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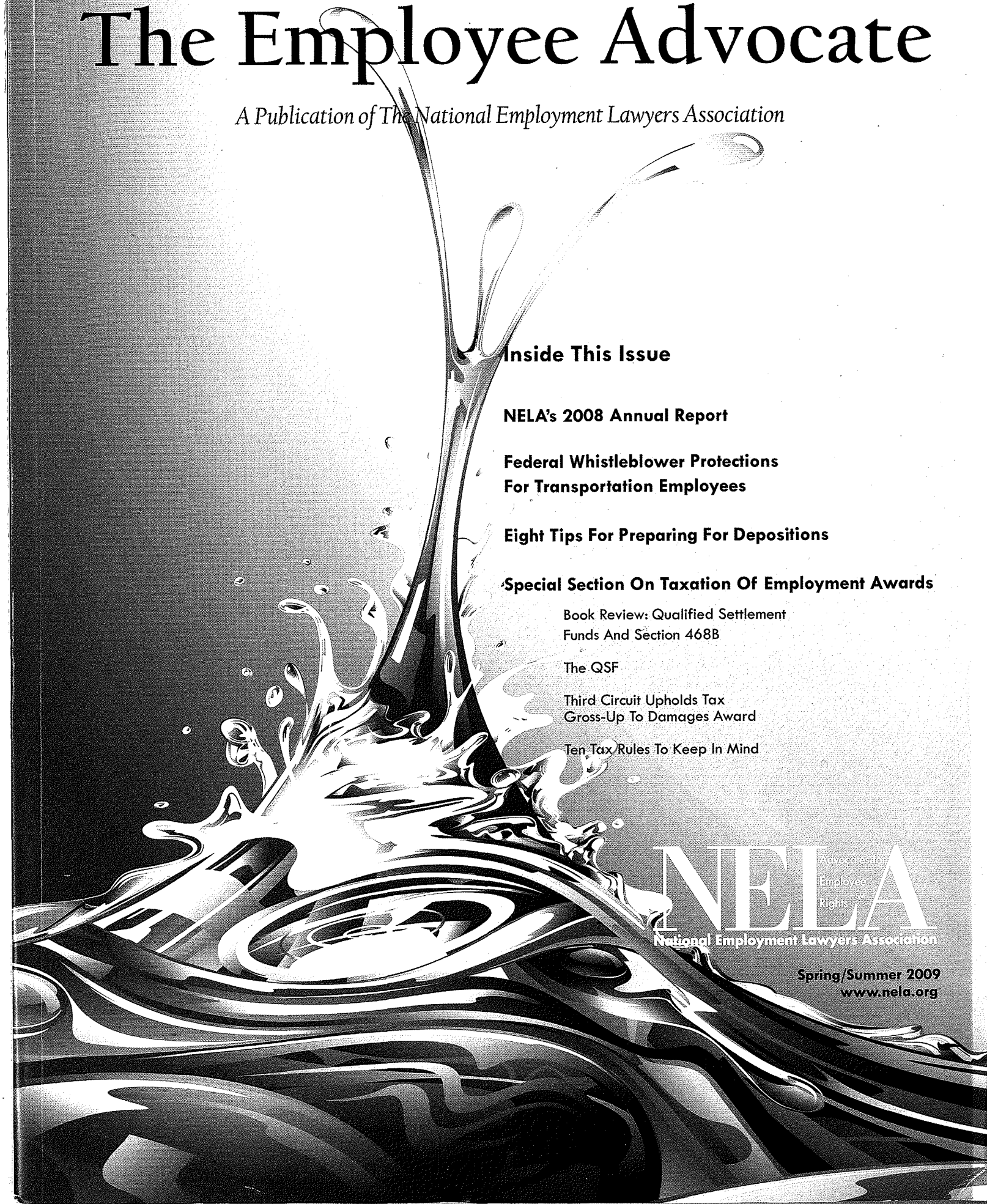

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Federal Whistleblower Protections For Transportation Employees

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In response to the catastrophic events of September 11, 2001, Congress enacted The Implementing Recommendations of the 9/11 Commission Act of 2007 ("9/11 Act"). To ensure that employees can blow the whistle on transportation safety issues, the Act provides robust whistleblower protection to employees in the railroad, commercial motor carrier, and public transportation industries.[1] In particular, the following three provisions of the 9/11 Act protect whistleblowers:

- Section 20109 of the Federal Rail Safety Act ("FRSA");[2]
- Section 405 of the Surface Transportation Assistance Act ("STAA"), as amended by section 1536 of 9/11 Act;[3] and
- Section 1413 of the National Transit Systems Security Act of 2007 ("NTSSA").[4]

Elements Of A Whistleblower Retaliation Claim

Similar to the retaliation provision of the Sarbanes-Oxley Act ("SOX"), 18 U.S.C. 1514A, transportation whistleblowers must prove by a preponderance of evidence that (1) they engaged in protected conduct; (2) the employer knew that they engaged in protected conduct; (3) the employer took an adverse action; and (4) the protected conduct was a contributing factor in the employer's decision to take an adverse action against the employee.[5]

