Best's Insurance Law Podcast

Current Employment Law Issues in Trucking and Transportation Litigation - Episode #215

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John Czuba: Welcome to Best's Insurance Law Podcast, the broadcast about timely and important legal issues affecting the insurance industry. I'm John Czuba, managing editor of *Best's Insurance Professional Resources*. We're pleased to have with us today attorneys **:** Leonard Leicht, Harold Moroknek and Peggy Smith Bush from the law firm Marshall Dennehey address legal issues affecting the trucking and transportation industries.

Leonard Leicht and Harold Moroknek lead Marshall Dennehey's Trucking & Transportation Litigation Practice Group. Peggy Smith Bush is a shareholder in the group. All three attorneys are tremendously experienced in the field.

Leonard Leicht works in the firm's Roselyn, New Jersey office, and has been in private practice for 38 years. A certified civil trial attorney by the New Jersey Supreme Court, he has achieved over 100 verdicts on trucking cases, handling all aspects of litigation from Carmack, or cargo loss claims, to motor vehicle litigation.

Harold Moroknek is located in the firm's Westchester County, New York office, and has over 33 years in private practice. He has litigated hundreds of trucking and transportation matters, achieving a high number of defense verdicts. Harold frequently lectures to national and regional industry groups on transportation litigation issues.

Peggy Smith Bush is a shareholder in the firm's Orlando office and devotes a large portion of her practice to trucking and transportation litigation. Peggy just completed a two-year term as an executive committee member of the Transportation Lawyers Association.

She is a Florida Supreme Court certified mediator and is a member of the International Association of Defense Counsel, where she sits in on the transportation committee.

There are an estimated 8.4 million people that are employed in the United States in jobs related to the transportation industry. As of 2022, approximately 3.45 million of those US transportation workers were truck drivers in the United States.

Today's discussion is going to seek to highlight several of the common everyday employment issues faced by trucking companies by using hypothetical examples and discussing the legal issues raised by each hypothetical as well as the various practical and creative ways to help resolve these issues.

Peggy, we're going to start our questioning today with you. According to the data, it seems pretty clear that those in the transportation industry are facing a wide range of challenges, which can certainly open an employer up to liability if these issues are not addressed consistently, timely, and in compliance with state and federal laws.

Peggy Smith Bush: Thank you, John. I agree, and we're hoping that our conversation today will be helpful to those in the transportation industry to prepare for and deal with some of those challenges, keeping in mind that even with the best efforts, it's hard to avoid the challenges altogether.

The big takeaway today is we believe that employers benefit from having clear policies and procedures outlining expectations for employee conduct, performance, and consequences, and that there is a benefit to being proactive by having those in place ahead of time and applying them consistently.

A common challenge that can occur with employees in any industry, but for today's conversation, let's take the example of a driver whose performance has been poor for several months. Let's say he's been taking longer breaks than permitted, getting lost on routes, not delivering on time, or just ultimately failing to meet customer and employer expectations.

The driver has been spoken with a number of times regarding the issues, and with the continuing performance issues, the company eventually has placed this driver on a formal performance improvement plan, or a PIP, documenting detailed expectations and the consequences.

It sounds pretty straightforward, but let's say that about a month goes by without improvement in the driver's performance. Then before action can be taken, the driver contacts human resources to ask for accommodations which he or she says are needed in order to perform the job.

Now, the employer has to take into consideration the request for accommodations while still making efforts to monitor and address the driver's performance issues. One example would be a driver who asked for accommodations for nausea and morning sickness associated with pregnancy.

Here, the Pregnancy Discrimination Act and the Americans with Disabilities Acts are two federal key laws which would come into play as they both address workplace discrimination.

The PDA prohibits discrimination on the basis of pregnancy, childbirth, or related medical conditions. The ADA prohibits discrimination against individuals with disabilities and various aspects of life, including their employment.

