Statutory and Common Law Relief for Overworked Truck Drivers

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I. INTRODUCTION

I'm so tired. I just drove twenty hours. This company is killing me. I'm keeping two log books. I'm drinking a gallon of coffee per day. I don't remember how I got here. I'm working ninety hours per week. The refrain is a common one at truck-stops across America. Truck drivers, operating on four to five hours of sleep per day, for weeks on end, seem to believe they have no recourse, other than quitting their jobs. Some carriers routinely report annual driver turnover in excess of 150 percent.[1] Many other firms report replacing more than 100 percent of their drivers annually.[2] Certainly, drivers who keep meticulously falsified log books are aware that they are prohibited from driving more than a specified number of hours per week. However, drivers continue to falsify their logs and drive in excess of the legally allowed limit. Why?

Both drivers and trucking companies have incentives to break the law. Long-distance drivers are paid by the mile, not by the hour, and employers are not required to pay long-distance drivers overtime pay.[3] Thus, the more miles they drive, the more income drivers earn. Additionally, companies give out monthly or quarterly bonuses, generally based on three separate categories— customer service, fuel economy, and safety. "Customer service" not only takes into account commendations and complaints from shippers and purchasers, but also such things as on-time deliveries.

To counter the great incentives to speed and drive recklessly that customer service bonuses create, companies also give bonuses based upon fuel economy and safety. Thus, drivers are encouraged to break the law, but still drive at a speed which will not needlessly waste fuel or create a hazard, and obtain enough sleep to keep the truck on the road. "Safety" also takes into account not only such things as accidents, but also over-hours violations. Consequently, a driver who stands to gain an extra $200.00 per month for a safety bonus has a great incentive to falsify his or her log book. This falsification not only serves the driver's financial interests, but also the employer's, as companies are required by statute to preserve log books for six months, and the Department of Transportation levies substantial fines against companies with patterns of over-hours violations.

Companies which encourage drivers to break the law, either explicitly or implicitly, have incentives of their own. Trucks constantly depreciate in value. Consequently, the more hours per day that a truck is

1. John D. Schulz, *High Stakes Poker*, TRAFFIC WORLD, Aug. 19, 1996, at 40.

2. Daniel Machalaba, *Truckers' Pay Rises Amid Labor Crunch—Shipping Costs May Increase for Consumer Goods*, WALL ST. J., Sept. 23, 1996, at A2.

3. 29 U.S.C.§ 213 (1994).

utilized shipping freight, the more economic gain for the company. Additionally, the more hours an individual driver can drive, the fewer the drivers the company needs to employ and pay benefits. For example, suppose Company A is a 60-hour-a-week company. If their drivers can actually work 80 hours per week, then for every four drivers the company should have, only three actually are employed. Although the mileage pay would be the same with either three or four drivers, the company would only need to pay health and possibly retirement benefits for three drivers.

Long-distance drivers are rarely home during the week, the time when administrative agencies and law offices are open. Long-distance drivers thus have little access to those agencies and organizations which offer them the best remedy to their situation. This lack of access is demonstrated by the dearth of case law in this area.[4] Drivers have the option of turning themselves in at weigh stations and throwing themselves on the mercy of the various states operating these weigh stations, but the potential penalties are stiff. For every over-hours violation found at a weigh station, a driver personally stands to be fined $500.00.[5] Thus, not only is there an incentive for drivers to impeccably falsify log books, there is an incentive not to turn to the most available assistance, the inspector at any weigh station. This lack of access to legal remedies could possibly be the greatest reason that drivers continually break the law.

In this paper, I will discuss the statutory schemes and remedies designed to limit the type of abuse described above, as well as common-law remedies that may exist for drivers harmed by these practices. Although administrative remedies exist, I contend that these remedies give neither drivers nor companies sufficient incentive to comply with the law. Thus, drivers need a private right of action against their employers in order to ensure humane working conditions and safety for both the driver and the general public.

II. Relevant Statutory Schemes

A. Surface Transportation Assistance Act

In 1935, Congress passed the Motor Carrier Act, which first gave the Interstate Commerce Commission (ICC) the duty to regulate hours of service of truck drivers.[6] In 1966, the Department of Transportation Act was passed, creating the Department of Transportation.[7] At that time

4. Executing a WESTLAW search, I could find only forty-five reported cases in this country that contained the words "truck driver" and "wrongful discharge" in the same paragraph.

5. 49 U.S.C. §521(b)(2)(A) (1994).

6. Former 49 U.S.C. § 304 *noted in* 1 William E. Kentworthy, Transportation Safety Law Practice Manual 4-3 (1989).

7. 1 William E. Kentworthy, Transportation Safety Law Practice Manual 4-3 (1989).

much of the ICC's authority to regulate safety was transferred to the Department of Transportation.[8] In 1984, the Motor Carrier Safety Act was passed.[9] All of these statutes were repeatedly rewritten, re-codified, and updated, as has the Surface Transportation Assistance Act.

