OSHA violations and defenses

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Issuing an OSHA violation and citation

The Occupational Safety and Health Act is a federal law enacted by Congress to ensure that employers provide employees with safe and healthful working conditions.[1] The Act imposes two duties on an employer: a "general duty" to provide a place of employment free of recognized hazards and a "special duty" to comply with all applicable occupational safety and health standards promulgated after the Act.[2]

Under OSHA, there are two federal agencies that regulate the responsibilities of enforcing the Act. The first is the Secretary of Labor ("the Secretary") whom establishes safety standards, investigates employers to ensure compliance, and issues citations and monetary penalties for violations.[3] The other agency is the Occupational Safety and Health Review Commission ("the Commission" or "OSHRC") whom has adjudicative power and serves as a "neutral arbiter" between the Secretary and any cited employers.[4]

If a company receives an OSHA violation, the Secretary must show four elements: (1) that the regulation applied; (2) that the regulation was violated; (3) that an employee was exposed to the hazard that was created; and (4) that the employer knowingly disregarded OSHA's requirements.[5] As to the fourth element, the Act does not automatically impose strict liability on the employer, but rather, requires the employer to have knowledge of the misconduct. Under the common law of agency, an employer is deemed to have knowledge of the misconduct through the knowledge of its supervisors.[6]

There are two ways the Secretary can prove the employer had knowledge of the misconduct to satisfy the fourth element.[7] First, the Secretary can show that a supervisor had actual or constructive knowledge of the violation.[8] Second, the Secretary can show that the employer failed to implement an adequate safety program, with the rationale being that in the absence of such a program, the misconduct was reasonably foreseeable.[9] If the Secretary can show the employer failed to implement an adequate safety program, then it has shown that the employer should have foreseen this misconduct, demonstrating knowledge.

Additionally, when issuing a violation, the Secretary will characterize each violation as "not serious," "serious," or "willful," with accompanying severity of penalties.[10] Serious violations are those that create a substantial probability of death or serious physical harm.[11] However, willful violations require the employer to actually be aware of the misconduct at the time it occurred, or it requires a state of mind that if the employer were informed it would not care.[12] Further, if the Secretary can demonstrate the heighted mental state of intentional, knowing disregard, or plain indifference, there will be a willful violation.

Process after receiving an OSHA citation

After an employer receives an OSHA violation, they have the option to contest the violation and are entitled to an evidentiary hearing before an Administrative Law Judge (ALJ).[13] At this hearing, the Secretary will have to prove each of the four elements above for issuing the citation and will bear the burden of proof.[14] Although the decision of the ALJ is final, either party can request this decision to be reviewed by the OSHRC Commissioners, a three-person panel. If OSHRC reviews the decision, they will either affirm, modify, or vacate the citations and penalties imposed. Then, any aggrieved party can appeal for review directly to the Circuit Court of Appeals.[15]

Defenses to OSHA citations

The first defense is the supervisor misconduct defense ("rogue supervisor defense") which can be raised when the actions of a supervisor caused the accident and OSHA citation and not any actions of a non-supervisor employee. This defense attempts to negate the fourth element of knowledge because as some circuits recognize, the supervisor's misconduct does not automatically impute the employer's knowledge. Moreover, in circuits that recognize this defense, the court has stated that the Secretary cannot shift their burden of proof to the employer by claiming the employer had knowledge of the supervisor's actions.[16]

While the Commission does not recognize this defense and they may impute the knowledge of an employer when a supervisor has knowledge of his own actions, the Third, Fourth, Fifth, Tenth, and Eleventh Circuits acknowledge and recognize this defense.

> The Third Circuit covers New Jersey, Delaware, and the Virgin Islands
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> The Fourth Circuit covers Maryland, Virginia, West Virginia, North Carolina, and South Carolina
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> The Fifth Circuit covers part of Louisiana, part of Mississippi, and part of Texas
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> The Tenth Circuit covers Oklahoma, Kansas, New Mexico, Colorado, Wyoming, and Utah
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> The Eleventh Circuit covers Alabama, Florida, and Georgia

If the case falls under one of the above circuits, when reviewing the case, the Commission must recognize this defense when there is a high probability their decision will be appealed to the Circuit Court of Appeals.[17] However, if the case does not fall under one of the above circuits, the Commission is not entitled to recognize the defense and may impute the knowledge of the employer. Further, if the case gets appealed to a Circuit Court of Appeals not listed above, the circuit may either recognize the defense, or as the case with the Sixth Circuit, decline to follow the defense.[18]