While the PDA clearly comes into play here, employers need to be aware that the ADA may also apply, because morning sickness might meet the definition of a disability under the ADA. The employer will be obligated to make accommodations, but it's important to remember it's not a one-way street. The employee still has to be able to perform the essential functions of that job.

The documentation and performance improvement plan were in place before the driver's notification to HR that she was pregnant and that she wanted or needed an accommodation. While making the accommodations, the employer should continue to document and to continue, through the progressive discipline process, being proactive.

Having those processes and procedures in place and applying them consistently will help give the employer some risk mitigation when additional circumstances arise that could open the door to allegations of retaliation or discrimination.

John: Peggy, what are some possible accommodations that an employer should potentially consider?

Peggy: For this example, an employer might consider reduced hours, a later start time, a move to a non driving role, if the employer is large enough to offer that, or perhaps placing the employee on an unpaid job protected leave of absence. There is no one size fits all.

It's important for there to be an interactive dialogue between the employer and the employee to identify specific limitations and explore what accommodations would make sense in that situation and would enable the employee to perform those essential job duties.

John: Thank you, Peggy. Another issue of concern is the Fair Credit Reporting Act. Why is understanding this act important to those in the transportation industry, and particularly those in trucking?

Peggy: The Fair Credit Reporting Act can carry damages that range from $100 to $1,000 per violation. For larger trucking companies with a high volume of drivers on the road at any given time, that could add up pretty quickly.

For example, let's say that we have a driver who's worked for the company for a number of years. The driver's annual motor vehicle report, or their MVR, comes back from the company's consumer reporting agency with a ticket the driver received while on their personal time in their personal vehicle.

After review of the ticket and the circumstances, the decision is ultimately made to terminate that driver's employment.

The driver then files a class action Fair Credit Reporting Act lawsuit, claiming he was not provided with a proper FCRA disclosure and authorization before the company obtained his most recent MVR, even though he did sign one at the time he was hired several years ago, and he claims he was not provided with the required pre adverse action letter before being let go.

Motor carriers are required to get an annual MVR on each commercial driver they employ. Companies hiring those commercial drivers are required to obtain consumer reports in the hiring process, and then ongoing throughout the employment relationship.

It's common in the hiring process for motor carriers to pull not only the required MVR and criminal background checks but also to obtain the commercial driver's license information system report, social security verification, prior employment verifications and others, all of which under the FCRA are considered consumer reports.

While not technically required, one way an employer may seek to mitigate their risk is by providing a new FCRA disclosure and getting a new FCRA authorization each year from each driver. This helps avoid surprise on the part of the drivers, as well as helping limit the risk of allegations of retaliation or unfairness in the rescreening process.

It also helps ensure the employer is using the most up to date disclosure and authorization. We all know forms change, and one easy way to help lessen risk is to simply make sure you're using the latest and correct form.

One last note on the FCRA, each state has their own fair credit consumer protection law equivalent to the federal law, some of which impose additional requirements and notices on the employers, so employers must be aware of both the federal and state laws.

With the previous story, I believe the key takeaways are to be aware of the requirements, be proactive by having your policies and procedures in place, apply those consistently across the board, and document the efforts so that if and when issues arise, you're just better prepared to address and respond.

John: Len let's turn now to you. Have you seen anything recently which would speak to the challenges faced by the industry and complying with the ever-changing legal landscape presented by these issues?

Leonard Leicht: Good morning, John. The answer to that question is yes, I have what I think is a great story to share with our listeners on a real-world experience that happened a couple of months ago.

In January, I get a telephone call from a national trucking client that I've worked with for a long time, and the conversation starts with something along the lines of, "Hey, Lenny, what are you doing Thursday this week?"

My answer is, "Well, I don't know. What do you have in mind?" My client says, "Can you get to California this week?" I'm like, "I think I can. I don't think I have anything on my calendar, but what happened?"

Right away, I started thinking, was it a fatality? Did somebody die? Are we doing triage? What's the emergency? The answer I got was, "No, it had nothing to do with an accident." There was nothing along those lines.

