The Ten Worst Transportation Industry Employer Mistakes 2001-2003

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Sponsoring defined benefit pension plans topped the list of the most expensive employment-related mistakes made in the transportation industry during the 2001-2003 survey period. Two other errors, failing to pay overtime in California and hiring commercial drivers with poor safety records, cost several transportation industry employers, or their insurers, millions of dollars, but those numbers were dwarfed by the billion dollar exposures that some transportation industry employers face for underfunded pension plans. This article addresses the ten worst transportation industry employer mistakes to assist the transportation employers in avoiding similar litigation disasters.

MISTAKE 1:

FAILING TO PAY OVERTIME AS REQUIRED BY THE FAIR LABOR STANDARDS ACT AND APPLICABLE STATE LAW

Class action overtime suits are currently a hot area for employers in all industries, including the transportation industry, which has been hit particularly hard. Often the defendants in these suits are large and legally sophisticated companies that have arguably run afoul of some complexity

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in the overtime laws. These alleged errors rarely make significant monetary difference on a per-employee basis but add up to a large number when aggregated in a class action lawsuit.

Common employer errors under the Fair Labor Standards Act ("FLSA") include:

- misclassification of workers as supervisors when management is not their primary duty[1]
- failing to pay for on-call time[2]
- docking exempt employees[3]
- joint employer situations in which workers are hired through staffing services[4]
- misclassification of employees as exempt outside sales employees when they do not meet the test for exempt outside sales employees[5]
- treating workers as independent contractors when they are not independent contractors[6]

Employers with workers in California are particularly vulnerable to overtime suits due to a California law known as the Eight-Hour-Day Restoration and Workplace Flexibility Act of 1999 ("Act").[7] The Act mandates that nonexempt California employees be paid one and a half times their regular hourly rate for any work performed in excess of eight hours in any given work day, regardless of the total hours the employee works during the week.[8] The Act also mandates that double time be paid for any time worked over eight hours on the seventh day of a work week where the employee works all seven days.[9] Transportation industry employers should consider conducting internal audits of their wage and hour practices in order to discover and address their vulnerabilities in this area.

The application of overtime laws to part-time supervisors has always been a murky area. *Archie v. United Parcel Service, Inc.*[10] addressed this issue under California wage laws.[11] The plaintiff was a part-time supervi-

1. *See* 29 C.F.R. §§ 541.1(a)-(e) (2003); 29 C.F.R. §541.102(b) (2003).
2. *See* 29 C.F.R. § 785.17 (2003).
3. *See* 29 C.F.R. § 541.118(4) (2003).
4. *See* 29 C.F.R. § 791.2(b) (2003).
5. *See* 29 U.S.C. § 213(a)(1) (2003); 29 C.F.R. § 541.5(b) (2003).
6. *See* 29 U.S.C. § 207(a) (2003) (identifying that coverage extends only to employees). Independent contractors are not covered within the scope of the FLSA. *See* Carrell v. Sunland Constr., Inc., 998 F.2d 330, 332 (5th Cir. 1993). There are a variety of tests for determining independent contractor status, including economic dependence on the employer. *See* McLaughlin v. Seafood Inc., 861 F.2d 450, 452 (5th Cir. 1988), *modified*, 867 F.2d 875 (5th Cir. 1989).
7. CAL. LAB. CODE § 500 (2003).
8. *Id.* at § 510(a).
9. *Id.*
10. No. GIC748880 (Cal. Super. Ct. Aug. 1, 2002), *at* http://www.verdictssearch.com/ http://www.verdictsearch.com (on file with the Univ. of Denver, Coll. of Law, Transp. Law Journal).
11. *Id.*

sor for United Parcel Service ("UPS") for eighteen years.[12] He alleged an injury of $35 million to $40 million in unpaid compensation on behalf of almost 6,000 current and past part-time supervisors, arguing that UPS violated California's labor law "requiring exempt workers to earn twice the minimum wage."[13] He contended that the part-time supervisors were more accurately characterized as "lead workers" that the company expected to remain at work without pay to finish the tasks of non-supervisors after their shifts had ended.[14] Moreover, the plaintiff argued that they had virtually no discretion in performing their jobs and that they were tasked with work identical to that of non-supervisors.[15]

UPS defended, arguing that it was in compliance with applicable state wage and hour laws.[16] It noted that part-time supervisors' average annual salaries were $21,000 and that they were part of management, which included additional benefits and management duties.[17] Further, UPS argued that California law allowed for exempt status for "managers, professionals and administrators who spend more than half their time on managerial, intellectual or creative work."[18] Nevertheless, UPS agreed to an $18 million settlement.[19]

In *Addvensky v. Corporate Express Delivery Systems, Inc.*,[20] the plaintiff class consisted of nearly 2,000 messengers and delivery drivers paid on commission, where they earned between forty-five and fifty percent of the charges made to their customers.[21] However, the commission amount was allocated to "wages" and "leasehold reimbursement" (for vehicle use).[22] The plaintiffs argued that this commission system violated California's minimum wage and overtime statutes, as well as a state labor code requiring reimbursement for "necessarily incurred employment expenses including vehicle expenses."[23] The company denied any culpability and argued that the damages were not as high as the plaintiffs contended.[24] Ultimately, the company agreed to a $9.7 million settlement.[25]

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12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. No. 720794 (Cal. Super. Ct. July 21, 2000), *at* http://www.verdictsearch.com (on file with the Univ. of Denver, Coll. of Law, Transp. Law Journal).
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.* The plaintiff's lawyer who handled this case also obtained a $124.5 million judgment

In *Confidential No. 101-02-07*,[26] the plaintiffs were current and past delivery salespeople, route salespeople, or delivery route salespeople for the defendant's national corporation.[27] The plaintiffs alleged that the defendant employer violated several California labor codes requiring employee compensation for their overtime hours, unless they were identified as "salaried exempt" or as an "outside salesperson."[28] Specifically, the plaintiffs alleged that the defendant employer intentionally misidentified them as exempt employees to avoid paying overtime labor; that they were inadequately compensated (not receiving straight time or overtime compensation) for working more than eight hours each day and more than forty hours each work week; that they performed nonexempt work in excess of fifty percent of the time; that the employer falsely told its salaried employees that they were not due overtime compensation; that the employer engaged in "unfair business practices;" and that the employer's failure to pay the plaintiffs was an act of conversion.[29] The defendant contended that the plaintiffs were accurately identified as exempt employees, and, as a result, it did not violate state labor law.[30] However, the defendants agreed to a $4 million settlement.[31]