Congress enacted the Surface Transportation Assistance Act (the "STAA") in 1982, requiring the U.S. Department of Transportation Federal Highway Administration to establish voluminous safety regulations for long-distance drivers and motor carriers concerning everything from the maximum number of hours a driver may drive to the use of retread tires on commercial vehicles.[10]

The Federal Motor Carrier Safety Regulations forbid motor carriers from permitting or requiring any driver to drive more than ten hours following eight consecutive off-duty hours, or after having been on-duty (but not driving) for fifteen hours.[11] Furthermore, drivers may not drive after having been on duty (even if not driving) for sixty hours in any seven consecutive days if the carrier does not operate every day of the week, or after having been on duty (even if not driving) for seventy hours in any eight consecutive days if the carrier operates every day of the week.[12]

The Federal Motor Carrier Safety Regulations and Title 49 of the United States Code § 31105 afford drivers some degree of protection against retaliation against employees who refuse to break the law or drive vehicles they believe to be unsafe.[13] However, to qualify for protection if the employee simply believes the vehicle to be unsafe, "the employee must have sought from the employer, and been unable to obtain, correction of the unsafe condition."[14]

In order to use the power of the state for his or her protection, the employee must notify the Secretary of Labor of the violation not later than 180 days after the alleged violation occurred.[15] Furthermore, the

8. *Id.*
9. *Id.*
10. 49 U.S.C.S. §§ 31501 et. seq. (1994).
11. 49 C.F.R. § 395.3(a) (1995).
12. 49 C.F.R. § 395.3(b) (1995).
13. Title 49 U.S.C.A. § 31105 (a)(1)(1994) states:
A person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment, because—
(A) 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 regulation, standard, or order, or has testified or will testify in such a proceeding; or
(B) the employee refuses to operate a vehicle because—
(i) the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health; or
(ii) the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition.
14. 49 U.S.C.A. § 31105(a)(2) (1994).
15. 49 U.S.C.A. § 31105(b)(1) (1994).

action the Secretary of Labor may take is limited and does not include punitive damages.[16]

If the employee pursues administrative remedies and is consequently given relief (i.e., the employer ceases requiring employees to violate hours-of-service regulations), chances are that the employee will be given a smaller workload. Since payment for long-distance truck drivers is generally made on a per-mile basis, his or her income will be reduced. Could this be characterized as retaliation? It has never been litigated.

Drivers who wish to enforce their rights to work a safe number of hours can make a complaint either through the Occupational Safety and Health Act ("OSHA") (the procedure involving the Secretary of Labor as outlined above) or through their various state authorities.[17] In practice, while the Department of Transportation investigates safety violations and enforces safety regulations after receiving an employee complaint, OSHA alone enforces the employee's rights.

Unfortunately, the Federal Regulations offer no assistance to the employee who has first left his or her job and subsequently seeks redress. The Federal Regulations offer a current employee injunctive relief (i.e., an order for the employer to cease requiring the employee to break the law) and offer the terminated employee both injunctive (an order that the employee be reinstated) and legal relief (an order for the employer to pay the employee back wages). A possible way to work around the absence of specific wording dealing with employees who voluntarily quit would be for the employee to assert that he or she was constructively discharged. However, constructive discharge is difficult to prove, and to establish it one must show that working conditions are so intolerable that reasonable persons would feel compelled to resign.[18] Furthermore, when in an intolerable working environment, the employee must seek redress while remaining on the job unless confronted with an aggravating

16. 49 U.S.C.A. § 31105(b)(3)(A) (1994) states:

If the Secretary decides, on the basis of a complaint, a person violated subsection (a) of this section, the Secretary *shall* (emphasis added) order the person to—

(i) take affirmative action to abate the violation;

(ii) reinstate the complainant to the former position with the same pay and terms and privileges of employment; and

(iii) pay compensatory damages, including back pay.

17. 49 U.S.C. §502(c) (1994) states:

In carrying out this chapter as it applies to motor carriers, motor carriers of migrant workers, and motor private carriers, the Secretary may—

(1) confer and hold joint hearings with State authorities;

(2) cooperate with and use the services, records, and facilities of State authorities; and

(3)make cooperative agreements with a State to enforce the safety laws and regulations of a State and the United States related to highway transportation.

18. Chambers v. American Trans. Air, Inc., 17 F.3d 998, 1005 (7th Cir. 1994).

situation.[19]

Even if it would be possible for the employee to prove constructive discharge, the realistic likelihood that the non-lawyer employees of the administrative agencies charged with enforcing these safety regulations would aggressively and creatively pursue these claims in a manner not specifically articulated by statute or regulation is not good.

B. Occupational Safety and Health Act

Congress enacted the Occupational Safety and Health Act in an effort to reduce the number of occupational safety and health hazards at places of employment and to provide "safe and healthful working conditions."[20] 29 U.S.C.A. § 659 outlines enforcement procedures. Truck drivers who wish enforcement of safety regulations may make their complaint either with state authorities, or with OSHA as provided for by 49 U.S.C.A. §31105. However, drivers who make a complaint with OSHA and are subsequently fired might find themselves having a difficult time enforcing their rights later in a private suit, as there is a consistent history of case law holding that OSHA gives no implied private right of action.[21]

Only one reported case analyzes the relationship between OSHA and the STAA in the context of an employee suit.[22] In this case, the Supreme Court of Oklahoma held that the preemptive nature of OSHA does not demonstrate that the STAA also preempts state claims; "the relationship between OSHA and the STAA is one of procedural convenience only."[23] This case was not decided at the federal level and the opinion holds no authority outside of Oklahoma.