Protected Conduct Under The Federal Rail Safety Act

The FRSA prohibits an employer from retaliating against a railroad employee who provides information to a regulatory or law enforcement agency, a member of Congress, or any person with supervisory authority over the employee about a reasonably perceived violation of federal law relating to railroad safety or security.[6] In addition, the FRSA protects an employee who:

- refuses to violate a federal law, rule or regulation related to railroad safety or security;[7]
- files a complaint under FRSA;[8]
- notifies or attempts to notify the railroad carrier or Department of Transportation ("DOT") of a work related personal injury or illness of an employee;[9]
- cooperates with safety or security investigations conducted by the DOT, Department of Homeland Security ("DHS"), or National Transportation Safety Board ("NTSB");[10]
- furnishes information to the DOT, DHS, NTSB, or any federal, state or local law enforcement agency regarding an accident resulting in death or injury to a person in connection with railroad transportation;[11] or
- accurately reports hours on duty.[12]

Protected Conduct Under The Surface Transportation Assistance Act (STAA)

The STAA protects drivers of commercial motor vehicles, mechanics, freight handlers, or any other person employed by a commercial motor vehicle carrier who affects safety and security during their employment.[13] An employee engages in protected activity by filing a complaint or initiating a proceeding related to a violation of a regulation affecting highway safety.[14] In addition, the STAA protects employees who accurately report hours on duty; cooperate with a safety or security investigation conducted by the DOT, DHS, or NTSB; furnish information to the DOT, DHS, NTSB or any federal, state, or local law enforcement agency regarding an

accident resulting in death or injury to a person in connection with commercial motor vehicle transportation; or refuse to operate a vehicle because operation of the vehicle would violate a STAA regulation.[15]

Protected Conduct Under The National Transit Systems Security Act (NTSSA)

The NTSSA prohibits public transportation agencies, including contractors and subcontractors, from discharging, demoting, suspending, reprimanding, or in any other way discriminating against an employee because the employee:

- reports a hazardous safety or security condition;[16]
- refuses to work when confronted by a hazardous safety or security condition related to the performance of the employee's duties;[17]
- refuses to authorize the use of any safety or security related equipment, track, or structures under certain hazardous conditions;[18]
- provides information or assists in an investigation regarding conduct which the employee reasonably believes constitutes a violation of federal law relating to public transportation safety or security;[19]
- is perceived by the employer to have engaged in the protected activity;
- refuses to violate or assist in the violation of a federal law;[20]
- files an employee protection complaint under NTSSA;[21]
- cooperates with a safety or security investigation conducted by the DOT, DHS, or NTSB;[22] or
- furnishes information to the DOT, DHS, NTSB or any federal, state, or local law enforcement agency regarding an accident resulting in death or injury to a person in connection with public transportation.[23]

"Reasonable Belief" Standard

A complainant need not prove that her disclosure is correct. Instead, the transportation whistleblower protection statutes apply a "reasonable belief" standard. Under that standard, a reasonable but mistaken belief that an employer engaged in conduct that constitutes a violation of the enumerated transportation safety laws is protected. See *Allen v. Administrative Review Bd.*, 514 F. 3d 468, 477 (5th Cir. 2008) (applying "reasonable belief" standard in a Sarbanes-Oxley whistleblower retaliation action). To determine whether the complainant's disclosure is objectively reasonable, the fact finder considers whether a reasonable person with the employee's training and experience would reasonably believe that the employer was violating the relevant law or regulation.

Specificity Of Disclosure

Both the DOL's Administrative Review Board and federal appellate courts construing analogous whistleblower protection laws are requiring complainants to demonstrate that their disclosures relate "definitively and specifically" to the subject matter of the particular statute under which protection is afforded. See, e.g., *Platone v. Dep't. of Labor*, No. 07-1635 (4th Cir. Dec. 3, 2008). Accordingly, it is important to plead the complainant's protected activities in detail and to describe in the complaint how the complainant's disclosures implicate a violation of the relevant transportation safety law.

Employer Knowledge Of Protected Conduct

Demonstrating knowledge of protected conduct is generally not difficult because the Department of Labor ("DOL") recognizes the doctrine of constructive knowledge, i.e., knowledge of protected conduct will be imputed to a decision-maker where a supervisor with knowledge of the protected conduct influenced the decision to take an adverse action.[24]

Prohibited Acts Of Retaliation

The transportation whistleblower provisions prohibit a broad range of adverse actions, including discharging, disciplining or discriminating against an employee regarding pay, terms or privileges of employment.[25] This includes blacklisting,

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termination, suspension, demotion, reduction in salary, failure to hire, or any act that would dissuade a reasonable person from engaging in protected activity.[26]

Causation

The causation standard under the whistleblower protection laws is very favorable to employees. The complainant must only demonstrate that the protected activity was a "contributing factor" in the adverse action.[27] A contributing factor is "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision."[28] Once a complainant meets her burden by a preponderance of the evidence, the employer must demonstrate by clear and convincing evidence that it would have taken the same action in the absence of the employee engaging in protected conduct.[29]

Remedies For Prevailing Employees

A prevailing employee is entitled to "make whole" relief, including: (1) reinstatement, (2) back pay, (3) compensatory damages, and (4) attorney fees and litigation costs.[30] In addition, a prevailing employee can recover exemplary or punitive damages up to $250,000.[31] The availability of punitive damages is significant because most whistleblower protection statutes administered by the DOL, including SOX, do not authorize punitive damages.

