

Unavoidable Employee Misconduct Defense - By George E. Spofford, IV and David Scott Knight

An employer who is served with a Complaint by OSHA pursuant to a Citation and Notification of Penalty has a number of defenses available. The employer can raise procedural defenses such as the failure of OSHA to issue the Citation within six months of the alleged violation, or the failure of OSHA to file the Complaint no later than 20 days after receipt of a Notice of Protest from the employer. The employer can also raise substantive defenses. Examples of these include literal compliance with the cited OSHA Standard being infeasible under the circumstances, or the fact that compliance with the cited Standard would expose employees to a greater hazard than non-compliance would.

Another available substantive defense is the unavoidable employee misconduct defense. This defense states that if the alleged violation stems from an unforeseeable act of an employee, then the employer should not be cited. The theory being that an employer only will be held responsible for violations it has the ability to prevent. *Secretary of Labor v. Howard P. Foley Co.*, 1977 WL 7543 (O.S.H.R.C. 1977). Thus, an employer will not be cited where it is able to prove by a preponderance of the evidence that violative conditions were due to the unforeseeable actions or misconduct of its employees. See *Danco Const. Co. v. Occupational Safety and Health Review Com'n*, 586 F. 2d. 1243 (8th Cir. 1978).

In order to establish the unavoidable employee misconduct defense, an employer must satisfy a four part test. See *Secretary of Labor v. Jensen Construction Co.*, 1979 WL 8461 (O.S.H.R.C. 1979); *Secretary of Labor v. The Fishel Company*, 1998 WL 558885 (O.S.H.R.C.A.L.J. 1998). The employer must prove that it has:

1. Established written work safety rules designed to prevent unsafe conditions;
2. Adequately communicated those work safety rules to its employees;
3. Taken steps to identify safety violations; and
4. Effectively enforced its work safety rules.

The first part of the test, establishment of work safety rules designed to prevent unsafe conditions, is the easiest to satisfy. Work safety rules should be as specific as possible and emphasize the type of work performed by the employer. For example, underground utility contractors should emphasize trench safety and confined space safety more than tag out rules. The key is that the employer have written work place safety rules intended to prevent the unsafe conditions that resulted in the citation.

Continuing with the four part test, an employer must next establish that it adequately communicates its work safety rules to its employees. This can be done by a formal written policy, by safety meetings and tool box talks with employees, and by safety training courses, among other methods. Generally

speaking, it is not sufficient to merely hand out the written rules. Some form of oral communication or testing is required. For example, it is a good idea that the written rules be communicated orally to the employees, via tool box talks, rather than just by giving the employees copies of the written rules. It is also helpful if the employer has a policy in place whereby the employees formally acknowledge receipt and review of the work safety rules, as well as their understanding thereof. Some employers have demonstrated effective communication by conducting formal safety tests of their employees. If you have workers that do not read or speak English, then you need to provide the written materials and oral communications in the language they understand.

In *Secretary of Labor v. Rawson Contractors, Inc.*, 2003 WL 1889143 (O.S.H.R.C. 2003), the employer's foreman testified that he was familiar with the employer's safety rules and OSHA's requirements, he attended competent person classes, and he also taught tool box talks on safety. Under those facts, the court ruled that the employer's work safety rules had been adequately communicated. In *Horne Plumbing & Heating Co. v. Occupational Safety and Health Review Com'n*, 528 F2d. 564 (5th Cir. 1976), effective communication existed because the employer orally instructed employees on safety, held safety meetings, and issued written safety manuals. See also, *Secretary of Labor v. Prospect Waterproofing Co.*, 1997 WL 658430 (O.S.H.R.C.A.L.J. 1997) (sufficient communication found where employer distributed written safety manuals, held oral safety tool box talks, conducted monthly safety meetings, held annual safety meetings, and employees testified that they knew what the safety rules were).

Lack of adequate communication is often where the defense will fail. In order to better its chances of succeeding, an employer needs to make sure it has sufficient proof of its communication of its work safety rules. This proof should include, at a minimum, 1) oral testimony by supervisors and laborers that the rules were communicated in writing and orally, 2) signed receipts of employment manuals/handbooks showing that employees received, read, and understood the written work safety rules, and 3) sign-in sheets and agendas for tool box talks and safety meetings where work safety rules were discussed identifying the topics discussed and attendees.

The third part of the defense requires the employer to show that it has taken adequate steps to identify and prevent safety violations. In *Fishel*, the court ruled that the employer had taken adequate steps to discover violations where the employer: had safety coordinators who periodically inspected jobsites; the employer hired a third party consultant, its insurance carrier, to inspect jobsites for safety; and, the jobsite supervisor performed inspections of the jobsite.

The fourth and final part of the unavoidable employee misconduct defense is a showing by the employer that it has effectively enforced its work safety rules. Once again, it is not enough that the employer merely enforce its rules. Sufficient documentation should be generated evidencing that enforcement took place, both pre and post citation. As the court acknowledged in *Prospect Waterproofing*, it is vital that the employer have "more than just a paper program."

In *Fishel*, the employer had a progressive disciplinary system which included oral and written reprimands, suspensions, demotions, and termination of employees that violated the employer's rules.

The disciplinary actions were communicated orally and in writing, and the employer immediately disciplined the employees involved in the violation rather than waiting to see what OSHA's response was going to be to the inspection. In addition, the employer reported unsafe conduct and discipline to other employees, and the employer demonstrated that it had disciplined foremen, supervisors and laborers, prior to the citation being issued.

Even though the unavoidable employee misconduct defense is only occasionally successful, an employer will increase its chances of negotiating a reasonable reduction of the citation and penalty, or of winning at trial, if the employer has established work safety rules, has and continues to adequately communicate its work safety rules to its employees, makes every effort to identify and prevent unsafe conditions, and has a track record of enforcing its work safety rules by disciplining its labor and supervisory employees who violate those work safety rules.

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