OSHA has pursued some creative claims from drivers who were *not* fired by their employer for refusing to drive under dangerous conditions. For example, a group of drivers employed by Roadway Express, Inc. refused to finish their trip (against the orders of their dispatcher) because about 115 miles into it, they encountered freezing rain and icy roads. One other driver, on the same trip, chose to complete the delivery and arrived at the destination on time. The drivers were not fired and were for the mileage they were entitled to for the run, under their union contract. However, they contended that they were additionally entitled to hourly "down" time for time spent in their trucks waiting out the storm. The Secretary of Labor, via OSHA, pursued their claim, and ultimately prevailed. The rationale was that the STAA forbids a carrier from dis-

19. Lottman v. City of River Falls, 1996 WL 496740 (Wis. Ct. App.); Brooms v. Regal Tube Co., 881 F.2d 412, 423 (7th Cir.1989).

20. 29 U.S.C.A. § 651(b) (1996).

21. 29 U.S.C.A. § 666 n.17 (1996).

22. Todd v. Frank's Tong Service, Inc., 784 P.2d 47 (Okla. 1989).

23. *Id.* at 47-49.

criminating against an employee who refuses to commit an unsafe act, Roadway Express sometimes paid drivers for down time when drivers were unable to drive due to weather, and thus Roadway Express' decision to withhold down time pay for this particular run constituted discrimination.[24]

Even if, on paper, it appears that drivers have sufficient time to lawfully complete a trip at the time of dispatch, OSHA may take action if there is evidence that the employer knew that appearances did not match reality. "The legal premise is that a dispatch that contemplates a violation of the driving-time rules by the driver is illegal even if the driver had available driving-time at the outset of the run."[25]

C. Implied Private Rights of Action

The STAA does not specifically provide for a private right of action. Could it implicitly provide one? In 1975, the United States Supreme Court, in deciding *Cort v. Ash*, identified four factors to be considered when determining whether a court should imply a private cause of action from a federal statute otherwise silent on the matter. First, the plaintiff should be a member of the class for whose benefit the statute was enacted. Second, the court needs to examine legislative intent, either explicit or implicit, to either imply or deny a private remedy. Third, a private cause of action should be consistent with the underlying purpose of the legislative scheme. Last, to find a private cause of action in the federal law, the cause of action should not be one traditionally relegated to state law, which would make it inappropriate to infer a cause of action based solely on federal law.[26]

Recent cases, however, have moved away from the four-factor approach identified in *Cort* "toward an exclusive reliance on legislative intent."[27] One could infer that Congress does not oppose an implied cause of action from congressional inaction to prohibit one based on the STAA after some courts began recognizing one.

Even if a court in which an action was commenced based on an employer's violation of the STAA were to recognize an implied private right of action in the STAA, how would one identify the employee's loss? Presumably, the driver was paid for the miles driven. One possible measure

24. Roadway Express, Inc. v. Dole, 929 F.2d 1060 (5th Cir. 1991); Kenworthy, *supra* note 6, at 8-20.

25. Trans Fleet Enterprises, Inc. v. Boone, 987 F.2d 1000, 1004 (4th Cir. 1992); Kenworthy, *supra* note 6, at 8-21.

26. Cort v. Ash, 422 U.S. 66, 77 (1975); *see also* Susan J. Stabile, *The Role of Congressional Intent in Determining the Existence of Implied Private Rights of Action*, 71 Notre Dame L. Rev. 861 (1996).

27. Stabile, *supra* note 26, at 868.

of damages would be the amount of lost customer service bonus money a driver would lose for refusing to drive after running out of hours. Another measure could be the lost safety bonus for a driver who hands in accurate logs showing that he or she drove over-hours, rather than the usual immaculately falsified documents.

D. Workers Compensation

Workers Compensation is a national system of overlapping state programs. Workers Compensation is designed to provide financial redress to an employee injured in the course of work-related activities. Generally, it is statutorily the exclusive remedy for work-related injuries.[28] Drivers suffering demonstrable physical injuries (i.e., back injuries) should have little difficulty maintaining a claim, but emotional harm is a different situation. While injury "includes mental harm or emotional stress or strain without physical trauma, if it arises from exposure to conditions or circumstances beyond those common to occupational or nonoccupational life,"[29] proving that one suffered emotional harm appears to be an evidentiary issue. The employer could certainly argue that the driver, despite claiming to be exhausted, did manage to drive all that was required without having a breakdown or needing to see a physician. The goal of the attorney representing the driver should be to obtain a ruling that chronic sleep deprivation is per se emotional harm.[30]

For determining whether emotional harm suffered in an employment setting is compensable under the WCA, the Wisconsin Supreme Court has held:

> The injury must be an egregious one that is to be tested not by the severity

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28. *See* Wis. Stat. §102.03 (1996). Wisconsin's statute is typical of those in other states. §102.03, Conditions of liability, states:

> (1) Liability under this chapter shall exist against an employer only where the following conditions occur: (a) Where the employee sustains an injury. (b) Where, at the time of the injury, both the employer and employee are subject to the provisions of this chapter. (c) 1. Where, at the time of the injury, the employee is performing service growing out of and incidental to his or her employment.... (d) Where the injury is not intentionally self-inflicted. (e) Where the accident or disease causing injury arises out of the employee's employment.

