothetical remark even if Malabet had relayed it exactly as Baez alleged she stated it.²⁰ The court gave several reasons for its conclusion. First, the fact that the plane left with Baez’s unaccompanied luggage was enough to cause a reasonable security officer to want to investigate the matter.²¹ Second, airline employees should not be held liable for not relaying a person’s statement with perfect accuracy because holding them liable in such instances

¹⁴ *Id.* at 272–73.

¹⁵ *Id.* at 273.

¹⁶ *Air Wis. Airlines Corp. v. Hoepfer*, 134 S. Ct. 852, 857–58 (2014).

¹⁷ 49 U.S.C. § 44941(a) (2012).

¹⁸ *Id.* § 44941(b).

¹⁹ *Hoepfer*, 134 S. Ct. at 863 (internal quotation marks and alterations omitted).

²⁰ *Baez II*, 793 F.3d at 275–76.

²¹ *Id.* at 275.

could potentially deter employees from reporting suspicious remarks, which could cause an airline to be subject to civil penalties for failing to report potential threats.²² Third, that the FBI included in its report Baez's hypothetical remark further evidences that a reasonable security officer would have investigated the matter based on the hypothetical remark alone.²³ Fourth, the standard is an objective one; the court categorically stated that "[a]ny reasonable security officer would follow up on a report of a disgruntled passenger who adverted to a bomb in luggage and deprecated the agency responsible for detecting such bombs."²⁴ Finally, the court asserted that the TSA's policy of "when in doubt, report" would be defeated if air carriers and their employees were exposed to liability for reporting a statement that references a bomb in luggage."²⁵

III. THE COURT'S OPINION IS A WIN FOR AIRLINE EMPLOYEES AND SECURITY

The court's holding and reasoning undoubtedly favor the interest of public security in air travel and will surely be viewed favorably by those who support granting a great amount of deference to allow airline employees to report suspicious behavior. The opinion's sweeping language assures airlines and their employees that, when dealing with matters of security, they need not fear liability for failing to relay a suspicious person's statement with precise accuracy.²⁶ Indeed, the court implicitly encouraged airline employees to liberally report any utterance or suggestion that could be reasonably construed to refer to terrorist violence, including "bare reference[s]" to bombs, ambiguous statements, and even jokes.²⁷ Security officers also receive implicit encouragement regarding their job responsibilities via the court's broad language regarding the "reasonable officer"—language that implies that officers should investigate all statements made by passengers that reference bombs in luggage²⁸

²² *Id.*

²³ *Id.* at 276.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *See id.* at 275 (asserting that an employee need not relay the "precise wording" of a potential security threat (quoting *Air Wis. Airlines Corp. v. Hooper*, 134 S. Ct. 852, 865 (2014))).

²⁷ *See id.* at 275–76.

²⁸ *See id.* at 276 ("Any reasonable security officer would follow up on a report of a disgruntled passenger who adverted to a bomb in luggage and deprecated the agency responsible for detecting such bombs.").

and even seems to suggest that officers should investigate every instance in which a bag happens to be on a plane without its owner.²⁹

Policy factors are featured prominently in the opinion.³⁰ The judgment arguably serves to advance the policy interests of protecting employees acting in accordance with their duty to report threats to civil aviation,³¹ both encouraging airline employees and security officers to report and investigate liberally and deterring civil lawsuits against airline employees who report questionable statements. One could reasonably infer that this court simply does not believe that people should be able to file a lawsuit as a response to unfortunate consequences arising from their ill-thought decision to utter the word “bomb” in an airport.³² It is clear that this circuit court panel is ready and willing, in the interest of security and prevention, to protect any employee from any legal reprisal arising from his or her decision to relay such information to either a supervisor or security personnel.

IV. THE OPINION MISAPPLIED THE LAW AND UNWISELY DISREGARDED EFFICIENCY AND ACCOUNTABILITY

Notwithstanding the court’s safeguarding of security interests, any praise that the court might appear to deserve is clearly outweighed by the errors the court committed. The court’s opinion is contaminated with non-linear reasoning, misapplication of the law to the facts, and language that potentially threatens the efficiency of airline travel. While the court at the outset accurately stated the legal framework governing the case—that Baez must show a genuine issue of material fact regarding whether

²⁹ See *id.* at 275 (“[S]ince Baez’s luggage was indisputably a checked bag unaccompanied by its owner, a reasonable law enforcement officer would have wanted to investigate.” (internal quotation marks and alterations omitted)).

