



## **HOW TO CREATE UNAVOIDABLE EMPLOYEE MISCONDUCT DEFENSE TO OSHA CITATIONS**

By Mark A. Lies II\*

### **INTRODUCTION**

As most employers are (or should be) aware, there are literally hundreds and, in some industries, thousands of federal and state OSHA regulations regarding occupational safety and health which may apply and which create potential civil and criminal liability for the employer and managers. This article will discuss the primary defense available to an employer against such liability – unavoidable employee misconduct.

### **OSHA BURDEN TO PROVE EMPLOYER LIABILITY**

In order to prove a violation of an OSHA safety or health regulation (or the General Duty Clause, Section 5(a)(1)), the agency must show by a preponderance of factual evidence at the hearing the following elements:

- (1) the regulation applies to the safety or health hazard (e.g., fall, confined space, machine guarding, etc.) which OSHA observed at the worksite; and
- (2) the requirements of the regulation were not met at the worksite (e.g., there was no fall protection, no confined space program, no machine guards in place, etc.); and

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- (3) one or more of the employer's employees were actually exposed to the hazardous condition so that the employee could have been injured by the hazard. NOTE: On multi-employer worksites, an employer may be liable for exposure of another employer's employee to the hazard if certain conditions are met; and
- (4) the employer knew, or with the exercise of reasonable diligence, could have known of the violative conditions.

### **EMPLOYER DEFENSE BURDEN**

Once the Secretary of Labor presents enough evidence to establish each of these elements (which is called a prima facie case), the employer has the burden of presenting evidence at the hearing that the agency's evidence on each of the elements (1)-(4) above is not sufficient (e.g., the regulation is inapplicable; the hazard never existed; there was no employee exposure or the employer had no knowledge of the violation).

If the employer is successful in submitting such evidence, OSHA may not be able to meet its burden of proof (which remains with the agency throughout its case), and the citation may be vacated, reclassified, penalties reduced or otherwise modified by the Review Commission.

### **EMPLOYER AFFIRMATIVE DEFENSE**

Assuming that the employer cannot directly refute any of the foregoing (1)-(4) elements of OSHA's case discussed above, the employer may have to resort to an affirmative defense to defeat the agency's case. An affirmative defense is a defense which the employer must establish and prove and, if successful, the citation will be vacated. There are a number of such defenses, including the defense that OSHA did not issue the citations within the statutory period of six months, the OSHA inspection

was non-consensual, etc. The most potent defense available to the employer is that of unavoidable employee misconduct.

### **UNAVOIDABLE EMPLOYEE MISCONDUCT**

In order to establish the defense of “unavoidable employee misconduct,” the employer must prove the following elements:

- (a) the employer had a safety or health program and work rules which applied to the OSHA regulation contained in the citation (e.g., if OSHA has cited the employer for violations of the fall protection regulations, the employer had a specific program and work rules relating to fall hazards), and
- (b) the employees were effectively trained in such safety or health program and work rules (to prove this element the employer will need documentation of training – NOTE: This training requirement is often difficult to establish when employees are illiterate or cannot understand the language, typically English, in which the written and spoken training is being provided), and
- (c) the employer has effectively enforced these safety or health programs and work rules at previous times or jobs with discipline for violations (to establish this element the employer must be able to produce documentation of verbal or written discipline given to employees for past violations which requires that such documents be generated and maintained), and
- (d) the employer must prove that on the date when the violation occurred in the citation that the violation occurred in such a fashion (e.g., extremely short time frame, totally unforeseeable circumstances) that the employer could not have learned of and prevented the violation – hence the violation is due to “unavoidable” employee misconduct.

This affirmative defense may be the employer’s only means to defeat the citation but it can only be made if the groundwork has been laid for elements (a)-(d) of the defense through an effective safety and health program.

## **UNAVOIDABLE SUPERVISORY EMPLOYEE MISCONDUCT**

Until relatively recently, OSHA took the position that if the supervisor (who is the employer's agent at the worksite) was the violator of the safety or health regulation, there was strict employer liability for the violation and that the affirmative defense of unavoidable employee misconduct could not be utilized. Fortunately, recent case law has begun to recognize that the employer can still assert the defense of unavoidable employee misconduct even if the violator is the supervisor. The defense will be more difficult to establish because of the supervisor's status. Unfortunately, the defense frequently fails because the employer has a "double standard" for discipline and while hourly employees have been disciplined for prior violations, there is no such record of such discipline for supervisors for prior violations.

## **CONCLUSION**

Realistically, the employer should anticipate that employees may well violate OSHA safety and health regulations. If, however, there is evidence of competent, effective training and enforcement (for both managers and non-managers) the employer can avoid potential liability for citations if OSHA observes a violation by utilizing the unavoidable employee misconduct defense.