The COO of the company had gotten a text a few days prior, and I'm going to read the text to our listeners, which is going to be a verbatim reading of the text other than changing the names of the parties involved.

The text goes like this. "I want to inform you that your Senior Vice President," (and I'm going to use the name John Smith), "is having sexual relationships with two employees. "Their names are Amy G and Tina B." (Again, those are made up names.)

"He is taking advantage of his executive position to have sexual relationships with women that work under him. They have both spent the night at his house, and I have the photos to prove it. Here he is with Tina B at his house past 2:00 AM," and there's a picture attached to the text, where we can identify the SVP, and his motor vehicle, and there's two bodies in the car with their hands covering their faces and it's clear he is the male in the photograph. So, there's definitely something going on here, something to it.

My client says, "We've suspended the SVP, he's not coming to work, but we need you to get out there and do the investigation right away." I say, "All right, I'll do that."

I confirmed, "This is not something you want me to do by Zoom." The client said, "No, we understand there's an expense involved, but given the nature of who's involved in this case, we want you out in California, boots on the ground. We want you to do this."

Couple of days later, I'm in California and I'm meeting with the human resources manager out there. We wanted to identify the alleged victims of this sexual harassment as best we could.

We determined that one of the two individuals did formerly work for the company but had left some time ago. In fact, she had left before the SVP joined the company, so there was no overlap in employment between the two of them. That made me feel a little bit better.

The second employee, Tina, in my example, did still work for the company. She was a current employee, so there was clearly overlap between her and the SVP, who I'll call John Smith.

In case any of our listeners are curious, we did try to trace the phone number of the person that sent the text message. It was a burner phone or a WhatsApp type of thing, and we couldn't get any traction out of that, so we didn't know who sent it, but we knew that nobody had reported sexual harassment. Neither Amy or Tina, the names being changed, had come forward and said anything about this.

In speaking with human resources, I wanted to confirm two things. One is that we had an anti harassment policy, which was published in part of our employee manual. The answer was we did.

That policy made it clear as to who to go to if you had a complaint about somebody harassing somebody else, even though the person or the alleged harasser in this case was in charge of the whole West Coast operation. We did have all those policies in place, so that was good.

We also had a written anti fraternization policy, which I thought also important. All that's good. The HR end of this had checked out. I tried to speak with the alleged victim who no longer worked for the company, and she refused to cooperate. She was a dead end. She wouldn't return my phone calls or my texts.

I did interview a bunch of employees, who just talked about their observation in the workplace, and none of them really had anything critical to contribute. They saw what was described as a somewhat flirtatious relationship, but nothing beyond that.

I interviewed the alleged victim. There was a little bit of a language barrier, but I felt that she was conversant enough in English that we could conduct the interview without an interpreter, and she was clearly not forthcoming with her answers.

You do this long enough, you know when somebody is candid and forthcoming, and she was not. It was clear she was trying to hold back some information.

It was only when I confronted her with exactly what I knew, which included a picture taken at the SVP's home, that she became more forthcoming.

She did concede or did tell me that yes, they did have a dinner date at one point in time, but it was nothing beyond that. She certainly was not making any complaints.

Finally, I interviewed the SVP who was suspended, the alleged harasser. It was awkward. I explained why I was there. He knew why I was there. I said, "What do you have to tell me before we go any further?"

He said, "Lenny, I didn't do anything wrong. I don't really know where this is all coming from, but I can tell you, I respect my job, I respect my colleagues, and I would never do anything to jeopardize any of that. I vehemently deny any improper allegations."

I said, "Well, I have a picture." He said, "Can I see it?" Of course, I showed it to him. He said, "Lenny, I had that picture. It's on my cell phone. I'll show it to you on my cell phone," and he proceeds to do that.

He said, "Here's what happened. That picture was taken by my ex-girlfriend. There's an issue with my ex-girlfriend who had nothing to do with the company, and she randomly will show up at my house and give me a hard time to the point where on this evening, I actually called the police to have her removed." We checked that out and did confirm that.