MISTAKE 2:

FAILING TO CHECK REFERENCES AND DRIVING RECORDS OF APPLICANTS FOR JOBS INVOLVING PUBLIC SAFETY

When an employee kills or seriously injures someone else, the plaintiff's lawyer's first acts likely will be to check the criminal and civil lawsuit history of the wrongdoing employee as well as his employment references. If these checks reveal a history of dangerous, or even criminal behavior, then the lawsuit against the employer will be much more expensive to settle. Most employers know that background checks should be performed on employees before they are hired for safety-sensitive positions. Yet sometimes this background check slips through the crack. The following are some recent examples of suits against transportation industry employers that settled for large sums, partly based on negligent hiring of employees in safety sensitive positions.

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in an overtime suit against Farmers Insurance Exchange. Rose v. Farmers Ins. Exch., No. 774013-0 (Cal. Super. Ct., July 10, 2001), *at* http://www.verdictsearch.com (on file with the Univ. of Denver, Coll. of Law, Transp. Law Journal).

26. No. 101-02-07 (Cal. Super. Ct. Aug. 10, 2000), *at* http://www.verdictsearch.com (on file with the Univ. of Denver, Coll. of Law, Transp. Law Journal).

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

In *Meister v. Smithway Motor Xpress, Inc.*,[32] a Smithway Motor Xpress driver lost control of the eighteen-wheeler he was driving and swerved across a highway median, killing two persons and seriously injuring three persons.[33] Depositions in this lawsuit indicated Smithway had hired the driver knowing his history of safety violations.[34] The plaintiffs contended the employer did not enforce its personnel and safety policies.[35] Specifically, the plaintiffs claimed the employer hired and then continued to retain this driver even though he had "habitually violated federal motor carrier regulations regarding driving times for over the road truckers."[36] The plaintiff alleged that the driver was fired by a former employer for false entries in his federally mandated driving log.[37] The driver asserted Fifth Amendment rights when questioned about these false entries.[38]

Also, evidence indicated the employer had ignored reports generated from its satellite-tracking system showing the driver was in violation of the law.[39] The driver contended that he was only traveling forty to fifty mph, but "panic stop" data gathered from an on-board computer showed he was traveling sixty-five mph when the accident occurred.[40] The various plaintiffs eventually settled for a total of $17.4 million.[41]

In *Corley v. L & E Trucking Co.*,[42] a truck driver caused an accident that killed one person.[43] The plaintiffs, the deceased family members, alleged the trucking company "entrusted 30-ton gravel trucks to unqualified drivers with excessive numbers of prior accidents and moving violations."[44] In addition, they claimed the trucking company was negligent in hiring this driver after she noted on her job application that she had more than three moving violations and accidents in the previous three years, which violated the employer's own policies.[45] Ultimately, the trucking company paid a $6 million settlement.[46]

32. No. 00-04246-A (Tex. Dist. Ct. Oct. 2, 2001), *at* http://www.verdictsearch.com (on file with the Univ. of Denver, Coll. of Law, Transp. Law Journal).
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.*
42. No. 200100071 (Tex. Dist. Ct. Apr. 17, 2002), *at* http://www.verdictsearch.com (on file with the Univ. of Denver, Coll. of Law, Transp. Law Journal).
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.*

MISTAKE 3:

FAILING TO INVESTIGATE SERIOUS SEXUAL HARASSMENT AND WORKPLACE VIOLENCE ALLEGATIONS BECAUSE THE COMPLAINANT REQUESTS PRIVACY

From time to time, an employee comes forward to report that they have been victimized by a co-worker who has assaulted, threatened, or harassed them in some serious way. After disclosing this information, the employee then asks for confidentiality, stating that they are embarrassed or fearful for their life if the perpetrator finds out that a report has been made. Sometimes the employee will even point to a provision in the employer's anti-harassment policy promising confidentiality. This is a very sensitive situation involving not just sexual harassment issues but possibly issues of criminal law, workplace violence, and common law privacy. In *Gallagher v. Delaney*,[47] the Second Circuit noted that confidential complaints of this type create a catch-22 situation for employers.[48] This catch-22 situation stems from the need for management to act upon sexual harassment charges, but not violate the confidentiality of the victim.[49]

Moreover, there is authority that the employer need not investigate allegations if the complainant so requests.[50] Nevertheless, the best course for the employer is usually to investigate any type of alleged workplace harassment (whether based on gender, race, religion or any other protected status) promptly and thoroughly. One reason an employer should do this is so that the employer may take advantage of the "prompt remedial action" defense as described in the U. S. Supreme Court decisions in *Faragher v. City of Boca Raton*[51] and *Burlington Industries, Inc. v. Ellerth*.[52] Equal Employment Opportunity Commission ("EEOC") authority also indicates that an employer has a duty to investigate reports of sexual harassment.[53]

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47. 139 F.3d 338 (2d Cir. 1998).

48. *Id.* at 348.

49. *Id.*

50. *See* Torres v. Pisano, 116 F.3d 625, 639 (2d Cir. 1997).

51. 524 U.S. 775, 807 (1998) ("The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities. . . .").

52. 524 U.S. 742, 765 (1998).

53. U.S. Equal Employment Opportunity Comm'n, *EEOC Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors*, *at* www.eeoc.gov/policy/docs/harassment.html (last visited Nov. 9, 2003); *see also* Malik v. Carrier Corp., 202 F.3d 97, 105 (2d Cir. 2000) ("[A]n employer's investigation of a sexual harassment complaint is not a gratuitous or optional undertaking; under federal law, an employer's failure to investigate may allow a jury to impose liability on the employer.").