³⁰ See *id.* at 276 (“[T]he TSA’s policy known as ‘when in doubt, report,’ . . . would be defeated if air carriers and their employees were exposed to liability for reporting a statement that references a bomb in luggage.” (internal quotation marks omitted)); see also *id.* at 275 (“‘[T]o accept [Baez’s] demand’ that an airline employee relay the ‘precise wording’ of a potential security threat ‘would vitiate the purpose of ATSA immunity.’” (quoting *Hoeper*, 134 S. Ct. at 865)).

³¹ See 49 U.S.C. § 44905(a) (2012).

³² See *Baez II*, 793 F.3d at 276 (“[A] passenger who speculates aloud about whether there is a bomb in her luggage cannot be heard to complain when an airline representative reports the use of those words, even if the passenger’s precise words are misrepresented.”).

Malabet's report was materially false³³—the reasoning whereby the court arrived at its conclusion is, at best, questionable and unsatisfying.

When the court asserted that “[a]ny reasonable security officer would follow up on a report of a disgruntled passenger who adverted to a bomb in luggage and deprecated the agency responsible for detecting such bombs,”³⁴ it completely missed the mark by converting the legal analysis from a specific inquiry to one that is more general. The question is not, as the court implied, whether a reasonable security officer would have investigated a reference to a bomb in luggage; the question is whether the difference between what Baez actually said and what Malabet allegedly reported could have caused a reasonable security officer to perceive and respond to the report in a different way.³⁵ Furthermore, the breadth of the court's categorical assertion is problematic, for it implies that all references to bombs in luggage made by passengers that appear “disgruntled” should be treated equally.³⁶ But context matters, and a reasonable security officer very well could, and arguably should, react differently to a visibly worried passenger, who perhaps is flying for the first time, that voices aloud his hopes that there is nothing dangerous in the luggage while doubting the efficacy of the TSA, as opposed to a passenger who affirmatively states that she has a bomb in her luggage.³⁷

The reasoning employed in the court's reference to the FBI report is unconvincing because it glosses over the fact that the FBI report did not merely contain Baez's hypothetical formulation “[w]hat if I had a bomb in my bag?” but also alleged that Baez had affirmatively stated that “she did have a bomb in her bag.”³⁸ Thus, the FBI report does nothing to advance the court's notion that security officials would have investigated the matter even if Malabet had reported Baez's hypothetical question and not, as Baez alleged, that she had made an affirmative assertion about a bomb. Moreover, the report provides no evidence re-

³³ See *id.* at 274.

³⁴ See *id.* at 276.

³⁵ See *Hoepfer*, 134 S. Ct. at 863.

³⁶ See *Baez II*, 793 F.3d at 276.

³⁷ See 49 C.F.R. § 1542.307(a) (2015) (mandating that airport authorities create procedures for evaluating bomb threats. Thus, a reasonable security officer's reaction to any given situation might differ depending on the procedures in place at the airport in which he is working.).

³⁸ *Baez II*, 793 F.3d at 273.

garding the real issue in the case, which is whether the different statements would have had a different effect on the mind of a reasonable security official.

The court's error in its application of the law is further evidenced by the court's conclusion to the discussion of the issue wherein the court stated that the TSA's policy of "when in doubt, report" would be defeated if air carriers and their employees were exposed to liability for reporting a statement that references a bomb in luggage."³⁹ And so it would; but, once again, the issue is not *whether* employees report such statements, but *how* those statements are reported. Congress understood and sought to protect the policy interest of encouraging airline employees to liberally report suspicious statements.⁴⁰ What Congress did *not* condone, however, are instances in which an airline employee misrepresents a person's statements in such a way that would have a different effect on the mind of a reasonable listener,⁴¹ which is exactly what Baez alleged Malabet did in this case.⁴² For these reasons, the court erred in its application of the law to the facts by discussing whether a reasonable security officer would have responded in general to Baez's alleged hypothetical remark rather than the true issue: whether the alleged difference between the remark as uttered and the remark as reported would have caused a reasonable security officer to perceive and react to the remark differently.

Additionally, the assumptions and assertions contained in the court's opinion carry implications that could potentially result in inefficient implementation of security measures as well as a lack of accountability on the part of the employees that relay information to authorities. In this case, the investigation and response involved rerouting the plane and a subsequent bomb search,⁴³ and the inquiry is whether this response would have been different had Malabet reported the incident differently.⁴⁴ Thus, when the court asserted that an unaccompanied checked suitcase on an airplane is enough to cause a reasonable officer to investigate the matter,⁴⁵ one could believe the court to be suggesting that the authorities' particular response in this case

³⁹ See *id.* at 276.