29. Jenson v. Employees Mut. Casualty Co., 468 N.W.2d 1, 6 (Wis. 1991).

30. Chronic sleep deprivation of prison inmates is already considered cruel and unusual punishment forbidden by the Eighth Amendment. *See* Keenan v. Hall, 83 F.3d 1083 (9th Cir. 1996); Bracewell v. Lobmiller, 938 F. Supp. 1571 (M.D. Ala. 1996). Several states, in an attempt to curb "hazing" of fraternity pledges have criminalized the intentional sleep-deprivation of new pledges. *See* Ill. Rev. Stat. ch. 38, para 112A-3 (1997); Ga. Code Ann. § 16-5-61 (1997); Del. Code Ann. tit. 14, § 9302 (1996); Fla. Stat. Ann. § 240.1325 (West 1997); Idaho Code § 18-917 (1996); Mo. Ann. Stat. § 578.360 (Vernon 1997); Neb. Rev. Stat. § 28-311.06 (1996); Okla. Stat. tit. 21, § 1190 (1997); Pa. Cons. Stat. § 5352 (1997); Utah Code Ann. § 76-5-107.5 (1996). In Illinois, intentional sleep deprivation is a codified example of criminal domestic violence. Ill. Rev. Stat. ch. 725, para 112A-3 (1997).

> of the distress or disabling manifestations but by the severity or traumatizing likelihood of the particular causative circumstances of employment. It is not an injury no matter how disabling unless it arises from unusual occupational stresses. This is more a rule of evidence that is geared to discovering the probability of harm than to discovering the fact of harm. It is in a sense an objective test— would a person of ordinary sensibilities be emotionally injured or mentally distressed in the absence of the unusual circumstances.[31]

One last Workers Compensation issue an attorney representing a truck driver should note is the effect that violations of safety provisions may have on Workers Compensation awards in their state. For example, the Wisconsin statute reads:

> If injury is caused by the failure of the employer to comply with any statute or any lawful order of the department, compensation and death benefits provided in this chapter shall be increased 15% but the total increase may not exceed $15,000. Failure of an employer reasonably to enforce compliance by employes with that statute or order of the department constitutes failure by the employer to comply with that statute or order.[32]

E. Unemployment Compensation

Unemployment Compensation is another national system of overlapping but different programs designed to pay temporary benefits to workers who are unemployed "through no fault of their own."[33] Grounds for denial of benefits include unavailability to work in the general labor market, physical limitations, unwillingness to accept all forms of work available, failure to return to the employer upon recall, and misconduct.[34]

A driver who can establish that he or she quit because he or she was required to break the law as a condition of employment should be able to establish good cause. The employer always has the option of recalling the employee, but case law and statute establish good cause grounds for an employee to refuse to return to work upon recall.[35]

Furthermore, at least one court has held both that truck drivers seeking unemployment benefits are not required to notify their employers of their objections to being required to drive more hours than permitted under the Federal Motor Carrier Safety Regulations before quitting their employment in order to establish that the termination of the employment relationship was with good cause attributable to the employer, and that when the employer violates federal safety laws a driver has good cause

31. *Jenson*, 468 N.W.2d at 6.
32. Wis. Stat. §102.57 (1996).
33. Legal Action of Wisconsin, Inc., Unemployment Compensation Law (1994).
34. *Id.* at 32-61.
35. Wis. Stat. §108.04; *supra* note 33, at 44-46.

per se to quit at any time as a result of the violation.[36]

F. Statutes Prohibiting Blacklisting

Not all states have enacted statutes that prohibit the blacklisting of employees, but in those states that have, drivers whose employers have terminated them in violation of the STAA may have a remedy if they subsequently have difficulty obtaining employment. Not all statutes prohibiting blacklisting allow a private right of action, however.[37]

The Federal regulations require all truck drivers applying for driving jobs to disclose all driving positions held for the past ten years.[38] Thus, a driver fired for refusing to violate safety regulations will be required to disclose that company as a past employer. Although the employer is allowed to make truthful statements about the driver, it is difficult to imagine how a statement to the effect that a former employee refuses to break the law would be beneficial to a potential employer engaging in only lawful business practices. It should be argued that the logical inference from such a disclosure would be an attempt to blacklist.

While the Wisconsin statute does not specifically provide for a private cause of action, it does not specifically prohibit one. The attorney representing the driver should integrate this type of statute with other recognized causes of action.

G. Statutes Governing Fraud in Employment

Some states give employees a cause of action based in fraud if their terms of employment were misrepresented. Wisconsin prohibits the fraudulent advertising for labor, and specifically provides the employee with a private right of action to recover all actual losses associated with the acceptance of employment based on misrepresentations made by the

36. Parnell v. River Bend Carriers, Inc., 484 N.W.2d 442, 445 (Minn. Ct. App. 1992).

37. *See e.g.*, Wis. Stat. § 134.02 (1996):

(1) Any 2 or more persons, whether members of a partnership or company or stockholders in a corporation, who are employers of labor and who shall combine or agree to combine for any of the following purposes shall be fined not less than $100 nor more than $500, which fine shall be paid into the state treasury for the benefit of the school fund: (a) Preventing any person seeking employment from obtaining employment. (b) Procuring or causing the discharge of any employee by threats, promises, circulating blacklists or causing blacklists to be circulated. (c) After having discharged any employe, preventing or attempting to prevent the employe from obtaining employment with any other person, partnership, company or corporation by the means described in part (a) or (b)... (2)(a) Nothing in this section shall prohibit any employer from giving any other employer, to whom a discharged employee has applied for employment, or to any bondsman or surety, a truthful statement of the reasons for the employee's discharge... (b) It shall be a violation of this section to give a statement with the intent to blacklist, hinder or prevent the discharged employee from obtaining employment.