He said what had happened was Tina, "She is a coworker. She's an office clerk. We were talking the other day, and she was telling me that she was graduating college. She was very proud of that, and I was very proud of her doing that. She said it was also her birthday and had nothing to do.

"So I said, 'Why don't we go out and celebrate your graduation and your birthday?' and we did just that. It was an innocent dinner amongst two colleagues, amongst two coworkers, and there was nothing at all improper about the evening. And when we got back to my house, that's when we were confronted by my ex-girlfriend. Nothing happened." It all checked out.

At the end of the day, while I thought that he should have been a little more careful about how he proceeded with regard to going out to dinner with a colleague, there was really no violation of any discrimination laws. The coworker wasn't complaining.

I felt that I could conclude the investigation without recommending further disciplinary action. My recommendation was some retraining for all employees in terms of the anti harassment and anti fraternization policies.

My objective here is to tie this into what Peggy was talking about before. What I want our listeners to take away from this discussion is that this can happen to anybody. That this is not hypothetical. You're foolish if you think it won't happen in an organization you either work for or maybe represent at one point in time or another.

These are real world situations which happen in the real world, and you should be cognizant of that. Make sure your manuals and your policies are clear and up to date, and that all your employees sign off having read them. Continuing education is also important.

From the employee's point of view – I want your listeners to think about that for a second from the employee's point of view, perceptions matter. You're a representative of the company when you're at work, when you're off work, when you're on free time, when you're on company time. Don't do anything foolish.

Don't put yourself in a position where your employment and your professional career could be torpedoed because of something innocent, because of a misperception, or a misconception. It's not worth it.

The last thought I want to leave with our listeners is something I remember from law school.

Now, I don't remember a whole lot from law school because it was a long time ago, but when we took legal ethics and the professor said, "If there comes a point in time in your career where you have a choice to make and you're not sure which choice is the right choice, or whether there's an ethical issue if you proceed one way as opposed to another, don't do it! Do not do it. Seek consultation. Get the advice and counsel of your colleagues before making any kind of decision."

If the SVP had reached out to me before beginning a relationship or attempting to begin a relationship, just a pure social relationship, not a sexual one, with a coworker, I would've counseled him to follow the anti fraternization policy, and perhaps bring a colleague with him to dinner. It didn't have to be just the two of them.

Again, perceptions matter. We should all be cognizant and careful of that. In the end, this situation worked out, but I felt bad for that SVP who was suspended and now has to deal with this for the rest of his career, that he made an indiscretion. That's what I want to leave with the audience.

John: Harold, a few years back, you recorded a podcast with us where you discussed the reptile theory in trucking and transportation litigation, and how the plaintiffs use this to appeal to the juror's emotions. Can you speak to any recent trends or updates with regard to this tactic?

Harold Moroknek: I sure can, John. I appreciate you asking that question. In reality, the reptile is not extinct. It's still on the run, and frankly, has been kind of rebooted. The plaintiff's bar is together working hard to rebrand what we have come to know as reptile. We hear it sometimes referred to as edge or the edge in its evolution and rebirth of sorts.

It still has the same principles at play, however. It continues to evolve and is still very much in use, and candidly, at its core, it is still basically the same as it always was. We see it every day in the very significant verdict numbers we're experiencing across the country.

One of the core ideas is the search by the plaintiff's attorneys out there who are still looking for discovery deposition soundbites. Their objective, as we've long known, is to obtain simple yes answers to their simple questions posed at depositions, which they look for generally in a few specific areas.

Those include unfavorable case facts, inadequate professional conduct or decision making relative to industry or employer standards, policies and procedures, and liability and causation of harm. The timing for plaintiff's reptilian tactics generally occurs early in discovery and at depositions.

As a result, we, the defense bar, need to do more to counter reptile theory and litigation early, and perhaps even before the case is brought in pre suit stage.