In *Ferris v. Delta Airlines, Inc.*,[54] the plaintiff alleged that, while they were on an airline layover in Italy, a male flight attendant with whom she worked invited her to go wine shopping, and then asked her to visit his room to sample the wine.[55] In his room, he drugged the plaintiff's wine and then raped her.[56] There was evidence that over a five-year period, two other flight attendants had reported the male flight attendant for similar assaults and a third flight attendant had reported that he threatened to kill her after she refused to go out with him.[57] One complainant requested confidentiality but the others did not.[58] The airline took no formal action in response to these three complaints.[59] A Delta supervisor, to whom one of the rapes was reported, acknowledged to the victim that the male flight attendant was a known rapist but instructed the victim not to discuss the incident with anyone.[60] Another supervisor, to whom the assaultive conduct was reported by another victim, refused to take action without a written report.[61]

Even though the plaintiff in this case refused for nearly six weeks to reveal to Delta the name of her alleged attacker, she eventually sued Delta for sexual harassment and negligent supervision and retention, among other claims.[62] The judge ordered a separate trial on the issue of whether a rape had occurred, and that trial resulted in a hung jury.[63] The judge granted Delta summary judgment on the plaintiff's sexual harassment compliant and she appealed.[64] The Second Circuit reversed.[65] While acknowledging that the question is a close one, the Second Circuit found that a block of hotel rooms booked and paid for by the airline to house flight attendants on foreign assignment could constitute a "work environment."[66] The Court noted that Delta "had notice of Young's proclivity to rape co-workers," and opined that an employer may be liable for co-worker harassment, even where that co-worker did not have supervisory authority over the victim.[67]

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54. 277 F.3d 128 (2d Cir. 2001).
55. *Id.* at 131.
56. *Id.*
57. *Id.* at 132-34.
58. *Id.* at 132.
59. *Id.* at 133-34.
60. *Id.* at 133.
61. *Id.* at 132.
62. *Id.* at 130-31.
63. *Id.* at 134.
64. *Id.*
65. *Id.* at 138.
66. *Id.* at 135.
67. *Id.* at 136.

MISTAKE 4:

STILL NOT "GETTING IT" IN TERMS OF BLATANT SEXUAL HARASSMENT AT WORK

In *Faragher* and *Burlington Industries*, the United States Supreme Court opined that employers may escape liability for hostile environment sexual harassment claims where they took common sense measures such as conducting anti-harassment training for employees, implementing an anti-harassment policy with a complaint procedure, and undertaking investigation and prompt remedial action when sexual harassment is reported.[68] Incredibly, many employers have not availed themselves of these rulings and therefore continue to be found liable for significant sums in sexual harassment cases.

For example, in *EEOC v. Trans World Airlines, Inc.*,[69] the EEOC charged that TWA subjected three named plaintiffs and a "class of similarly situated female employees" working at the airline's John F. Kennedy International Airport facility to a "sexually hostile work environment."[70] The plaintiffs alleged that their male supervisors subjected them to unwelcome sexually explicit comments, touching and propositions.[71] The plaintiffs contended the supervisors touched their breasts and buttocks and held the plaintiffs' hands in a way to force them to touch the supervisors' erect genitals.[72] The plaintiffs also alleged that the supervisors pressed their erect genitals against the plaintiffs' buttocks and made various vulgar sexually offensive comments.[73] In addition, several of the plaintiffs working in the TWA tower were harassed while they were directing ground movements of aircraft.[74] The EEOC argued TWA did not take remedial action after it had notice of the harassment but instead retaliated against those employees who complained.[75]

TWA denied the allegations while settling the lawsuit for $2.6 million without admitting liability.[76] No information was provided regarding the impact of TWA's Chapter 11 filing on this settlement.

In *Vargas v. Celadon Trucking Services, Inc.*,[77] a trainee truck driver

68. *See Faragher*, 524 U.S. at 807; *Burlington Indus., Inc.*, 524 U.S. at 765.

69. No. 98-4142 (E.D.N.Y. May 24, 2001), *at* http://www.verdictsearch.com (on file with the Univ. of Denver, Coll. of Law, Transp. Law Journal).

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. No. 1999-CVQ 001270 D3 (Tex. Dist. Ct. Apr. 19, 2002), *at* http://www.verdictsearch.com http://www.verdictssearch.com/(on file with the Univ. of Denver, Coll. of Law, Transp. Law Journal).

claimed that a supervisor raped her on a cross-country training run.[78] She sued the supervisor for sexual assault and intentional infliction of emotional distress, and her employer for sexual harassment based on the supervisor's conduct.[79] She also alleged that the trucking company compounded its errors by firing her in retaliation for her complaints.[80] She contended that she suffered Post-Traumatic Stress Disorder from the alleged assault.[81] The supervisor and the trucking company responded that there was no rape and that the contact was consensual.[82]

However, the jury believed the plaintiff, finding the trucking company liable for sexual harassment and the supervisor liable for intentional infliction of emotional distress and sexual assault.[83] The verdict totaled $2,417,500, with the trucking company liable for $1,259,500 and the supervisor liable for $1,158,000.[84] The award included $2,212,500 for future pain and suffering and $205,000 for past pain and suffering.[85] The court directed a verdict on the plaintiff's punitive damages claim, which prevented the jury from considering these damages.[86] According to the plaintiff's attorney, jurors related that they would have awarded at least $10 million in punitive damages if they had been allowed to do so.[87] Before trial, the plaintiff offered to settle for $200,000, but the trucking company's best offer was $80,000.[88]

In *Hamilton v. First Transit Inc.*,[89] a female bus driver for a bus operator in Los Angeles claimed that her supervisor began sexually harassing her after she was promoted to a staff position.[90] She claimed she was subjected to "obscene and vulgar statements, sexual propositions, offensive touching, and masturbation."[91] After she reported the conduct, her employer conducted a two-day investigation but failed to interview any other female bus drivers at that location.[92] To escape the continued harassment, the plaintiff returned to her previous position and took a de-

78. *Id.*
79. *Id.*
80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.* (noting the employer's liability will likely be decreased to $300,000 to comply with Title VII's statutory damages cap).
85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.*
89. No. BC262304 (Cal. Super. Ct. Jan. 16, 2003), *at* http://www.verdictsearch.com (on file with the Univ. of Denver, Coll. of Law, Transp. Law Journal).
90. *Id.*
91. *Id.*
92. *Id.*

crease in pay.[93]