⁴⁰ See *Hoepfer*, 134 S. Ct. at 857.

⁴¹ See *id.* at 863.

⁴² See *Baez II*, 793 F.3d at 272.

⁴³ See *id.* at 273.

⁴⁴ See *id.* at 274.

⁴⁵ See *id.* at 275.

was justified on the basis of the unaccompanied bag alone. While the court is surely not suggesting that rerouting, landing, and searching the plane is a reasonable response to every instance in which a passenger accidentally misses her plane, the court should have clarified that, even assuming *arguendo* that a reasonable officer would investigate every instance in which a passenger missed her plane, a reasonable officer's response to such situations would depend on the circumstances of the situation.

In another portion of the opinion, the court reasons that because an employee "may not confidently distinguish between a veiled threat and a comment expressing genuine concerns about security . . . once a report is made, it is for the TSA and other law enforcement officers 'to determine and execute a response.'"⁴⁶ This raises two issues. First, similar to the passage discussed in the preceding paragraph, this passage raises the issue of efficiency as it relates to security policy. That it might be difficult at times to distinguish between a real threat and a non-threat should not mean that an employee can simply notify the authorities that a passenger mentioned, or made a "bare reference to,"⁴⁷ a bomb, leaving security officials in the dark as to the circumstances surrounding the report. If security personnel investigated every incident in which someone in an airport or an airplane mentioned a bomb, terrorism, or violence, the result would be unworkable inefficiency, not only for air travel, but also for the security officers tasked with ensuring the safety of air travel.⁴⁸ Situational factors matter in determining which reports merit an investigation.

Second, this passage raises questions regarding the allocation of responsibility. Because circumstances matter, airline employees reporting questionable incidents should make a good faith effort to accurately relay the circumstances surrounding the incident so as to allow the recipient of the information to make the best reasoned judgment regarding whether and how to re-

⁴⁶ *Id.* (quoting *Hoeper*, 134 S. Ct. at 864).

⁴⁷ *Id.*

⁴⁸ *Cf.* Deponent: Kathleen Sweet, *Barnes v. Carnival Corp.*, No. 1:06-CV-20784 (S.D. Fla. 2008), 2008 WL 8847851, in which an expert witness opined, regarding security threats made on cruise ships, that "basic risk management principles say that you evaluate the threat, then you take appropriate action. You don't automatically call in expensive US [sic] assets for no reason whatsoever. If that were the case, we would stop shipping, we would stop commerce, we would stop every cruise ship any time anybody ever may allegedly have said something."

spond. The court, by emphasizing the difficulty in deciphering the significance of potential threats and the Supreme Court's dicta indicating that employees need not relay the "precise wording" of a person's statement,⁴⁹ sent the message that airline employees bear little responsibility for communicating accurate information to authorities. However, airline employees are the ones observing the incidents and should bear greater responsibility in relaying accurate information. While the court was correct in stating that it is the security officers' duty to "determine and execute a response,"⁵⁰ their decisions depend on the information given to them by the airline employees. An employee's intentional or reckless alteration of the nature of a passenger's statement, combined with an omission of the circumstantial facts, could drastically affect how a security official decides to respond. Thus, the court by its language and tone sent the message that the way in which an airline employee reports an incident does not matter and, in doing so, the court threatened not only the efficacy of law enforcement in its effort to respond to legitimate threats, but also the future and fortunes of those individuals who, while perhaps not speaking with due care, arguably do not deserve the consequences that accompany a federal investigation.

V. CONCLUSION

The circuit court's opinion misapplied the law to the facts and serves to advance a policy paradigm that is burdensome and inefficient. Undoubtedly, society's interest in air travel safety is no less than compelling. Safety policy, however, must be reasonable and not overreaching. Under the court's ruling, airline employees in the Second Circuit can rest easy knowing that the court is so willing to shield them from lawsuits arising out of instances in which they inaccurately convey information to authorities. On the other hand, if the general public is to take anything away from the ruling, it is this: no matter how stressful the situation, no matter how extenuating the circumstances, do not ever, *ever*, utter the word "bomb" in an airport.

⁴⁹ *Baez II*, 793 F.3d at 275 (quoting *Hoeper*, 134 S. Ct. at 865).

⁵⁰ *Id.* (quoting *Hoeper*, 134 S. Ct. at 864).