38. 49 C.F.R. § 383.35 (1996).

employer.[39]

Minnesota codifies a private right of action as does Wisconsin, but the Minnesota statute is even stricter. The Minnesota statute states that "(a)ny person, firm, association, or corporation violating any provision of section 181.64 and this section shall be guilty of a misdemeanor."[40]

Although the carrier, when advertising, might generally remain silent as to the conditions of employment, the driver could reasonably argue that implied in the offer was the belief that the employer would, at a minimum, adhere to federal safety regulations. This statute does not expressly limit the type of damages which are recoverable, and in states where similar legislation has been enacted, this might be a foot in the door for establishing a claim for emotional harm.

III. Non-Statutory Remedies

The Surface Transportation Assistance Act imposes nominal public control, but is not entirely effective at preventing drivers from working more than they are safely and legally permitted. Allowing all drivers a private remedy against their employers and thus making noncompliance more expensive than hiring the necessary number of drivers would serve the safety interests of the STAA. Currently, aside from the administrative remedies promulgated by statute or regulation, the wronged employee in many jurisdictions has possible civil tort and breach of contract claims. Although in most states by virtue of statute or common law employers can terminate employees at any time for any reason, "several exceptions have been created and today the presumption of at-will employment is generally recognized as rebuttable."[41]

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39. Wis. Stat. § 103.43 (1996) reads in relevant part:

(1) It shall be unlawful to influence, induce, persuade or attempt to influence, induce persuade or engage workmen to change from one place of employment to another in this state or to accept employment in this state or to bring workmen of any class or calling into this state to work in any department of labor in this state, through or by means of any false or deceptive representations, false advertising or false pretenses concerning the kind and character of the work to be done, or amount and character of the compensation to be paid for such work, or the sanitary or other conditions of the employment. . . . Any of such unlawful acts shall be deemed a false advertisement, or misrepresentation for the purposes of this section. . . .

(3) Any person who shall be influenced, induced or persuaded to engage with any persons mentioned in sub. (1), through or by means of any of the things therein prohibited, shall have a right of action for recovery of all damages that he shall have sustained in consequence of the false or deceptive representation. . . directly or indirectly. . . and in addition to all such actual damages such workman may have sustained, shall be entitled to recover such reasonable attorney fees as the court shall see fit, to be taxed as costs in any judgment recovered.

40. Minn. Stat. § 181.65 (1996).

41. Patricia K. Gillette & Eric A. Tate, *An Analysis of Wrongful Termination and Common Law Claims Related to The Workplace*, 508 PLI/Lit 646, 646 (1994).

A. Employment Torts

1. Wrongful Discharge

The exception to at-will employment most applicable to the fact pattern at hand is the public policy exception. Public policy claims protect employees from employers who discharge in retaliation for refusing to engage in acts contrary to public policy. The public policy relied upon may come from "constitutional provisions, statutes, and administrative regulations, or may be based on other substantial and fundamental non-statutory beliefs. However, the public policy must involve a subject which affects the public at large rather than a purely personal or proprietary interest of the employee or employer."[42] The discharged driver may meet this burden by demonstrating that he or she was discharged for refusing to violate the hours-of-service regulations and because the stated purpose of the Federal Motor Carrier Safety Regulations is the protection of the public upon highways of interstate commerce and the protection of employees engaged in transportation in interstate commerce.[43]

There is no uniform standard for evaluating when public policy concerns rise to the level necessary to establish the tort of wrongful discharge. For example, in 1993 a discharged employee sued in the District of Columbia, alleging that he had been wrongfully discharged in violation of public policy after reporting to his superiors that he believed his employer was violating the minimum wage law. The District of Columbia Court of Appeals held that the employee could not invoke the at-will exception, as he could not demonstrate that he had been terminated for an outright refusal to violate a specific law.[44] The same year, however, the United States Court of Appeals for the Seventh Circuit, in assessing a wrongful discharge claim in a case where a specific law had been violated, held that an Illinois truck driver who was discharged for refusing to sign a lease which governed his employment because the lease violated specific Interstate Commerce Commission (ICC) regulations did not meet the threshold for the public policy exception to Illinois' employment at will doctrine. Again in 1995, a discharged transportation employee (though not a driver) was found not to have a cause of action under Illinois law, despite his allegations that he was fired after advising his employer that it was not in compliance with Interstate Commerce Commission regulations regarding written contracts when using owner-operator carriers for interstate shipping. The court held that public policy must "strike at the heart of a citizen's social rights, duties, and responsibilities," or "involve the

42. *Id.* at 652.

43. 49 U.S.C. § 31502 n.2 (1994).

44. Thigpen v. Greenpeace, Inc., 657 A.2d 770 (D.C. 1995).

protection of each citizen's health and safety."[45]

In Illinois, it does not appear that there will be many cases where the public policy exception meets this standard. For example, in one Illinois case, a security guard at a nuclear power plant was fired after notifying the plant owner that the plant was engaging in safety violations. The Appellate Court of Illinois, Third District held that since he had signed an agreement not to reveal information obtained in the course of his employment with anyone other than his employer and since Pinkerton, not the plant owner, was his actual employer, he had violated his employment contract which would give his employer legitimate grounds for termination.[46]

However, truck drivers have, in several reported cases, been found to have a cause of action based on wrongful discharge after being terminated for refusing to break various safety regulations and statutes. A District of Columbia court held that a truck driver fired for refusing to drive a truck that did not display a valid inspection sticker was found to have a public policy-based cause of action.[47] In another case involving driver safety, the Indiana Court of Appeals, Second District held that a driver who was terminated for refusing to drive an overweight load had a cause of action, and in particular noted that the driver himself would have been personally liable for violating the statutory weight limit.[48] This reasoning may support a public policy claim for the facts at hand since drivers who are audited for hours-of-service compliance may also be held personally financially liable for noncompliance.