Thereafter, the plaintiff made a report of the harassment to her union.[94] Her union requested that the supervisor be transferred to another job site, but the employer refused to transfer him.[95] The plaintiff requested her supervisor be moved to another job site because she came into contact with him daily where they were both at the same location.[96] The plaintiff, as her employer knew, could not relocate to another job site without forfeiting her union seniority status.[97] The employer argued no sexual harassment took place and that its investigation conducted pursuant to its policy was inconclusive because the lone witness was not reliable.[98] The jury found for the plaintiff, awarding $1.1 million in damages, including punitive damages.[99]

Finally, in *Austin v. Conrail Corp.*,[100] a railroad engineer contended that she had been sexually harassed while at work for a period of years.[101] She alleged that her employer knew of the conduct, failed to respond, and engaged in retaliation by suspending her.[102] She argued that she was subjected to offensive comments and graffiti that, on occasion, used her name.[103] In addition, the plaintiff claimed her employer's sexual harassment training was inadequate.[104] The employer responded that no sexual harassment occurred and that it responded appropriately to her allegation.[105] But the jury, consisting of six men and two women, returned a verdict for the plaintiff and awarded $450,000 in damages.[106]

Mistake 5:

Failing to Recognize the Seriousness of Title VII Retaliation Claims

Retaliation claims are clearly a growth industry for civil rights plaintiffs. EEOC data indicates that these claims have almost doubled since

93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.*
100. No. 00-1713 (W.D. Pa. Aug. 22, 2002), *at* http://www.verdictsearch.com (on file with the Univ. of Denver, Coll. of Law, Transp. Law Journal).
101. *Id.*
102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.*

1992.[107] Retaliation claims, which do not require proof of discrimination, are based on the language of Title VII itself, which protects persons who complain about conduct "made . . . unlawful" by Title VII.[108] To prevail on a retaliation claim, a plaintiff must establish: 1) "protected activity" engaged in by the plaintiff; 2) subsequent "adverse employment action" by the employer; and 3) a "casual connection" between the plaintiff's "protected activity" and the "adverse employment action."[109]

Although retaliation claims are often defensible, an employer should use extreme caution in terminating or taking other serious adverse action against an employee who has recently made a discrimination claim. Of course, this does not mean that an employee is bullet proof for years to come merely because he or she has filed a discrimination claim. Although every case must be analyzed on its facts, periods as short as a few months between the protected activity and the adverse action have been found too long, standing alone, to establish causality.[110] Furthermore, favorable treatment of the plaintiff after the employer learned of the protected inactivity, but before the adverse action, may make it much more difficult for the plaintiff to prove retaliation.[111] And, importantly, retaliation claims may be filed not just by persons in protected groups under Title VII, but also by non-minorities who have opposed practices unlawful under Title VII or participated in Title VII proceedings through testimony or otherwise.[112]

In *Pineda v. United Postal Service, Inc.*,[113] the plaintiff claimed his employer, UPS, fired him after he filed a disability discrimination claim, complained of harassment, and testified in a co-worker's suit.[114] The plaintiff had been with the company for twenty-two years when he was terminated.[115] He contended that he was terminated in retaliation for the above protected activities.[116] UPS denied the claim, responding that the

107. U.S. Equal Employment Opportunity Comm'n, *Charge Statistics FY 1992 Through 2002*, *at* http://www.eeoc.gov/stats/charges.html (last visited Nov. 9, 2003).

108. *See* Clark Cty. Sch. Dist. v. Breeden, 532 U.S. 268, 269 (2001).

109. Sowell v. Alumina Ceramics, Inc., 251 F.3d 678, 684 (8th Cir. 2001).

110. O'Neal v. Ferguson Constr. Co., 237 F.3d 1248, 1253 (10th Cir. 2001); *see, e.g.*, Richmond v. Oneok, Inc., 120 F.3d 205, 209 (10th Cir. 1997) (three-month period standing alone is insufficient); Hughes v. Derwinski, 967 F.2d 1168, 1174 (7th Cir. 1992) (four-month period is insufficient).

111. *See* Coffman v. Tracker Marine, L.P.,141 F.3d 1241, 1243-44, 1247-48 (8th Cir. 1998).

112. This is because the anti-retaliation provisions of Pub. L. 88-352, Title VII § 704(a) & 42 U.S.C. § 2000e-3(a) contain both a "participation" and an "opposition" clause.

113. Pineda v. United Parcel Serv., Inc., No EP-01-CA-0374-DB (W.D. Tex. Sept. 12, 2002), *at* http://www.verdictsearch.com (on file with the Univ. of Denver, Coll. of Law, Transp. Law Journal).

114. *Id.*

115. *Id.*

116. *Id.*

plaintiff was terminated after he threatened violence towards co-workers.[117] The defendant employer's attorneys related that six employees corroborated the allegations regarding the threats made by Pineda.[118]

The jury was unanimous in finding that the plaintiff had been terminated as a result of his protected activities.[119] Moreover, it found malice, awarding a sum of $1,643,000.[120] But, the sum included $1 million for punitive damages, which the judge refused to award, and $400,000 in compensatory damages, which was likely reduced due to the $300,000 statutory cap.[121] Therefore, the net damages were $543,000.[122] Before trial, the plaintiff had offered to settle for $350,000.[123] According to the plaintiff's attorney, UPS made a "nominal" settlement offer.[124]

In *Talbot-Lima v. Federal Express Corp.*,[125] the plaintiff, a twenty year employee of Federal Express ("FedEx"), was a senior manager at one of the company's Philadelphia stations.[126] Upon being promoted, her managing director began to criticize her performance and that of the station.[127] She filed a gender discrimination complaint against the managing director, which the company determined to be groundless.[128] The plaintiff alleged that the director then retaliated against her.[129]

During the same time period, the plaintiff voiced her displeasure to the CEO of FedEx at having been asked to testify for FedEx in a separate harassment suit.[130] She was suspended and fired for lack of leadership skills, forgery, and coercing employees.[131] The plaintiff denied all of the employer's allegations.[132] At the time of her suspension, the plaintiff, who was pregnant, was earning $100,000 annually despite having never attended college.[133] Based on these facts an expert determined that the plaintiff would be unable to secure any future employment at that income.[134] The plaintiff remained unemployed between the time in which

