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Greatwide Dedicated Transport II, LLC v. United States Department of Labor: Whistleblower Claims in Trucking

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The trucking industry is not immune from whistleblower cases. The facts in *Greatwide Dedicated Transport II, LLC v. United States Department of Labor*[1] are more intriguing than usual in transportation decisions. The primary issues include driver hours of service, protected employee activity, recorded phone calls, impermissible use of company information, and handbook language. The employee driver was ultimately awarded $107,940.07 in backpay and $5,000 in emotional distress damages.

Greatwide Dedicated Transport ("**Greatwide**") has approximately fifty distribution centers and employs 3,500 to 4,000 drivers. Among its shippers are the Nordstrom stores. Theodore Huang was a driver employed at the Upper Marlboro, Maryland distribution center. Huang witnessed certain drivers receive additional driving assignments in violation of 49 C.F.R. § 395.3 – *Maximum driving time for property-carrying vehicles*.[2] Notwithstanding this regulation, dispatchers allowed certain drivers to drive over regulated hours. One day, after a driver informed Huang that he was going to drive illegally, Huang decided that he would expose the unlawful conduct and collect evidence to support his discovery.

In order to capture discussions concerning the alleged safety violations, Huang duct-taped a digital voice recorder to a cubicle's outer wall in the distribution center's "bullpen" area and recorded the dispatcher's daily review and assignment of drivers' routes and hours. The bullpen area, which was in a Nordstrom packaging warehouse, was an open floorplan area with desks and cubicle dividers. Huang alleged that the bullpen was often busy, filled with foot traffic. Only a brief portion of the recorded conversations was relevant to the safety violations, and Huang deleted the remainder. On the same day, Huang also removed paperwork belonging to one of the drivers from the center's lockbox. Management at the Upper Marlboro distribution center required its drivers to deposit relevant documentation, including mileage or assigned store routes, into the lockbox after returning from daily assignments.

Huang stated that he easily slipped his hand through the lockbox's opening, removed the driver's log from the lockbox that demonstrated that the driver surpassed permissible hours, took the paperwork home, made copies, and returned it two hours later. The driver's log supposedly included store numbers referencing the delivery locations, delivery receipts and sheets, and a list of all drivers and runs.

Huang, thereafter, sent identical anonymous letters to several management officers relaying his findings on the safety violations. He later confessed to management that he was the author of the letters and emailed management an edited mp3 file and transcription of the dispatchers' bullpen conversation related to the safety concerns.

Approximately, a month later, Huang drew an assignment to drive a double-trailer to Nordstrom locations in Manhattan, New York and Paramus, New Jersey. Greatwide contended that his performance regarding that assignment was defective, on the grounds that he improperly dropped an unsecure trailer.

Greatwide suspended Huang upon his return from the double-trailer drop. A few days later, he received notice that he was under investigation for an hours-of-service violation. And a week thereafter, he was informed that he was being investigated for a security issue.

Later, Huang met with management to discuss his alleged conduct and the following day, Huang received an official Termination Request which stated without elaboration that he was being terminated based on "[m]ultiple company violations."

Huang filed a whistleblower complaint with the U.S. Department of Labor's ("**DOL**") Occupational Safety and Health Administration. An Administrative Law Judge ruled in Huang's favor, ordering Greatwide to pay both backpay and emotional distress damages; and the DOL's Administrative Review Board affirmed.

The DOL found: (i) Huang engaged in protected activity when he wrote anonymous letters to management, removed and copied documents from the lockbox, and recorded a management conversation to support his allegations; (ii) the temporal proximity between Huang's protected

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activity and termination was sufficient to establish that Huang's protected activity was a contributing factor in his termination; and (iii) Greatwide had not established that it would have terminated Huang absent his protected activity.

On Appeal, the Fourth Circuit Court first set for the legal standard for federal transportation whistleblowers as follows:

> "The Surface Transportation Assistance Act ("STAA") includes an "Employee Protections" provision which prohibits discharging, disciplining, or discriminating against an employee "regarding pay, terms, or privileges of employment, because" "the employee, or another person at the employee's request, has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety or security regulation, standard, or order, or has testified or will testify in such a proceeding."[3]

In 2007, Congress amended 49 U.S.C. § 31105 'to incorporate the legal burdens of proof set forth in the whistleblower provision of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. § 42121(b)(2)(B) ('AIR 21').'[4] Pursuant to the burdens of proof set forth in 49 U.S.C. § 42121(b), complainants must present a prima facie case demonstrating by a preponderance of the evidence that: (i) they engaged in protected activity, (ii) the employer knew of the protected conduct, (iii) their employer took an unfavorable employment action against them, and (iv) the protected activity was a contributing factor to the employer's adverse employment action.[5] Once established, the burden shifts to the employer to demonstrate, 'by clear and convincing evidence, that the employer would have taken the same unfavorable personnel action in the absence of that protected behavior."[6] This standard, as a result, is 'more favorable to the complaining employee.'[7]

The Court agreed that Huang engaged in protected activity when he sent letters reporting safety violations, when he removed and copied documents, and recorded the dispatchers' meeting. Regarding Huang's recording of the dispatchers' bullpen meeting, the Court held that under Maryland's Wiretapping and Electronic Surveillance law, protected oral communication is defined as "any conversation or words spoken to or by any person in private conversation."[8] Huang taped the recording device outside of a cubicle wall in the distribution center's bullpen area, which was an open space in a warehouse floor with only cubicle dividers that Huang and any other employee could access. Although the conversation took place over a couple of hours, Huang testified that he only sent a roughly three-and-a-half-minute portion to management that focused on what Huang claims was relevant discussion of the alleged safety violations and deleted the remainder of the recording.

