Session No. 757

"The Unpreventable Employee Misconduct Defense"

Matthew T. Deffebach, Partner
Texas Board of Legal Specialization
Haynes and Boone, LLP
Houston, TX

Introduction

Should an employer be held liable for an employee's violation of an Occupational Health and Safety Administration (OSHA) standard and/or his or her employer's safety policies? While certainly all employers will answer this question negatively, the real answer is "it depends."

In general, employers are responsible for the actions of their employees, as long as the actions are within the scope of the employment. An employer can only act through its agents, after all. Following this idea, an employer should be, and usually is, held liable for employees' OSHA infractions. The exception to this rule is that employers are not held liable if they can prove the unpreventable employee misconduct defense. The principle of this defense is that employers should not be held responsible for the unforeseeable and unpreventable actions of employees. While this sounds reasonable, the unpreventable employee misconduct defense, unfortunately, is very difficult to successfully argue. The purpose of this article is to help employers prepare themselves in case they ever need to rely on this defense. This article will explain how the unpreventable employee misconduct defense works, show how courts have picked apart this defense, and explain what employers can do to increase their chances at successfully applying the unpreventable employee misconduct defense.

What is the "Unpreventable Employee Misconduct" Defense?

Most employers take precautions to ensure the health and safety of their employees. Regardless of motives, whether it be contractual obligations, compliance with OSHA, or a genuine interest in the safety of the employees, employers are concerned about job safety and act in accordance with their concerns. Employers take precautions – such as creating safety manuals, providing safety training, and enforcing safety policies – to both maximize employee health and minimize employer liability. But despite efforts taken by employers, accidents happen and individual employees sometimes violate the rules. And, of course, OSHA can (and does) cite an employer even if it is an accident or an unexpected employee violation.

To prove an OSHA violation, the Secretary of Labor ("Secretary") must show that:

1. The cited standard applies;
2. There was noncompliance with its terms;
3. Employees had access to the violative conditions; and

4. The cited employer had actual or constructive knowledge of those conditions.[1]

When an OSHA citation has been issued, the Secretary has the burden of proof for each element of its case before the Occupational Health and Safety Review Commission (OSHRC or "Commission"). If it does, the employer has the opportunity to defend itself. The OSHRC and Circuit Courts of Appeal have recognized that an employer should not be liable for OSHA violations that were caused by an employee's unforeseeable misconduct. The employer may use this defense, the unpreventable employee misconduct defense, to avoid liability from the OSHA violations.

In order to establish the defense of unpreventable employee misconduct, an employer has to prove that it:

1. Established a work rule to prevent the reckless behavior or unsafe condition from occurring;
2. Adequately communicated the rule to its employees;
3. Took steps to discover the violation. "Constructive knowledge is shown if the employer could have known of the violative condition with the exercise of reasonable diligence. Whether an employer was reasonably diligent involves a consideration of several factors, incidents of noncompliance; and
4. Effectively enforced the rule.[2]

As stated earlier, the Secretary will need to establish each element of its case, one element being actual or constructive knowledge of the employer of including the employer's obligation to have adequate work rules and training programs, to adequately supervise employees, and to take measures to prevent the occurrence of the violation."[3] These issues can become particularly cumbersome when the Secretary attempts to impute the knowledge of a particular employee to the employer. In other words, an employee's failure to abide by an employer's safety policies and OSHA standards could, and in fact has, raised either a lack of knowledge issue or a misconduct issue. In fact, there is legal precedent, established by the OSHRC, that where a supervisory employee has actual or constructive knowledge of a violative condition, the knowledge is imputed to the employer, and the Secretary's burden of proof of knowledge is satisfied without having to demonstrate any inadequacy in the employer's safety program.[4] Some courts, however, do not follow this precedent.[5] These courts, while agreeing that knowledge can be imputed, hold that the Secretary must also show that the violation was foreseeable in order to make such a leap of knowledge.

The reason this distinction is important is because if the Secretary can impute a supervisor's knowledge of the violation to the employer in order to establish the employer's knowledge, the employer must then show that the violation was unforeseeable, a showing that would require the employer to establish the unpreventable employee misconduct defense. If, on the other hand, the Secretary cannot impute the supervisor's knowledge of the violation, the Secretary has to prove that the violation was foreseeable. It essentially boils down to who has the burden of proof – the Secretary or the employer. Courts around the country are split on this decision: some say that the Secretary has to prove that the conduct was foreseeable (knowledge not automatically imputed), some say that the employer has to prove that the conduct was unforeseeable (knowledge is imputed). At some point, the U.S. Supreme Court will likely decide a case involving this issue and put this dispute to rest.