117. *Id.*
118. *Id.*
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.*
125. No. 01-CV-547 (E.D. Pa. Feb. 21, 2003), *at* htpp://www.verdictsearch.com (on file with the Univ. of Denver, Coll. of Law, Transp. Law Journal).
126. *Id.*
127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.*
131. *Id.*
132. *Id.*
133. *Id.*
134. *Id.*

she was fired and the trial began, and she sought back pay, future lost wages (including her pension package), emotional distress and punitive damages.[135] She was awarded $309,000 in back pay, $1 each for front pay, past and future emotional distress, and $2 million in punitive damages (subject to the federal cap of $300,000 under Title VII).[136]

In *Bruso v. United Airlines*,[137] a male supervisor was given a written counseling letter and suspended after he complained about another male supervisor's allegedly abusive treatment of women.[138] After United investigated his complaint, he was demoted from supervisor to baggage handler.[139] He sued for retaliation and was awarded $10,000 in damages and $393,418 in attorneys' fees.[140] On appeal, the Seventh Circuit reversed the District Court's entry of summary judgment on the plaintiff's punitive damage claim and remanded the case for determination of punitive damages and consideration of the plaintiff's right to be reinstated as a supervisor.[141]

MISTAKE 6:

FAILING TO CONTROL RACIAL HARASSMENT IN THE WORKFORCE

Racial harassment is just as actionable as sexual harassment. However, in some ways racial harassment claims are more dangerous to employers than sexual harassment cases because they can be brought not just under Title VII, but also under 42 U.S.C. § 1981, which has no damage cap.[142] The elements of a claim for a racially hostile work environment are: "(1) that [plaintiff] belongs to a protected class; (2) that he was subject to unwelcome harassment; (3) that the harassment was based on race; (4) that the harassment affected a term, condition or privilege of employment; and (5) that the employer knew or should have known about the harassment and failed to take prompt remedial action."[143] Additionally, the plaintiff must show that the harassment involved racially discriminatory intimidation, ridicule or insults sufficiently severe or pervasive to alter the conditions of employment and create an objectively abusive working environment.[144]

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135. *Id.*
136. *Id.*
137. 239 F.3d 848 (7th Cir. 2001).
138. *Id.* at 852-53.
139. *Id.* at 854.
140. *Id.* at 855.
141. *Id.* at 861-62.
142. *See* 42 U.S.C. § 1981 (2003).
143. Miller v. Rowan Co., 55 F. Supp. 2d 568, 572-73 (E.D. Miss. 1998), *aff'd*, 180 F.3d 265 (5th Cir. 1999).
144. Walker v. Thompson, 214 F.3d 615, 625-26 (5th Cir. 2000).

Just as in the area of sexual harassment, an investigation and prompt remedial action may constitute a defense to racial harassment.[145] Moreover, isolated minor incidents of improper racial remarks do not create a hostile environment.[146] Nevertheless, although these claims may be defensible, the best strategy is to avoid them by proper training of the workforce and selection of supervisors and managers who send a strong message that this conduct is unacceptable.

For example, in *Antoine v. Yellow Freight Systems*,[147] an African-American truck driver/dock worker and two fellow employees sued their employer, Yellow Freight Systems, asserting state claims and federal claims for "hostile environment racial discrimination under Title VII and 42 U.S.C. § 1981."[148] A motion for separate trials was granted and Plaintiff Antoine's case was tried alone.[149] The plaintiff alleged that starting at the time of his employment in 1995 and continuing up until his trial, he experienced discriminating and retaliatory terms and conditions at Yellow Freight.[150] He alleged that he was discharged for infractions for which other employees had never been discharged although he was later reinstated through union proceedings.[151] He claimed that he had been given less desirable assignments than whites, that he and other African-American employees were verbally harassed, and that nooses and swastikas were displayed at work.[152]

The defendant employer contended that it responded appropriately

145. *See Miller*, 55 F. Supp. 2d at 573 (employer not liable for harassment based on hangman's noose left in plaintiff's locker because it took prompt corrective action); Tutman v. WBBM-TV, Inc., 209 F.3d 1044 (7th Cir. 2000); Hill v. Am. Gen. Fin. Inc., 218 F.3d 639 (7th Cir. 2000).

146. *See* Eaglin v. Port Arthur Indep. Sch. Dist., No. 1:99-CV-109, 2000 U.S. Dist. LEXIS 6103, at *9-10 (E.D. Tex. Mar. 15, 2000) (citing Snell v. Suffolk County, 782 F.2d 1094, 1103 (2d Cir. 1986)); *see also* Anderson v. Loma Linda Cmty. Hosp., No. 91-56331, 1993 U.S. Dist. LEXIS 15249, at *7 (9th Cir. June 16, 1993) (finding that five racial comments were not sufficiently severe or pervasive to constitute racial harassment); Grant v. UOP, Inc., 972 F. Supp. 1042, 1052-53 (W.D. La. 1996) (finding no actionable harassment where the term "n———-" was used in the black plaintiff's presence on three separate occasions by three different co-workers); Vaughn v. Pool Offshore Co., 683 F.2d 922, 924, 926 (5th Cir. 1982) (finding no actionable harassment where names like "n———-," "coon" and "black boy" were "bandied back and forth without apparent hostility or racial animus"); Coleman v. PMC, Inc., No. 96 C 6248, 1998 U.S. Dist. LEXIS 4399, at *23 (N.D. Ill. Mar. 31, 1998) (no actionable harassment found where the African-American plaintiff set forth only a few instances of derogatory comments over the course of a year).

147. No. 99WM2441 (D. Colo. Oct. 25, 2002), *at* htpp://www.verdictsearch.com (on file with the Univ. of Denver, Coll. of Law, Transp. Law Journal).