However, even if a circuit recognizes this defense, if the misconduct or violation was "reasonably foreseeable," the company may still be held responsible and the defense will fail.[19] Foreseeability of an accident will fall under the Secretary's burden to prove the fourth element of

knowledge.[20] The Secretary can either prove knowledge through the malfeasant supervisor's knowledge, or through an employer's ability to foresee the unsafe conduct of the supervisor.[21]

When determining whether the misconduct was reasonably foreseeable, the court will consider the adequacy of a company's safety program, its implementation, its communication to the employees, training of the employees, records for safe working conditions, and records of discipline to employees who violate the safety rules.[22] If the Secretary is able to demonstrate the employer had constructive knowledge through foreseeability due to the employer's insufficient safety program, this defense will likely be defeated.[23] Therefore, in circuits where this defense is recognized, employers wishing to raise it must be ready to demonstrate that its safety program is robust, not only on paper, but in practice as well.

Affirmative defenses to OSHA violations

After the Secretary has proved all four elements of the violation, an employer may raise affirmative defenses which may include (1) infeasibility; (2) greater hazard; and (3) unpreventable employee misconduct.[24] When raising an affirmative defense, the employer must include the defense in their initial answer to the violation, and failure to do so may result in the defense being prohibited from being raised at a later stage in the proceeding.[25]

The "unpreventable employee misconduct" defense has four elements an employer must prove: (1) that the employer established work rules designed to prevent the violation; (2) the employer has adequately communicated the rules to its employees; (3) the employer has taken steps to discover violations of the rules; and (4) the employer has effectively enforced the rules when violations are detected.[26] While some of the elements may overlap, the Commission will consider the evidence the employer presents to prove each element. However, when raising this defense, employers must be prepared to demonstrate a consistent and thorough discovery and enforcement policy with sufficient documentation of their safety procedures, training, and disciplinary measures.

As to the first element, work rules, this includes an employer directive that specifically requires or prescribes employees to maintain certain conduct and refrain from certain misconduct, rather than mere general hortatory statements to employees.[27]

The second element, effective communication, includes proving serious efforts to communicate the rules and procedures to employees in a way that makes it likely the employees will understand the rules, remember the rules, and follow the rules.[28] Employers cannot simply give an employee training when they start at the company and then hope the employee continues to follow the training procedures throughout their time at the company. Additionally, the court will consider signage procedures and warnings of hazards throughout the work area, as well as continued effective training to the employees.

The third element, discovery of violations, includes proving that the employer has done more than enforce exemplary safety programs on paper, but rather, has taken adequate steps to investigate and discover violations that may have taken place.[29] In considering this element, the

court may look to the employer's ability to detect conspicuous warning signs of violations, provide adequate supervision of employees, oversee the behavior of supervisory employees, or strictly enforce and implement the safety program.[30]

In proving the fourth element, effective enforcement, the employer should show a progressive and consistent disciplinary policy to demonstrate adequate enforcement of their safety program.[31] This may include warnings and discipline when a violation of the safety rules occur, suspension, or a review of the safety procedures and rules.[32]

When raising the unpreventable employee misconduct defense, employers may have difficulty proving this defense if the actions of a supervisor have either caused the violation, or added to the misconduct. Under the Commission's precedent, when a supervisor has violated an employer's safety policy, this is indicative that the employer is not adequately taking steps to enforce their work rules and that their policies are lax.[33] Thus, if a supervisor's actions have contributed or caused a violation of the policies, the employer will have a higher standard to prove the unpreventable employee misconduct defense.[34]

Another affirmative defense an employer may raise is the "good faith effort" defense which, if proven, may reduce a "willful" characterization to a "serious" categorization.[35] It is worth noting that if the employer has raised the above defenses and failed, this defense will likely be unsuccessful as well.

As noted above, the three citation characterizations of an OSHA violation are "not serious," "serious," or "willful."[36] While "serious" violations include violations that create a substantial probability of death or serious physical harm, "willful" violations contain an employer's intentional or knowing disregard for the requirements of the Act or their employees' safety.[37] Further, "willful" violations require the employer to actually be aware at the time of the misconduct that the violation was unlawful.[38] Moreover, under "willful" violations, the employer's knowledge is imputed because the supervisor either knew of the violation and did not take action to prevent the misconduct, or the supervisor knowingly disregarded the safety rules.[39]

Under the good faith effort defense, an employer may prove that they made good efforts to comply with the OSHA standards or eliminate a potential hazard, even if the employer's efforts were not successful.[40] When raising this defense, the employer should show that they made efforts to reduce the violation by following up on documented violations and disciplining employees, continuing to enforce their safety policies, procedures, and rules, issuing written warnings in addition to actual discipline, and reinforcing their training before and after accidents occur.[41] In considering this defense, the Commission and court will not only examine the extensive safety program that is in place, but they will consider the actual implementation and enforcement, not just the signage or initial training program.

