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Prominent Defenses to OSHA Citations: The Employer Knowledge and Unforeseen Employee Misconduct Defenses

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Employers under the jurisdiction of the Occupational Safety and Health Administration ("OSHA") can and sometimes do receive citations for alleged violations of the Occupational Safety and Health Act of 1970 (the "Act") or the regulations promulgated under the Act. Section 5(a) of the Act sets forth the duties of each employer with respect to safety and health standards in a workplace. Section 5(a) provides that each employer:

> (1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees;
>
> (2) shall comply with occupational safety and health standards promulgated under this Act.

Thus, under the Act, an employer can be cited for either failing to comply with a safety and health standard promulgated under the act, such as a standard applicable to the construction industry contained in 29 C.F.R. § 1926, or based upon what is known as the General Duty Clause ("GDC") contained in subsection (a)(1).

SAFETY AND HEALTH STANDARDS

The Act is not a strict liability act, which means that an employer is not automatically liable for violations found by the agency. Instead, in order to establish a violation of a cited regulatory standard OSHA must prove, by a preponderance of evidence, the following four elements: (1) that the cited standard applies; (2) that the employer failed to comply with the cited standard; (3) that employees had access or exposure to the condition; and (4) that the employer had knowledge of the violative condition. *ComTran Grp., Inc. v. U.S. Dep't of Labor*, 722 F.3d 1304, 1307 (11th Cir. 2013).

THE GENERAL DUTY CLAUSE

The GDC is intended to serve as a "gap-filler" to address hazards that are not already covered within the safety and health standards promulgated under the Act. Courts have interpreted the GDC to mean that an employer has a legal obligation to provide a workplace free of conditions or activities that either the employer or the industry recognizes as hazardous and

that cause, or are likely to cause, death or serious physical harm to employees when there is a feasible method to abate the hazard. *Beverly Enterprises, Inc.*, 19 O.S.H. Cas. (BNA) ¶ 1161 (O.S.H.R.C. Oct. 27, 2000). Thus, in order to prove a GDC violation, the Secretary of Labor ("Secretary") must establish that (1) a hazard exists in the workplace; (2) that hazard is recognized either by the employer or the industry; (3) the hazard caused or is likely to cause death or serious physical harm to employees; and (4) that there is a feasible method to abate the hazard. In addition to each of the elements noted above for proving a GDC citation the Secretary must also establish that the employer knew, or with the exercise of reasonable diligence, could have known, of the hazardous condition that is the subject of the GDC citation. *Burford's Tree, Inc.*, 22 BNA OSHC 1948, 1949 (No. 07-1899, 2010), *aff'd*, 413 F. App'x 222 (11th Cir. 2011) (unpublished)).

EMPLOYER KNOWLEDGE DEFENSE

Employers can directly defend against an enforcement action by attacking any one or more of these elements. However, one of the most prominent defenses and areas of dispute revolves around the knowledge of the employer. The Act is not a strict liability act, which means that an employer is not automatically liable for violations found by the agency. So, in order to sustain an alleged violation of a safety and health standard or the GDC, the Secretary of Labor must also establish that the employer knew, or with the exercise of reasonable diligence, could have known, of the hazardous condition that is the subject of the GDC citation. *Burford's Tree, Inc.*, 22 BNA OSHC 1948, 1949 (No. 07-1899, 2010), *aff'd*, 413 F. App'x 222 (11th Cir. 2011) (unpublished)).

How is knowledge imputed to the employer? "The actual or constructive knowledge of an employer's foreman can be imputed to the employer." *Dun Par Engineered Form Co.*, 12 BNA OSHC 1962, 1965 (No. 82-928, 1986). "An employee who has been delegated authority over other employees, even if only temporarily, is considered to be a supervisor for the purposes of imputing knowledge to an employer." *Paul Betty, d/b/a Betty Brothers*, 9 BNA OSHC 1379, 1381-82 (No. 76-4271, 1981). OSHA can establish this knowledge requirement two ways. First, OSHA can succeed by proving the employer, through its supervisor or foreman, had actual, direct knowledge of the violation. This would arise, for example, if a supervisor knew that workers were not wearing proper fall protection or other personal protective equipment such as a hard hat or safety glasses and did nothing.