148. *Id.*

149. *Id.* The latest information available from Verdict Search indicates that the two other plaintiffs' cases originally filed with this one were scheduled for trial in the spring of 2003. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

to racial harassment events and that any employee that was reprimanded for racially harassing conduct discontinued the conduct.[153] The company claimed equal employment opportunity policies were in place and that management was trained in that area.[154] Finally, it stated that legitimate business reasons constituted the actions it took against the plaintiff.[155]

The plaintiff claimed emotional distress and sought compensatory and punitive damages from the company.[156] He also sought an injunction against future retaliation, a written apology, and the display of the judgment on the employee bulletin boards in the company's Colorado facilities.[157] Economic damages were not claimed because they were addressed in his proceedings with the union.[158] The plaintiff succeeded on four of the five federal claims and on both of the state claims and was awarded $300,000 in compensatory damages and $3 million in punitive damages.[159]

In *Hussain v. Long Island Railroad Co.*,[160] plaintiff Sheikh Hussain, a Pakistani-born Muslim and a United States citizen, had worked for the railroad for ten years.[161] He alleged discrimination "on the basis of race, national origin and religion, in the form of a hostile work environment, in violation of Title VII . . . and § 1981."[162]

The plaintiff contended that, beginning in 1995 and continuing until March 1999, his supervisor humiliated him by making statements in front of his co-workers such as:

- When he asked to see the plaintiff's bag and locker, he said that "maybe you [Hussain] are putting fertilizer or bombs in there."
- When finding a garden snake on the property, he said "Give this to Sheikh, he probably eats these snakes back home."
- When asked by the plaintiff why he was being singled out for unfair treatment, he said "Look at your skin and look at mine."
- When he said to the plaintiff, "Your people live in boxes and huts."
- When he referred to the plaintiff as "nigger" and "sand nigger."[163]

The supervisor also allegedly called the plaintiff "Saddam Hussain," and said to him, "Saddam is your uncle. What is he? Your father?"[164]

153. *Id.*
154. *Id.*
155. *Id.*
156. *Id.*
157. *Id.*
158. *Id.*
159. *Id.*
160. No. 00 Civ. 4207, 2002 U.S. Dist. LEXIS 17807 (S.D.N.Y. Sept. 20, 2002).
161. *Id.* at *2.
162. *Id.* at *2.
163. *Id.* at *4-5.
164. *Id.* at *5.

Plaintiff further contended that he was told by co-workers that the supervisor had made threatening comments "intended to chill [the] Plaintiff from proceeding with any claims of discrimination."[165]

In addition, the plaintiff claimed that, on occasion, the supervisor assigned him to mechanic's work without properly noting the work and therefore, depriving him of the higher pay rate for the mechanic's work.[166] The plaintiff also alleged that the supervisor ordered him to bring him coffee in the morning before clocking in.[167] The evidence indicated that the supervisor's conduct was repeatedly called to the attention of management, resulting in the supervisor's transfer.[168] The court found the plaintiff's allegations sufficient to withstand summary judgment.[169] No further information about this case is available.

MISTAKE 7:

TERMINATING EMPLOYEES SHORTLY AFTER THEY FILE WORKERS COMPENSATION CLAIMS

Many state workers compensation laws contain anti-retaliation provisions. Often these statutes do not contain damage caps and it is not unusual to see multimillion-dollar verdicts in this area.

For example, in *Breedlove v. Transwood, Inc.*,[170] Billy Breedlove was a truck driver who worked at a terminal in Oklahoma for Transwood, a national trucking company, and who was injured while on the job.[171] Breedlove claimed that at the time he was injured, his partner was driving the 18-wheeler while he occupied the sleeper compartment.[172] His employer contended that Breedlove was an alcoholic with cirrhosis of the liver who was actually driving the truck at the time of the accident, but that he claimed to have been sleeping because he had been drinking.[173] According to the employer, Breedlove's driving partner admitted to a co-worker at Transwood that Breedlove was the driver when the accident causing Breedlove's injuries occurred.[174]

Breedlove filed a workers compensation claim after the accident and

165. *Id.*
166. *Id.*
167. *Id.* at *5-6.
168. *Id.* at *6-7.
169. *Id.* at *31.
170. No. CJ-2001-222 (Okla. Dist. Ct. Aug. 15, 2002), *at* htpp://www.verdictsearch.com (on file with the Univ. of Denver, Coll. of Law, Transp. Law Journal).
171. *Id.*
172. *Id.*
173. *Id.*
174. *Id.*

took some time off.[175] He later asked his doctor to release him to return to work, and the doctor gave him a release with lifting restrictions.[176] When Breedlove returned for his first day back at work, he could not walk up the steps leading to the office.[177] He notified his doctor, who submitted an additional report stating that further testing was required and that Breedlove would remain off work for an additional two weeks.[178] Upon receiving the two conflicting doctor's reports the terminal manager ordered Breedlove to return to work within 72 hours.[179] He then allegedly called Breedlove's home and left a message firing Breedlove for not returning to work.[180] Mrs. Breedlove, also a Transwood employee, testified that Transwood knew her husband was undergoing medical procedures during this time because she had informed her supervisor that she would not be at work due to those medial procedures.[181]

After firing Breedlove, Transwood allegedly sent notices to other trucking companies advising them to contact Transwood before hiring Breedlove, implying that he had a drinking problem.[182] Breedlove later died of a stroke.[183] His widow's suit claimed that her husband was fired as retaliation for filing the workers compensation claim.[184] She testified that he "had been a professional driver for 10 years, had logged millions of road miles and never had an alcohol-related accident or failed a DOT alcohol screening."[185] She claimed that the damage to Breedlove's reputation forced the couple to take odd jobs in which they earned $3,000 to $4,000 a year.[186] She further testified that Transwood engaged in activities intended to destroy her husband's reputation making it impossible for him to work elsewhere as a truck driver.[187] The plaintiff's attorney argued that Transwood had a history of terminating employees who had filed workers compensation claims.[188]

The employer, which continued to insist that Breedlove's accident was due to his drinking, alleged that it was thwarted in its efforts to have Breedlove's driving partner testify at trial.[189] The employer claimed that