Again, the unpreventable employee misconduct defense is used for the employer to establish that it did not foresee the prohibited conduct. If the conduct involves a supervisor, the

defense is even more difficult to prove because supervisory involvement is strong evidence that the employer's safety program is lax because it is the supervisor's duty to protect the safety of the employees under his or her supervision.[6] That fact aside, the unpreventable employee misconduct defense is, at best, difficult to prove and usually is successful only when the employer is able to show that a supervisor engaged in idiosyncratic and unforeseeable behavior. The defense may be essentially unavailable if the Secretary has established that the employer had constructive knowledge of the violation or, if imputation is allowed, if the violation was reasonably foreseeable.

How Does This Defense Work?

The following cases involve straightforward application of the unpreventable employee misconduct defense. In the first seven cases, the employers were unsuccessful in relying on the unpreventable employee misconduct defense. The last two cases show employers who were successful with the defense. These cases will help illustrate how difficult it is for employers to successfully apply this defense when OSHA citations are handed down.

Secretary of Labor v. S&G Packaging Co., L.L.C.[7]

S&G Packaging's troubles began when a female employee's hair became entangled in a machine, causing her serious injury. Following this incident, an OSHA compliance officer came to inspect the plant. S&G Packaging received a citation for failing to comply with a machine-guarding standard. The Administrative Law Judge ("ALJ") affirmed the citation even though S&G Packaging issued the defense of unpreventable employee misconduct. The Commission agreed with the ALJ and held that S&G Packaging's defense failed. In particular, the Commission held that S&G Packaging did not have a work rule that would have prevented this violation (first element).

S&G did not dispute the fact that the machines were unguarded. But it argued that it should not be held liable for the employee's unforeseeable misconduct. S&G Packaging contended that it did, in fact, have work rules addressing this specific situation. S&G relied upon the following as evidence of its work rules.

- A memorandum providing "[e]mployees having hair shoulder length or longer must keep it tied back so it does not swing around shoulders to the front or put it up under a hat. This must be done for your protection and to keep clothes, hands and hair from getting caught in any machinery."

- "Safety Rules and Procedures" booklet provided "[s]ecure long hair when working around all moving equipment."

- "Job Safety for New Employees" booklet provided "[k]eep hands and feet away from moving machinery" and "[d]o not put your hands in any piece of moving machinery."

The Commissioner, however, felt that these rules would not have prevented the violation. These rules did not prohibit other activities, such as bending down, kneeling, or squatting to adjust machinery, which would put the body of an employee within one to two feet of a moving machine part. Although the rules focused on employees' hair, which caused the injury in this situation, the Commission was additionally concerned with employees' upper bodies and heads. Even strict compliance with the rules would not have obviated the requirements imposed by OSHA. The Commission concluded that the rules were inadequate to prevent the violation and, therefore, the unpreventable employee misconduct defense failed.

Secretary of Labor v. Staz-On Roofing, Inc.[8]

Staz-On Roofing was cited by OSHA for violating standards regarding employees engaged in above-the-ground construction activities. The OSHA compliance officer, on two separate occasions, observed multiple employees working on a roof without using fall protection equipment. She observed three employees without any equipment, a foreman putting on a harness (while on the roof), and another employee who was not tied-off. According to the OSHA officer, at least five Staz-On employees admitted that there were times when they did not tie off.

Of the many arguments Staz-On made, one included the defense of unpreventable employee misconduct. Staz-On relied on the following pieces of evidence to prove its defense.

- It maintained an employee manual that contained work rules relevant to the situation.
- Each employee received a copy of the employee manual when he or she was hired.
- Each employee was required to attend weekly safety meetings on site.
- Employees were trained on how to put on safety equipment.
- Employees were disciplined for failing to put on safety equipment.