Procedures Governing Transportation Whistleblower Actions

Actions brought under the three transportation whistleblower provisions must be filed initially with the Occupational Safety and Health Administration ("OSHA") within 180 days of the employee becoming aware of the retaliatory adverse action.[32] OSHA investigates the claim and can order preliminary relief, including reinstatement.[33] Either party can appeal OSHA's determination by requesting a *de novo* hearing before a DOL Administrative Law Judge ("ALJ"). Objecting to an OSHA order of relief will stay the order, except for an order of reinstatement.[34] If neither party objects to OSHA's findings, the findings and any accompanying order of relief become final. Hearings before DOL ALJs are less formal than federal court proceedings. For example, ALJs are not required to apply the Federal Rules of Evidence.

The ALJ issues a recommended order and decision, which either party can appeal by requesting review by the DOL Administrative Review Board ("ARB"), and can appeal an ARB decision to the Circuit Court of Appeals in which the adverse action took place.[35] If DOL does not issue a final decision within 210 days of the employee filing the complaint, the employee can remove the claim to federal court and is entitled to a trial by jury.[36]

Summary

The whistleblower provisions of the 9/11 Act provide robust protection to employees in the transportation industry and will go a long way in enhancing transportation safety. ■

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[1] Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-53 (2007).

[2] Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-53, § 1521, 121 Stat. 266, 444 (codified as amended at 49 U.S.C. § 20109 (2007)).

[3] See *Id.* § 1536, 121 Stat. at 464 (codified as amended at 49 U.S.C. § 31105 (2007)).

[4] See *Id.* § 1413, 121 Stat. at 414 (codified at 6 U.S.C. § 1142 (2007)).

[5] See *Allen v. Administrative Review Board, United States DOL*, 514 F.3d 468, 475-76 (5th Cir. 2008).

[6] 49 U.S.C. § 20109(a)(1)(A)-(C).

[7] See *Id.* § 20109(a)(2).

[8] See *Id.* § 20109(a)(3).

[9] See *Id.* § 20109(a)(4).

[10] See *Id.* § 20109(a)(5).

[11] See *Id.* § 20109(a)(6).

[12] See *Id.* § 20109(a)(7).

[13] 49 U.S.C. § 31105(b)(3)(j).

[14] See *Id.* § 31105(a)(1)(A)(i).

[15] See *Id.* § 31105(a)(1)(B)-(E).

[16] 6 U.S.C. § 1142 (b)(1)(A).

[17] See *Id.* § 1142 (b)(1)(B).

[18] See *Id.* § 1142 (b)(1)(C).

[19] See *Id.* § 1142 (a)(1).

[20] See *Id.* § 1142 (a).

[21] See *Id.*§ 1142 (a)(3)

[22] See *Id.* § 1142 (a)(4).

[23] See *Id.* § 1142 (a)(5).

[24] See, e.g., *Deremer v. Gulfmark Offshore Inc.*, 2006-SOX-2 (ALJ June 29, 2007).

[25] 49 U.S.C. § 31105.

[26] The Department of Labor's Administrative Review Board has applied the *Burlington Northern* standard to the STAA and other whistleblower protection statutes administered by DOL. See *Melton v. Yellow Transportation, Inc.*, ARB No. 06-052, ALJ No. 2005-STA-2 (ARB Sept. 30, 2008).

[27] See *Allen v. Stewart Enterprises, Inc.*, ARB No. 06-081, ALJ Nos. 2004-SOX-60 to 62 (ARB July 27, 2006).

[28] *Id.*

[29] See *Platone v. FLYi, Inc.*, ARB No. 04-154, Case No. 2003-SOX-27(ARB Sept. 29, 2006).

[30] 6 U.S.C. § 1142 (d)(2)(A)-(C). The NTSSA, STAA, and FRSA provide substantially similar remedies.

[31] See *Id.*§ 1142(d)(3).

[32] 6 U.S.C. § 1142(c)(1); 49 U.S.C. § 20109(c)(2)(A)(ii); and 49 U.S.C. § 31105 (b)(1).

[33] 6 U.S.C. § 1142(c)(2)(A) and 49 U.S.C. § 31105 (b)(2)(A).

[34] 6 U.S.C. § 1142(c)(4)(A); 49 U.S.C. § 20109(c)(4); and 49 U.S.C. § 31105 (b)(2)(B).

[35] *Id.*

[36] *Id.*