175. *Id.*
176. *Id.*
177. *Id.*
178. *Id.*
179. *Id.*
180. *Id.*
181. *Id.*
182. *Id.*
183. *Id.*
184. *Id.*
185. *Id.*
186. *Id.*
187. *Id.*
188. *Id.*
189. *Id.*

the partner was "hiding out" and could not be found.[190] After less than two hours of deliberations, the jury found for the plaintiff, awarding nearly $2.2 million for wrongful termination.[191] According to the plaintiff's attorney, the defendant never attempted to make a settlement offer.[192]

MISTAKE 8:

TERMINATING ANY LONG-TIME EMPLOYEE OVER THE AGE OF FIFTY FOR A REASON THAT THE JURY MAY PERCEIVE AS FLIMSY

In this economy, employment loss is a fact of life and no worker is immune. However, when workers must be terminated, the best approach is often through a severance agreement and a release. Although the Age Discrimination in Employment Act originally protected a worker only until that person reached the age of seventy, the age cap was removed over a decade ago, so that, no matter how old the worker is, age is not a valid reason for terminating him.[193]

In *Ziegler v. Delta Airlines, Inc.*[194] plaintiff Joyce Ziegler, a flight attendant, age fifty-six, was fired after years of service with Delta.[195] Ziegler maintained that her discipline record was clean when she went on disability for a work-related injury.[196] While she was on disability leave she used pass privileges available to her for travel.[197] She contended that pursuant to Delta's employee handbook, flight attendants approved for disability benefits were able to continue to travel at no charge or at a reduced rate.[198] However, Delta claimed she violated another policy.[199] The plaintiff stated that the other policy was unknown to her and that it contradicted the employee handbook.[200]

The plaintiff presented evidence of a another Delta employee with a poor disciplinary record and only four years of service who traveled while on disability leave without adverse consequences.[201] She argued that the other employee was not terminated because she was young and would

190. *Id.*
191. *Id.*
192. *Id.*
193. 29 U.S.C. § 621 (2003).
194. No. 2000-157 (E.D. Ky. Jan. 9, 2003), *at* htpp://www.verdictsearch.com (on file with the Univ. of Denver, Coll. of Law, Transp. Law Journal).
195. *Id.*
196. *Id.*
197. *Id.*
198. *Id.*
199. *Id.*
200. *Id.*
201. *Id.*

not soon be eligible for retirement benefits.[202] Further, she presented evidence of Delta's preference for young flight attendants.[203] Further, she maintained that Delta told its investigative service to "pay special attention to age" when reviewing flight attendant applications.[204] She also claimed that, between 1998 and 1999, every flight attendant hired in Cincinnati was younger than she and eighty-five percent of those hired were under forty years of age.[205] Finally, she testified that she could not find other employment in the travel industry, "the only industry she knew," because Delta's termination for cause essentially blackballed her.[206]

Delta claimed the plaintiff was receiving full pay from Delta on "sick and accident" leave and not on disability leave.[207] Delta maintained that because she was on "sick and accident" leave her suspension and ultimate termination was proper because she was not eligible for pass privileges.[208] Delta testified that several employees who were in their early twenties to late fifties were terminated over a period of two years for the same reason as the plaintiff.[209] Delta stated that the particular employee that the plaintiff was relying on for comparison was reinstated on appeal due to compelling circumstances.[210] Finally, Delta argued age discrimination is not proven by favorable treatment towards a single employee.[211]

The plaintiff sought punitive damages and no specific amount of lost pay and benefits.[212] At the conclusion of the trial, Delta was found liable for age and pension discrimination.[213] The jury awarded damages of $770,000 in addition to attorney's fees and reinstatement of the plaintiff to her job.[214]

MISTAKE 9:

FAILURE TO MAINTAIN A CLEAR WRITTEN UNDERSTANDING ABOUT EMPLOYER CONTRIBUTIONS TO UNION PENSION FUNDS

An employer that agrees in a collective bargaining agreement to contribute to a union pension fund may be required to make such contribu-

202. *Id.*
203. *Id.*
204. *Id.*
205. *Id.*
206. *Id.*
207. *Id.*
208. *Id.*
209. *Id.*
210. *Id.*
211. *Id.*
212. *Id.*
213. *Id.*
214. *Id.*

tions even if the union defrauded it into signing the agreement. ERISA provides:

> [e]very employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.[215]

This provision has been held to insulate multi-employer funds from defenses that might be available to an employer against a union, such as lack of majority status or fraud in the inducement.[216] In *Gerber Truck Service, Inc.*,[217] the Seventh Circuit declared that, under 29 U.S.C. § 1145, multi-employer funds are treated like "a holder in due course in commercial law, . . . or like the receiver of a failed bank—entitled to enforce the [written collective bargaining agreement] without regard to understandings or defenses applicable to the original parties."[218] Courts continue to decline to give effect to oral understandings concerning contribution obligations that conflict with the terms of the written collective bargaining agreement, and three recent decisions have further defined, and in some respects, expanded the reach of *Gerber*.[219] Injunctions may be entered against employers to compel them to make the required contributions,[220] and a successor employer may be liable for the delinquent contributions of its predecessor.[221]

In *New York State Teamsters Conference Pension & Retirement Fund v. United Parcel Service, Inc.*,[222] a union-sponsored pension fund sued under 29 U.S.C. § 1145, claiming that UPS owed over $3 million in delinquent contributions.[223] The issue was whether an eight-hour per day contribution cap from an earlier collective bargaining agreement ("CBA") remained in effect even though a new CBA containing no contribution

215. 29 U.S.C. § 1145 (2003).

216. Cent. States, S.E. & S.W. Areas Pension Fund v. Gerber Truck Serv., Inc., 870 F.2d 1148, 1149 (7th Cir. 1989).

217. *Id.*

218. *Id.* (citations omitted).

219. Cent. States, S.E. & S.W. Pension Fund v. Transp., Inc., 183 F.3d 623, 626-28 (7th Cir. 1999); Bakery & Confectionary Union & Indus. Int'l Health Benefits & Pension Funds v. New Bakery Co. of Ohio, 133 F.3d 955, 959-61 (6th Cir. 1998); La. Bricklayers & Trowel Trades Pension Fund & Welfare Fund v. Alfred Miller Gen. Masonry Contracting Co., 157 F.3d 404, 407-09 (5th Cir. 1998).