Despite Staz-On's evidence, the ALJ held that the unpreventable employee misconduct defense failed. Although Staz-On had work rules sufficient to prevent the violation, it did not adequately communicate the rules prohibiting the violative conduct. The ALJ based this conclusion on the fact that many employees, even a supervisor, were seen working on a roof without fall protection on as many as three occasions. Additionally, the ALJ noted that the evidence showed that employees worked without fall protection whenever they felt it was more convenient to do so (based on employee testimony). Lastly, it was apparent that the employees would not have been disciplined for failing to use the safety equipment had there been no OSHA inspection.

Secretary of Labor v. North Dallas Acrylic & Stucco[9]

North Dallas Acrylic, a company engaged in stucco application, was cited for OSHA violations as three of its employees worked on tiered scaffolding while applying stucco to the outside of a Wal-Mart. Two employees worked on a planked platform approximately 12 feet off of the ground, and a third worked from a platform approximately 18 feet off the ground. The scaffolding was set upon wooden blocks, ladders were not provided, and no guards or fall protection was present.

North Dallas Acrylic argued that the violations were the result of unpreventable employee misconduct. North Dallas Acrylic relied upon the following evidence in support of its defense.

- Safety Handbooks contained work rules relevant to the violations.
- Safety Handbooks are provided to the employees when they are hired.
- Safety Handbooks are explained to the employees, and the employees view scaffolding videos.
- Employees attend weekly job site safety meetings which are presented by the lead man at the jobsite. Some of the meetings cover scaffolding. These meetings have sign-in sheets.

- A superintendent is responsible for inspecting individual job sites to ensure that scaffolds are erected properly. The sites are inspected approximately twice a week.

- The superintendent is also responsible for disciplining employees who do not comply with company safety rules.

Despite this evidence, North Dallas Acrylic employees testified that the safety program did not provide for any intermediate disciplinary action, but that if problems were repetitive, the employee would be fired (two employees, in fact, were terminated). However, there was no system for keeping track of verbal reprimands. And there was no specific rule on the number of infractions necessary to establish a repeated pattern.

The ALJ held that North Dallas Acrylic failed to establish the unpreventable employee misconduct defense. North Dallas Acrylic established work rules that, if followed, would have prevented the violation. And the employees were properly informed of and trained on the work rules. However, North Dallas Acrylic did not have a proper program for discovering and enforcing its rules concerning scaffolding construction. Although there was a progressive disciplinary program in place, the program consisted only of pre-inspection verbal warnings, which are insufficient to establish the defense. North Dallas Acrylic admitted that it did not document the number of infractions for each employee, nor did it have a system to record the number of reprimands a lead man received. Additionally, the disciplinary program made no provision for any punishment short of termination (which only happened twice). The unpreventable employee misconduct cannot survive these deficiencies.

Secretary of Labor v. CB&I Constructors, Inc.[10]

CB&I employees constructed water towers. At one point, a CB&I supervisor asked two employees to install a safety cable. The employees failed to do so even though they said they did when later asked by the supervisor. Shortly thereafter, an employee working on top of the water tower fell to his death, causing an OSHA investigation to commence. OSHA later issued CB&I a citation for failure to comply with OSHA standards.

CB&I contended that if there was, in fact, a violation, it was the result of unpreventable employee misconduct. CB&I relied upon the following information to support its defense.

- Written work rules were established that applied to the situation.

- CB&I provided extensive competent person training to teach individuals how to inspect a worksite.

- Weekly written reports of inspections were mandatory.

This evidence fell short of establishing the unpreventable employee misconduct defense. First, the ALJ found that CB&I failed to take steps to determine violations. The judge pointed to the fact that the supervisor did nothing but ask the employees if they installed the safety cable; there was no evidence he followed-up with the employees or inspected their work. The fact that the employees failed to install the cable is evidence alone that CB&I was lax in discovering violations. Also, the employees must have felt confident that their failure to install a safety cable would go undetected or else they would not have lied. Of the five men working on this project, two employees disobeyed safety instructions and lied about it, and a third employee either failed to make an inspection or was so incompetent that he did not notice the absence of a safety cable. Also, the fact that the supervisor's conduct was in question only strengthens the argument against the unpreventable employee misconduct defense. Thus, the defense failed.