The Supreme Court of Tennessee has held that drivers discharged for refusing to violate safety provisions of the Tennessee Motor Carriers Act had a retaliatory discharge claim because allowing the discharge of an employee for refusing to violate those provisions "would seriously impair the legislative plan for ensuring highway safety."[49]

The Court of Appeals of Indiana, First District, has held both that a driver who is discharged for refusing to violate federal safety regulations (specifically the hours-of-service regulations set forth in 49 C.F.R. § 395.3(a)(1)) for which he would have been personally liable has a cause of action and that the Surface Transportation Assistance Act does not preempt a state wrongful discharge cause of action.[50] In reaching their decision, they relied on an Eighth Circuit case which held that the lan-

45. Leweling v. Schnadig Corp., 657 N.E.2d 1107, 1109 (Ill. App. Ct. 1995) (citations ommitted).

46. McKay v. Pinkerton's Inc., 607 N.E.2d 237, 239 (Ill. App. Ct. 1992).

47. Adams v. George W. Cochran & Co., Inc., 597 A.2d 28 (D.C. 1991).

48. Remington Freight Lines, Inc. v. Larkey, 644 N.E.2d 931 (Ind. Ct. App. 1994).

49. Reynolds v. Ozark Motor Lines, Inc., 887 S.W.2d 822, 825 (Tenn. 1994).

50. Walt's Drive-A-Way Service, Inc. v. Powell, 638 N.E.2d 857 (Ind. Ct. App. 1994).

guage of the STAA does not indicate that it is to be the exclusive remedy for wrongfully discharged drivers.[51]

The United States Court of Appeals, Fourth Circuit, has held that a driver's discharge for refusing to drive a truck with defective brakes violates West Virginia public policy, giving rise to a wrongful discharge claim.[52] In a case turning on a virtually identical fact pattern, the United States District Court, D. Minnesota, Fourth Division held that a driver had a retaliatory discharge claim under Minnesota's whistleblower statute.[53]

2. Negligence

A driver injured by his or her working conditions may have a cause of action based upon the negligence of the employer. Negligence involves a duty to use reasonable care, a breach of the duty to conform to the standard of care, causation of the injury by the defendant's breach of duty, and damage resulting to the interests of another.[54]

Workers Compensation laws' exclusivity provisions will generally preclude private suits against employers for injuries sustained by employees due to an employer's negligence (by definition, a non-intentional occurrence). A few jurisdictions have recognized a cause of action based upon an employer's negligent hiring. Generally, however, the plaintiffs in the cases giving rise to this recognition have been customers or tenants injured by the employee of the defendant, not a co-worker or underling of the offending employee.[55] If representing a driver in a jurisdiction where Workers Compensation is not the employee's exclusive remedy, it might be possible to allege that the employer negligently supervised the dispatcher or supervisor. I was unable to locate any cases similar to the fact pattern at hand.

3. Emotional Distress

In wrongful discharge suits, claims for emotional distress typically require that: "(1) the employer intended to inflict emotional distress or recklessly disregarded whether its acts would result in the infliction of

51. Parten. v. Consol. Freightways Corp. of Del., 923 F.2d 580, 583 (8th Cir. 1991). *But see* Davis v. Customized Transp. Inc., 854 F.Supp. 513 (N.D. Ohio 1994), (holding in a diversity action that a retaliatory discharge claim based on Ohio law was preempted by the STAA which provided an exclusive administrative remedy for drivers terminated for refusing to violate hours-of-service standards).

52. Lilly v. Overnite Transp. Co., 995 F.2d 521 (4th Cir. 1993).

53. Rosen v. Transx Ltd., 816 F.Supp. 1364 (D. Minn. 1993).

54. K. KELLY ET AL., CASES AND MATERIALS ON TORTS 131 (9th ed. 1994).

55. David A. Cathcart, *Developing Termination Litigation: Collateral Tort Theories and the Multimillion Dollar Verdict*, C874 ALI-ABA 811, 867 (1993).

emotional distress, (2) the acts did in fact cause severe emotional distress, and (3) the acts constituted an extraordinary transgression of the bounds of socially tolerable conduct, i.e., outrageous conduct."[56]

Although Workers Compensation is generally the exclusive remedy for work-related injuries, courts generally have found an exception for intentional injuries, including the intentional infliction of emotional distress. In 1995, the Court of Appeals of Wisconsin held that Workers' Compensation is not the exclusive remedy for emotional injuries caused by an employer's intentional conduct.[57] In that case the plaintiff, a waitress, was repeatedly sexually harassed and offensively touched by her male employer. The court, in reaching its decision, looked at the wording of the statute, which defined an "injury" as "mental or physical harm to an employee caused by accident or disease."[58] The court then looked at a dictionary definition of "accident" as the statute did not define the word. "Accident" was held to mean an injury resulting from an unintentional act.[59]