220. 29 U.S.C. § 1132(a)(3) (2003).

221. *See* Haw. Carpenters Trust Funds v. Waiola Carpenter Shop, Inc., 823 F.2d 289, 298 (9th Cir. 1987); Mich. Carpenters Council Health & Welfare Fund v. C.J. Rogers, Inc., 933 F.2d 376, 379, 390 (6th Cir. 1991).

222. 198 F. Supp. 2d 188 (N.D.N.Y. 2002).

223. *Id.* at 192.

cap had been signed.[224] The union argued that the employer contributions should be in accordance with participation agreements providing for a weekly cap.[225] The employer had signed the first participation agreement but added the words "subject to contract."[226] Additionally, the employer had not signed a participation agreement since 1993.[227] The court found that the participation agreements, even if not signed by the employer, governed because the CBA required the employer to sign the participation agreements.[228] The court dismissed UPS' counterclaim against the fund seeking to recover millions of dollars in alleged overpayments.[229]

MISTAKE 10:

MAINTAINING A DEFINED BENEFITS PENSION PLAN

In the Trans World Airlines ("TWA") bankruptcy, the company's pension under-funding liability totaled $900 million.[230] This liability arose from a defined benefit pension plan, which is a retirement payment arrangement in which the employer agrees to pay retirees a fixed amount per month.[231] The employer contributions that fund these plans are frequently invested in the stock market.[232] Given the current economic environment, many of these plans are now seriously underfunded.[233] Administrators of underfunded plans have a variety of obligations, including notifying the government-owned non-profit corporation, the Pension Benefit Guaranty Corporation ("PBGC"), that the plan has become underfunded.[234] Moreover, they must notify the plan's participants and beneficiaries of its underfunded status.[235] After an employer becomes delinquent in paying $1 million of contributions to its pension plan, the PBGC may file a lien against the employer as well as its controlled group and affiliated service group members.[236] The PBGC, where it shows proper cause, may also move to involuntarily terminate an underfunded

224. *Id.* at 192-93.
225. *Id.* at 192.
226. *Id.* at 198.
227. *Id.*
228. *Id.* at 199-200.
229. *Id.* at 210-11.
230. Daniel Keating, *Chapter 11's New Ten-Ton Monster: The PBGC and Bankruptcy*, 77 MINN. L. REV. 803, 812 (1993).
231. *Id.* at 805.
232. Kirstin Downey, *Pilot Pensions Off Course; Airline Troubles Endanger Payments*, WASH. POST, Mar. 7, 2003, at E01.
233. *Id.*
234. 26 U.S.C. § 412(n) (2003); 29 C.F.R. § 4043.25 (2003).
235. 29 C.F.R. §§ 4011.3 & 4011.7 (2003).
236. 26 U.S.C. § 412(n).

pension plan.[237]

In the event that the PBGC moves to terminate an employer's pension plan, the employer is quite likely to see its under-funding liability skyrocket. This is because there are two types of pension plan under-funding: under-funding on an ongoing basis and under-funding on a termination basis.[238] The amounts shown as underfunded may differ dramatically depending on which type of under-funding is calculated. This may occur because the PBGC generally uses an interest rate assumption of 5% or less in computing termination liability, while employers often use a much higher interest rate assumption.[239] Another reason why the employer calculation of under-funding often differs dramatically from the PBGC calculation is a result of the concept of "past service credit," which allows an employer to establish a pension plan, give long-term employees immediate past service credit, and obtain a guaranty of payment from the PBGC.[240] As long as a pension plan is ongoing, this past service credit may be amortized over a period of years; however, when a plan is terminated, all past service credit must be included in the under-funding calculation.[241] "A firm may properly fund a plan on an ongoing basis but still severely underfund it on a termination basis. TWA, for example, properly funded its pension plan on an ongoing basis, but nevertheless underfunded the plan on a termination basis by $900 million."[242]

Given the potential for disaster in this area, it is not surprising that large corporations have been seeking to eradicate or modify their defined benefit pension plans.[243] Possible modifications include changing the formula to a cash balance formula, reducing the rate of accrual or freezing their plans. But, for various reasons, including tradition and commitments made in written agreements, some employers are still maintaining defined benefit pension plans.[244] Airlines seem particularly likely to have defined benefit pension plans. In 2002, seven major carriers were underfunded in the amount of $12 billion in traditional employee plans.[245] For example, US Airways, which filed for bankruptcy in 2002, had a pen-

237. Keating, *supra* note 230, at 808.

238. *Id.* at 812.

239. *See* Pension Benefit Guaranty Corporation, *Required Interest Rates for Valuing Vested Benefits for PBGC's Variable Rate Premiums*, *at* http://www/pbgc.gov/services/interest/VRP RATE.HTM; Daniel Kadlec, *Pension Bomb*, TIME, Oct. 28, 2002, at A24.

240. Keating, *supra* note 230, at 811.

241. *Id.* at 812.

242. *Id.*

243. Kadlec, *supra* note 239, at A24.

244. *Id.* (listing airlines as one of the four "worst situated" industries in terms of pension fund shortfalls).

245. James Ott, *Pension Plans Suffer from Terrorist Fallout*, AVIATION WEEK & SPACE TECH., June 10, 2002, at 36. The analyst group, Fitch Ratings, states that the "airline industry faces an $18 billion pension-funding shortfall." Downey, *supra* note 232, at E01.

sion plan that was underfunded by $2 billion.[246] It received permission from the bankruptcy court to terminate the plan for current retirees, leaving them to rely instead on payments provided by the PBGC, which are capped at $44,000 annually for a worker retiring at age 65.[247]

CONCLUSION

Given the often dangerous nature of the work, the inherent public safety issues, the prevalence of unionized workforces, and the large number of hourly employees, it is not difficult to understand why businesses in the transportation industry may have more than their share of employment law problems. Nevertheless, with the benefit of hindsight, it is apparent that many of the unfavorable outcomes revealed in these cases could have been avoided through more workforce training, different human resources practices, or less employer resistance to extending reasonable pretrial settlement offers where warranted. This article was written to assist transportation industry employers in avoiding similar litigation disasters.

246. Downey, *supra* note 232, at E01.
247. *Id.*