Secretary of Labor v. Boh Brothers Construction Co.[11]

Boh Brothers was hired to construct a power plant in Alabama. Boh Brothers employees had to drive 500 steel pipes into the ground to provide support for the foundation slab. A "sling" had been created to help support a load of pipes when they were lifted by a crane. Six employees were in the process of unloading some of the pipes when an accident occurred resulting in the fatality of one of the employees. This incident lead to an OSHA investigation, which resulted in Boh Brothers receiving citations for failure to comply with standards.

Boh Brothers argued that the violations of the standard were due to unpreventable employee misconduct. In support of its argument, Boh Brothers relied upon the following evidence.

- Safety and Health Manual work rules were designed to prevent the violation that occurred, such as "unloading pipes shall be supervised. All unnecessary personnel shall be kept clear," "taglines should be used on all loads," "[n]o employee shall walk under or be placed under a suspended load at any time," and "[e]mployees shall refrain from 'manhandling' piles which are being lifted by the rig **and shall avoid the area when piles are being lifted**" (emphasis in original).

- Bimonthly supervisory meetings and weekly safety meetings disseminated the information.

The ALJ held that, although Boh Brothers had sufficient rules and had adequately conveyed them to the employees, it did not take appropriate steps to discover violations, and it did not enforce the rules when violations occurred. Although Boh Brothers claimed unpreventable employee misconduct, the evidence showed that the conduct was, in fact, routine and condoned by Boh Brothers. Testimony showed that it was not unusual for an employee to get within two feet of a suspended load, despite the work rules. Also, testimony showed that employees would not only get close to a load, but many would try to guide it with their hands. Although the safety director stated that he would "make suggestions" on how to operate the correct way if he saw violations, this does not amount to actually enforcing the work rules or disciplining those who were responsible for violating the rules. Because of these deficiencies, Boh Brothers failed to establish the unpreventable employee misconduct defense.

Secretary of Labor v. GEM Industrial, Inc.[12]

GEM was a subcontractor working on the construction of a building. OSHA cited GEM for violations when an OSHA compliance officer observed employees working on beams 25 feet off the ground without any fall protection. The worksite foreman was unaware of the employees' violations until the OSHA officer informed him of them.

GEM relied on the unpreventable employee misconduct defense to avoid liability for the violations. GEM offered the following evidence in support of its defense.

- GEM had a work rule that required employees to wear and tie off safety belts when working above the ground.

- The foreman would warn employees every time they went up that they had to tie off their safety belts.

- Fall protection was the number one topic at the weekly safety meetings.

- GEM's Safety Manual contains an "Employee Written Warning of Disciplinary Action."

The Commissioner held that the unpreventable employee misconduct defense failed, however, because GEM did not adequately enforce its safety rules and it did not take adequate steps to discover violation. "To prove adequate enforcement of its safety rules, an employer must present evidence of having a disciplinary program that was effectively administered when rule violations occurred."[13] GEM's disciplinary program consisted of verbal warnings and increasingly severe disciplinary measures for repeated instances of misconduct. The ALJ had found that GEM properly enforced its safety rules because there was no evidence that other violations occurred and the employees involved had not been disciplined for committing violations in the past. The Commission disagreed. He relied on testimony that three instances of noncompliance occurred in the month prior to the inspection, and only oral reprimands were given. One of the employees was also involved in the misconduct that the OSHA inspector witnessed. Instead of receiving a written reprimand after his second infraction (as required by the GEM safety program), he received another verbal warning. This fact indicates that oral reprimands were ineffective in preventing employees from violating work rules. It also indicates that GEM did not follow its own safety program. Also, the foreman testified that the only type of reprimand issued for violation of the work rules were verbal ones. He also testified that he had trouble getting employees to tie off, and thus was the need to remind employees to do so each time they worked above ground.

These facts also led the Commission to conclude that GEM did not take reasonable steps to discover violations. Testimony showed that the employees, being ironworkers, maintained a large degree of discretion in the use of fall protection. According to the Commission, this should have been reason enough to carefully monitor their actions. In particular, on the day of the violation, the foreman left the decision of whether to work up on the beams to the employees due to the snowy weather. Despite knowing that the employees had a tenancy to forgo using protective gear, the foreman did not later inspect the employees – and did not even know if they went up on the beams or not. These facts, along with the failure to adequately discipline employees for violations, led the Commission to conclude that the unpreventable employee misconduct defense did not apply.