In *Lentz*, the court then held that they would not "permit employers to use the WCA to shield themselves from the consequences of their intentional acts by labeling these acts as accidents."[60] They further noted that "allowing employers to use the WCA to shield themselves from liability for intentional acts would exceed the purpose of the WCA. When an employer intentionally injures an employee, it is not appropriate to allocate the financial burden associated with that injury to the public. Rather, the burden of compensating the employee for the consequences of the intentional act should lie exclusively with the employer."[61]

The United States Supreme Court has held that the exclusivity provision of a state's Worker's Compensation law does not bar a private right of action for injuries sustained due to the intentional violation of a law designed to protect migrant workers.[62] This case arose out of an incident in which migrant farm workers sustained physical injuries while riding to work in their employer's van. Although the injuries were sustained in an automobile accident, the workers maintained that the violations of the Migrant and Seasonal Agricultural Worker Protection Act (the "AWPA") (i.e., transporting too many workers in the van, not providing seat belts, etc.) were intentional acts and caused their injuries. The employer con-

56. Lindbergh Porter Jr., *Developing Tort Claims Related to Employee Discipline and Discharge*, 527 PLI/Lit 269 (1995) *relying on* Patton v. J.C. Penney Co., 719 P.2d 854 (Or. 1986).

57. Lentz v. Young, 536 N.W.2d 451 (Wis. 1995), petition for review filed.

58. *Id.* at 456 *citing* WIS. STAT. §102.01(2)(c) (1995).

59. *Lentz.* at 456.

60. *Id.* at 457.

61. *Id.*

62. Adams Fruit Company, Inc. v. Barrett, 494 U.S. 638 (1990).

tended that the state's Workers Compensation laws exclusive remedy provisions barred a private right of action, but the Supreme Court disagreed, holding that the AWPA specifically provided a private right of action and thus state law did not bar a private AWPA suit.[63]

No cases arising from emotional injuries caused by an employer's intentional violation of the STAA have been decided by the United States Supreme Court. The STAA does not specifically provide for a private right of action, but it does not specifically prohibit one. Given the manner in which the majority of recent cases have interpreted the STAA, it appears that there could be a good argument for synthesizing *Adams Fruit* with state cases to argue that although the STAA does not specifically provide for a private right of action, suits to recover for emotional injuries suffered by intentional violations of the STAA are not precluded by state Workers Compensation laws.

It appears that the greatest stumbling block in jumping the hurdle to prove intent on the part of the employer to avoid the Workers Compensation exclusivity provisions is the supervisory problem. How was the employer to know that the dispatcher or supervisor was requiring employees to break the law? Was there negligent supervision of the supervisor? Negligence is, by definition, unintentional. While it may be possible to show that the driver's dispatcher or supervisor intended to cause an emotional injury, how is one to show that the employer knew of the acts but failed to take action to end them?

Depending on the depth of the pockets of the parties involved, it might be worthwhile for the driver to sue the dispatcher or supervisor, in addition to the employer. In a suit against a company and a co-employee, the court held that Wisconsin's Workers Compensation Act is not the exclusive remedy for an injury caused by an assault intended to cause bodily harm.[64] However, the Wisconsin Court of Appeals has held that in order to avoid the exclusivity provision, the employee must show that the assault was committed with the intention of causing bodily harm.[65] Furthermore, the court held that verbal criticism is not an assault; the assault intending to cause bodily harm must be physical, not verbal.[66]

B. Breach of Contract

The general rule in America is that unless a written contract specifies otherwise, employees are "at-will," meaning that they can be terminated at any time, for any reason, or for no reason at all. However, there are

63. *Id.*

64. Jenson v. Employers Mut. Casualty Co., 468 N.W.2d 1, 4 (Wis. 1991), *reconsideration denied*, 471 N.W. 2d 512 (1991).

65. West Bend Mut. Ins. Co. v. Berger, 531 N.W.2d 636, 640 (Wis. Ct. App. 1995).

66. *Id.* at 640.

both federal and state statutes which limit the employment-at-will doctrine.[67]

Truck drivers not represented by collective bargaining are generally at-will employees. Attempting to find a document relating to the employment relationship expressing otherwise is wishful thinking. Although some courts have found that evidence of a promise of continued employment can create an implied contract by looking at the employer's personnel policies and practices, industry practice, employee's length of service, and actions or communications by an employer reflecting assurances of continued employment, disclaimers of contractual liability set forth in employee handbooks will generally prevent a finding that an implied contract of continued employment existed.[68] Trucking companies, knowing the potential financial loss associated with their activities, generally include disclaimers in their employment applications and employee handbooks.

Despite the at-will doctrine, there is in every contract an implied contract of good faith and fair dealing. However, not all states recognize a claim for breach of the covenant of good faith and fair dealing in the context of a wrongful termination action.[69] Furthermore, even in those states that do recognize a covenant of good faith and fair dealing in employment contracts, bad faith breaches of those covenants may only give rise to breach of contract claims but not tort claims.[70]

It could be argued that the employment relationships in the trucking industry are at-will contracts to engage in unlawful activity. Since parties cannot have a contract to break the law, the driver could petition a court for a reformulation of the contract. However, since OSHA, the federal Department of Transportation, and the various states' departments of transportation seem to do an adequate job of investigation and enforcement when a problem is brought to their attention, this step would be expensive, time-consuming, and unnecessary. An OSHA or DOT investigation would have the same net effect (reformation of an illegal contract and the granting of injunctive relief to the drivers) while not wasting court time or attorney fees. The driver who alleges a breach of contract could attempt to recover compensatory damages for excess hours already driven, but nothing in either Title 29 or Title 49 allows compensation for merely being required to break the law. The driver, in all probability, was paid the standard per-mile rate for all miles driven in the over-hours period of time, and the employer could argue, most persuasively, that he or

67. J.B. Kauff & H.J. Silverstein, *Recent Developments in the Law of Unjust Dismissal*, 364 PLI/Lit 9, 15 (1988).

68. Gillette & Tate, *supra* note 41, at 649.

69. *Id.* at 659.