Second, when supervisors don't have actual knowledge of a violation, OSHA often shifts to a constructive knowledge theory by arguing that the supervisor ***should have known*** of the violation ***if he or she was exercising reasonable diligence***. *Evergreen Constr. Co.*, 26 O.S.H. Cas. (BNA) ¶ 1615 (O.S.H.R.C. Apr. 26, 2017). To determine reasonable diligence, the Court considers several factors, including "an employer's obligation to inspect the work area, anticipate hazards, take measures to prevent violations from occurring, adequately supervise employees, and implement adequate work rules and training programs." *Jacobs Field Svcs. N.A.*, 2015 WL 1022393 at *3 (No. 10-2659, 2015).

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UNPREVENTABLE EMPLOYEE MISCONDUCT

In addition to an Employer Knowledge Defense, employers often utilize another potentially strong defense known the Unpreventable Employee Misconduct ("UEM") defense. Unlike the Employer Knowledge Defense, which attacks the agency's case on its face, the Unpreventable Employee Misconduct Defense is an affirmative defense. In order to prevail on this defense an employer must prove that (1) it has work rules designed to prevent the violation; (2) that it has adequately communicated those rules to employees; (3) that it has taken steps to discover violations; and (4) that it has effectively enforced the rules when violations are discovered. *Buford's Tree, Inc.* 22 BNA OSHC 1948 (No. 07-1899, 2010). All four elements must be satisfied by an employer before the defense will effectively nullify a violation.

In several cases involving the UEM defense, employers are able to establish the first two elements because they have an established work rule that is either in their safety manual or has been otherwise communicated effectively to its employees. It is often the last two elements where litigation ensues and ALJ's find deficiency in an employer's defense. If an employer fails at presenting a UEM defense it is often because they either failed to take proper steps to evaluate their employees and detect violations of the work rules at their workplace, and/or they failed to effectively enforce violations if they are discovered.

Although an employer is not required to provide constant surveillance, it is expected to take reasonable steps to monitor for unsafe conditions. *Ragnar Benson, Inc.*, 18 BNA OSHC 1937, 1940 (No. 97-1676, 1999). An effective program requires "a diligent effort to discover and discourage violations of safety rules by employees." *Paul Betty d/b/a Betty Brothers*, 9 BNA OSHC 1379, 1383 (No. 76-4271, 1981). Employers must exercise reasonable diligence to discern presence of violations, including adequate supervision of employees, inspecting work area, anticipating hazards, and taking measures to prevent occurrence of violations. *N & N Contractors, Inc.*, 18 BNA OSHC 2121 (No. 96-0606, 2000).

Furthermore, adequate enforcement of work rules is a critical element of the employee misconduct defense. To prove that a disciplinary system is more than a paper program, an employer must show evidence of actually administering the discipline outlined in its policy and procedures. *See Pace Constr. Corp.*, 14 BNA OSHC 2216, 2218 (No. 86-758, 1991). Although an employer has a system of verbal reprimand and written reprimands, if it is not enforced, it is ineffective.

OSHA often argues that although an employer has a work rule and informed employees about the rule, they failed to monitor employees to make sure the rules were being followed. *See Mountain States Contractors, LLC*, 2015 WL 3461043, OSHRC No. 13-20143 (April 23, 2015)(ALJ) (finding that an employer inadequately monitored or inspected jobsite for violations in connection with a crane defect citation when the employer left decisions onwhether to remove cranes from service up to non-supervisory crane operators); *but see Empire Roofing Company of*

Georgia, Inc., 2017 WL 2861574, OSHRC No. 16-1984 (May 18, 2017) (ALJ) (finding reasonable steps to detect violations were implemented when a supervisor traveled to sites over which he had supervision three times a week; had been to the cited worksite the day of violation and witnessed employees using fall protection; and employed the services of consulting group to conduct unannounced audit visits 10 times per month at various sites).

Another potential attack for OSHA surrounds situations involving a history of a lack of discipline with respect to a safety rule or policy. *See e.g. Gem Industrial, Inc.*, 17 O.S.H. Cas. (BNA) 1861 (OSHRC Dec. 6, 1996) (overturning an ALJ's vacation of a citation because although employer had a work rule and adequately communicated the rule to its employees, the employer did not take adequate steps to enforce violations of the rule based upon its own progressive disciplinary policy when repeat violations were found). Sometimes an employer may have no record of discipline because no employee has ever been caught. Such a situation may be useful, especially if an employer conducts regular safety inspections or unannounced audits or evaluations of worksites. *See Gaumcell Communications*, 2008 WL 5507121, OSHRC No. 07-1551 (Nov. 17, 2008) (ALJ) (finding the UEM defense was applicable even though an employer's discipline records were "thin"; recognizing that the employer had never previously been cited by OSHA and that it is possible that their employees were exemplary and had no need to be disciplined).