Conclusion

Defending alleged OSHA violations can be complex, and if the alleged violations are such that you wish to defend at various appeal levels, it would be wise to seek experienced legal counsel early on to develop the answer and subsequent responses in the most favorable light and immediately establish your defenses.

Citations:

[1] 29 U.S.C. § 651(b).
[2] 29 U.S.C. § 654.
[3] 29 U.S.C. §§ 655, 657–59
[4] 29 U.S.C. §§ 655, 657–59
[5] *ComTran Grp., Inc. v. U.S. Dept. of Lab.*, 722 F.3d 1304, 1307 (11th Cir. 2013).
[6] Restatement (Second) of Agency §§ 277, 496 (Am. Law Inst. 1958).
[7] *Eller-Ito Stevedoring Co. v. Sec'y of Lab.*, 567 F.App'x 801, 803–04 (11th Cir. 2014)
[8] *Eller-Ito Stevedoring Co. v. Sec'y of Lab.*, 567 F.App'x 801, 803–04 (11th Cir. 2014)
[9] *Eller-Ito Stevedoring Co. v. Sec'y of Lab.*, 567 F.App'x 801, 803–04 (11th Cir. 2014)
[10] 29 U.S.C. § 666
[11] 29 U.S.C. § 666(k).
[12] *See Dana Container, Inc. v. Sec'y of Lab.*, 847 F.3d 495 (7th Cir. 2017); 25 BNA OSHC at 1781
[13] 29 U.S.C. § 659(c)
[14] *Id*.
[15] 29 U.S.C. § 660(a).
[16] *Mountain States Tel. & Tel. Co. v. OSHRC*, 623 F.2d 155, 158 (10th Cir. 1980)
[17] *Kerns Bros. Tree Serv.*, 18 BNA OSHC 2064, 2067 (No. 96-1719, 2000)
[18] *Wayne J. Griffin Elec., Inc. v. Sec'y of Lab*., 928 F.3d 105 (D.C. Cir. 2019).
[19] *Ocean Elec. Corp. v. Sec'y of Lab.*, 594 F.2d 396, 401 (4th Cir. 1979)
[20] *Id.*
[21] *ComTran Grp*., 722 F.3d at 1316; *see also W.G. Yates*, 459 F.3d at 609 n. 8.
[22] *Pa. Power & Light Co. v. OSHRC*, 737 F.2d 350, 358 (3d Cir. 1984); *W.G. Yates & Sons Constr. Co. v. OSHRC*, 459 F.3d 604, 608-09 (5th Cir. 2006)
[23] *See, e.g., TNT Crane & Rigging, Inc. v. OSHRC*, 821 F.App'x 348, 355 (5th Cir. 2020)
[24] 29 C.F.R. § 2200.34(b)(3)
[25] 29 C.F.R. § 2200.34(b)(4)
[26] *Rawson Contractors, Inc.*, 20 BNA OSHC 1078, 1081 (No. 99-0018, 2003)
[27] *S. Hens, Inc. v. OSHRC*, 930 F.3d 667 (5th Cir. 2019)
[28] *Dukane Precast, Inc.*, 25 BNA OSHC 1041, 1055 (No. 12-1646, 2014); *Pressure Concrete Constr. Co*., 15 BNA OSHC 2011, 2017 (No. 90-2668, 1992)
[29] *Dukane*, 15 BNA OSHC at 1055

[30] *Dukane*, 15 BNA OSHC at 1055
[31] *Dukane*, 15 BNA OSHC at 1056
[32] *Dukane*, 15 BNA OSHC at 1056
[33] *Jensen Constr. Co.*, 7 BNA OSHRC 1477, 1479 (No. 76-1538, 1979)
[34] *Dukane*, 25 BNA OSHC at 1055
[35] 29 U.S.C. § 666(k)
[36] 29 U.S.C. § 666
[37] *Dana Container*, 25 BNA OSHC at 1781
[38] *Dana Container*, 25 BNA OSHC at 1782
[39] *Id*.
[40] *Dukane*, 25 BNA OSHC at 1060
[41] *Dana Container*, 847 F.3d at 501; *Stark Excavating, Inc. v. Perez*, 811 F.3d 922, 929 (7th Cir. 2016)