70. Cathcart, *supra* note 55, at 847.

she was already compensated. As noted in the introduction, motor carriers are not required to pay their drivers overtime pay.

Additionally, attorney fees are not generally recoverable in a breach of contract suit. Because there is a dearth of case law regarding breach-of-contract actions in relationships between at-will drivers and their employers (other cases have been pursued under tort theories or by OSHA), breach of contract claims do not appear to have a financial incentive making them worthwhile pursuing when attempting to find a cause of action for the given fact pattern, unless they are pursued in addition to wrongful discharge or other tort theories.

C. Statutory Change

In Europe, all trucks weighing more than 3.5 British tonnes are equipped with a tachograph, a device that measures hours of service, speed, idling time, and so forth.[71] The material is recorded on a daily card, which must be kept by the employer for one year.[72] Although cheating can and does occur,[73] the computerized system is much more difficult to circumvent than the American system of manual self-reporting.

In America, many motor carriers also equip their trucks with computerized equipment and satellite receivers. This equipment both allows the driver to contact the carrier regarding scheduling and allows the company to monitor the same things that European tachographs monitor.

Although European carriers find the financial resources to maintain this technology and many American carriers also utilize this technology for their own ends, it is questionable whether lobbying efforts of this country's transportation industry would allow regulation to mandate the use of this technology here in the near future.[74] For the plaintiff's attorney in private practice, advocating statutory or regulatory change is not a realistic option.

IV. Conclusion

When counseling or representing the driver who has experienced or is experiencing psychological or physical problems associated with a requirement to drive in excess of what the law allows, it appears that the most likely way for the employee to gain redress, if he or she has not

71. Sheila Jones, *Technology: Computer Haul for HGVs*, Fin. Times, Inc. (London), Oct. 27, 1995, at 18.

72. *Id.*

73. Martin Hoyle, *Today's Television*, Fin. Times, Inc. (London), May 1, 1995 at 15.

74. It is noteworthy that the C.F.R. already allows motor carriers to require their drivers to use automatic on-board devices in lieu of or in conjunction with written logs if the carrier chooses to do so. *See* 49 C.F.R. § 395.15(a)(2).

already voluntarily terminated his or her employment, is to advise the employee to write a detailed letter (or write it for him or her) to the employer reciting all of the past occasions on which hours-of-service falsification was required, a summary of the applicable Federal Regulations, and a statement to the effect that the employee will no longer violate the law at the employer's behest. The letter-writer should also preemptively inform the employer that any loss of a safety or customer service bonus due to the driver's decision to obey the STAA will be interpreted as an act of retaliation. A tactical decision is whether or not the employee should notify the employer that he or she is also sending this documentation to the Secretary of Labor. If the employee is willing to be fired, it might be worth his or her while to subtly encourage the employer to retaliate, in anticipation of being able to bring a civil tort suit. The employee should be informed, however, that there is no guarantee that his or her particular jurisdiction will recognize a wrongful discharge claim for this particular fact pattern.

When counseling the driver, it is also imperative to counsel the employee that he or she should only turn in accurate logbook pages to the employer, in order to leave a paper trail of continuing safety violations. This is particularly important in light of a North Carolina Court of Appeals decision holding that hours-of-service summaries reconstructed from a driver's memory are not admissible as evidence in a civil action for wrongful discharge.[75]

The Federal Regulations do not differentiate between requiring and allowing an employee to break the law. If the employee is dismissed or retaliated against, the Secretary of Labor is under a mandate to represent the wronged employee and a paper trail is necessary to establish the prior working conditions.

If the employee has already voluntarily terminated his or her employment due to adverse working conditions, the attorney should advise him or her to immediately make a claim for Unemployment Compensation, attributing the termination to the misconduct of the employer.

After termination of the relationship, a number of legal theories could be creatively pursued. Attorneys practicing in states which have codified tort suits against employers for misrepresenting terms of employment appear to have the greatest chance of successfully recovering damages for a driver required to break the law as a condition of employment. In states with no codified right of action, it appears that a wrongful discharge suit has the greatest possibility of success, although if the employee terminated the relationship on his or her own it would, in order to pursue a wrongful discharge suit, be necessary to establish that the em-

75. Coman v. Thomas Manufacturing Company, Inc., 411 S.E.2d 626 (1992).

ployee had been constructively discharged. Additionally, an employee could bring a tort action to recover damages for emotional distress. To cover all bases, it would be in the employee's interests to both make a claim for Workers Compensation and bring a private suit alleging infliction of emotional distress. In states that have codified a cause of action based on fraudulent misrepresentations of the condition of employment, the driver could pursue such damages either before or after termination of the employment relationship.

In addition to tort remedies, the discharged employee could commence suit on a breach of contract theory. Although employees are generally considered "at-will" and the employment relationship may be terminated for any or no reason, at any time, there are exceptions to the "at-will" doctrine. Again, to ensure that all bases are covered, claims alleging a breach of contract should be made in conjunction with other tort theories.