One of the things we need to continue doing is accomplish an earlier selection of who our witness is going to be, which will enable us to begin the prep months and weeks before the deposition or discovery process even starts.

We want to make sure we have the right person from the company who can avoid the yes or no and articulately and intelligently provide why the answer to the plaintiff's attorney's questions just aren't as simple as they're suggesting they are.

Working more closely with our clients before these incidents occur helps to ensure policies and procedures are in place and are being followed. This definitely pays dividends down the road. Another suggestion, of course, is to communicate with clients closely, serve the client not only as an advocate, but also as an advisor, a consultant, and do so preemptively.

When faced with this reptilian scenario we need to think other than as we would have historically. This is not your mom's reptile theory that's out there today. Let's not pretend discovery and depositions are as simple and routine as plaintiff's counsel is suggesting.

They require a witness who's prepared, ready to answer the simple questions correctly, with more than just yes or no answers to the series of general safety questions or danger rule questions being posed.

We can't wait until the eve of depositions to determine who the witness is going to be, and for that matter, begin preparation at that late time. These days, deposition testimony cannot be repaired at trial on the witness stand.

We like to use this particular witness who is selected and the facts we are dealt to tell what I call "the good company story." Early selection and early prep allows you to help do that. Never allow the plaintiff's attorney to define the parameters of the case, or the argument, or the litigation.

Utilize company-based counterarguments, presenting evidence of the defendant's contributions to community safety. Also, delve into the complexity of safety protocols that are relevant to the case, providing detailed explanations using experts, perhaps, about the context specific nature of the company's safety rules.

Constantly consider risk transfer when applicable. An educational approach is always a positive. You want to educate the jury; you want to educate the court by preparing and filing motions in limine.

Getting back to the jury, voir dire is a great opportunity to subtly educate the jury about the tactics used by the plaintiffs to, frankly, manipulate their emotions. That's just a little taste. It's in the same package. I really think it's just wrapped with a different color bow.

John: Harold, how about driver training? Is that important? Are there best practices to prepare managers for depositions?

Harold: Yeah, for sure. The drivers are our guys. They're the heart of the industry. Candidly, it's our job to train and educate them to let them know what's happening in their industry. It's our job to protect them. Like I said before, this process needs to start early, and it needs to continue often.

Like I said, it's not your mother's reptile theory. It's not the same old deposition. It's not the same old Q&A. Our drivers, our corporate reps need preparation. They need an education as to what will be thrown at them during deposition.

Just a couple of topics to focus on, we want to provide a legal education. What is reptile theory? What's coming at you? The concepts, terminology, and a basic understanding of it. We want to talk to these folks about communication skills training, clarity, how to be concise, how to not speculate, and how to handle the tough questions.

There's a psychology to this too, John. There is a psychological prep that we go through that includes role playing, consistency, and ultimately, honesty. What's our deposition strategy going to be? That's an important topic to spend time talking about with your driver, your witness, and your corporate rep.

What are our goals? What are the traps that are coming your way? How to avoid them, and how to maintain composure at all costs. We want to go through the relevant documents with the witness, with the driver, with the corporate rep.

They have to know what's out there. What do the hiring documents look like? What do the training documents look like? What's in there that hasn't been adhered to?

One of the things we try to do and make time for is perhaps a videotape of the prep, and certainly mock depositions. I'll leave you with a couple of final thoughts.

You definitely want to know the full extent of your driver's background. You definitely want to know the full history of your driver's background before you talk to them.

In every case, we're getting the driver's personnel file and we're looking into all the documents, making sure all the I's are dotted and the t's are crossed so we can address any issues that may exist with our driver, and frankly, with our corporate rep.

John: You've just listened to Leonard Leicht, Harold Moroknek and Peggy Smith Bush from the law firm Marshall Dennehey. Special thanks to today's producer, Frank Vowinkel.

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I'm John Czuba, and now this message.

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