The Court also stated that Huang engaged in protected activity when he removed and subsequently photocopied an "insider" driver's paperwork from the distribution center's lockbox. However, after removing documents from the lockbox, Huang discovered that the driver's log submitted by one of the drivers demonstrated driving hours beyond the permissible maximum. Huang brought driver's log home, photocopied it, and returned it to the lockbox two hours later. When Huang sent his anonymous letters to management, he attached the photocopied driver's log as relevant evidence to support his discovery.

The Court noted that Greatwide's employee handbook does not classify drivers' logs as confidential information or employee data. In fact, the handbook fails to mention drivers' logs altogether. Regardless of the company's policy, Huang's sole intent in collecting and copying the driver's log was to support his safety violation allegations. Thus, his actions rise to the level of protected activity. The Court then held that Huang's protected activity was a contributing factor in Greatwide's decision to terminate him.

Temporal proximity between the protected activity and the adverse action is a significant factor in considering a circumstantial showing of causation.[9] The Court found that Huang sent the anonymous letters to management on April 2, 2012. He disclosed to management that he was the author of the letters on May 14, 2012. He was suspended on May 18, 2012, the day he completed the double-trailer drop to Manhattan and New Jersey, and was officially terminated on May 31, 2012. These events all occurred in just under two months. The Court stated: "Yet, although integral, 'temporal proximity is not necessarily dispositive,' but rather a piece of 'evidence for the trier of fact to weigh in deciding the ultimate question of whether a complainant has prove[n] by a preponderance of the evidence that retaliation was a motivating factor in the adverse action.'"[10]

The burden then shifted to Greatwide to show, by clear and convincing evidence, that Huang would have been terminated absent his protected activity. The Court noted that Greatwide's Employee Handbook does not provide explicit guidance on why this alleged violation would result in termination:

> Among a non-exhaustive list of thirty examples, the Handbook's "Rules of Conduct" section states that 'willful destruction of Company property' is a serious policy violation which is grounds for "disciplinary actions *ranging from a verbal warning to immediate termination of employment.*" Given the broad range of possible disciplinary grounds, and Greatwide's failure to demonstrate that the destruction of comparable company property typically leads to termination, the company has not met the clear and convincing evidence standard that this specific 'serious policy violation' would have resulted in Huang's termination….
>
> Notably, the Handbook is also silent on rules governing trailer dropping and any related disciplinary conduct. Management testified at the hearing that it assumed there was a policy memorialized in the handbook concerning trailer abandonment, but 'if not, it would be something that would be orally passed out at a safety meeting.' [11]

The Court concluded that Huang prevailed under his whistleblower claim, because he engaged in protected activity which was a contributing factor in his termination, and that Greatwide failed to prove that he would have been terminated absent his protected conduct.

In my view, the moral of the story here to motor carriers is: (i) do not violate the hours of service rules; and (ii) do not overwrite handbooks

Endnotes

1 No. 21 1797 (4th Cir. Jun. 30, 2023).

2 Under this regulation, a "driver may not drive without first taking 10 consecutive hours off duty." 49 C.F.R. § 395.3(a)(1). Nor may a driver "drive after a period of 14 consecutive hours after coming on-duty following 10 consecutive hours off-duty." 49 C.F.R. § 395.3(a)(2). During that 14-hour period, a driver may only "drive a total of 11 hours." 49 C.F.R. § 395.3(a)(3). Further, "driving is not permitted if more than 8 hours of driving time have passed without at least a consecutive 30-minute interruption in driving status.

3 49 U.S.C. § 31105(a)(1)(A)(i).

4 *Formella v. U.S. Dep't of Lab.*, 628 F.3d 381, 389 (7th Cir. 2010); see also 49 U.S.C. § 31105(b) (stating that "[a]ll complaints initiated under this section shall be governed by the legal burdens of proof set forth in section 42121(b)").

5 *See Weatherford U.S., L.P. v. Dep't of Lab., Admin. Bd.*, 68 F.4th 1030 (6th Cir. 2023).

6 *Ibid.* at 1040 (quoting 49 U.S.C. § 31105(b)). See also *Maverick Transp., LLC v. U.S. Dep't of Lab., Admin. Rev. Bd.*, 739 F.3d 1149, 1155 (8th Cir. 2014).

7 Formella, 628 F.3d at 389 (citing Addis v. Dep't of Lab., 575 F.3d 688, 690–91 (7th Cir. 2009)).

8 Md. Code, Cts. & Jud. Proc. § 10-401(13)(i).

9 *Supra*, note 1, quoting *Tice v. Bristol-Meyers Squibb Co.*, 2006 WL 3246825, at *20 (A.L.J. Apr. 26, 2006)).

10 *Ibid.*, citing *Clemmons v. Ameristar Airways, Inc.*, ARB No. 08-067, ALJ No. 2004-AIR-011, slip op. at 6 (A.R.B. May 26, 2010) (quoting *Dixon v. U.S. Dep't of Interior*, ARB Nos. 06-147, -160, ALJ No. 2005-SDW-008, slip op. at 13 (A.R.B. Aug. 28, 2008)).

11 *Ibid.*