Secretary of Labor v. Rawson Contractors, Inc.[14]

This case arose out of an inspection made by two OSHA compliance officers of a Rawson work site. Rawson employees were working in a trench approximately 20 feet deep. The walls of the trench were nearly vertical, but the employees were not protected against the effects of a cave-in. Rawson received multiple citations related to the incident, which were affirmed by the ALJ.

Rawson claimed the unpreventable employee misconduct defense. Rawson offered the following evidence in support of its defense.

- Rawson's Safety Handbook provided that "employees working in excavations or trenches must always stay within the protective system (trench shield, shoring, sloping)." The Handbook also provided "walls and faces trenched 5 feet or more in depth and all excavations in which employees are exposed to danger from moving ground or cave-in must be guarded by shoring, sloping or benching."

- The rules were communicated to the foreman who testified that he knew both the company's rules and OSHA's requirements for trenching. The foremen also attend a competent person class and refresher classes.

- "Toolbox talks" were given to employees on excavating and trenching.

- Rawson's president made regular visits to the company's work sites, including a visit to the work site on the morning of the inspection.

- Rawson hired an outside consultant who made more than 100 unannounced safety visits to Rawson worksites over a period of five years. The consultant had visited the site in question 10-15 times and found only minor violations.

Although Rawson established proper work rules, adequately communicated the rules, and took reasonable steps to discover violations, it failed to show that it enforced its work rules when violations were discovered. Rawson had a "Written Disciplinary Action Policy and Procedures for Safety Violations" that provided for discipline for minor violations. But there was no evidence of any progressive discipline. The foreman testified that he had never been disciplined for violations discovered by the hired consultant. Additionally, there was no evidence of any employees subject to such discipline. The Commission stated that "[w]e agree with the judge that Rawson's argument fails without any specific evidence to corroborate its assertion that employees were disciplined." This lack of evidence, alone, was enough for the Commission to conclude that the unpreventable employee misconduct defense failed.

Secretary of Labor v. Raytheon Constructors[15]

The Raytheon case is a rare example in which the unpreventable employee misconduct defense was successful. Raytheon constructed an incinerator for the disposal of chemical weapons and agents. Following an inspection by an OSHA official, Raytheon received multiple citations for violations (exposure to toxic chemicals, welding without appropriate protective eyewear, mishandled electrical panels, etc.). Specifically regarding the welding incident, the OSHA inspector spoke with the foreman, who stated that he believed it was all right for the employee to forego eye protection so long as he looked away while welding.

Raytheon did not dispute the occurrences surrounding the welding violation. Raytheon asserted the unpreventable employee misconduct defense, and it relied on the following to support its argument.

- Raytheon had a work rule requiring that welders use eye protection. The Employee Handbook stated "when you arc/welding near other workers, they must be protected from the arc rays by noncombustible screens or must wear adequate eye protection."

- Raytheon's Job Hazard Analysis requires welders to obtain hot work permits from their foreman prior to commencing a welding project. The permit is to be issued only if the employee has the personal protective equipment necessary to safely perform the job.

- Each employee received an Employee Handbook. New employees are instructed to read the Handbook and to sign documentation indicating that they have reviewed it.

- Raytheon employees attend weekly toolbox safety meetings.

- Raytheon produced the unprotected employee's documentation showing that he received and reviewed the Handbook. Raytheon also produced a sign-in sheet indicating that the employee received training on the hot work policies.

- Safety personnel did safety compliance inspections several times a day and document their observations weekly.

- Raytheon had a progressive disciplinary system that included verbal warnings, written warnings, and dismissal, when appropriate.

- Raytheon introduced three warning letters issued concurrently as when the violations took place. These reprimands were for failure to wear protective eyewear.

The fact that Raytheon had established appropriate work rules and adequately communicated them to employees was not in dispute. But the Secretary questioned how effective the safety and disciplinary programs were, given the involvement of the foreman in the cited violation. The ALJ noted that, according to past Commissioner decisions, an employer may demonstrate its "effective enforcement" of its safety rules by showing that it had a progressive disciplinary plan with increasingly harsh measures taken for infractions of the work rule. "That a safety violation occurred in spite of Raytheon's efforts does not establish that its safety program was ineffectively enforced."

Although the foreman's statement regarding the need to wear eye protection was incorrect, the ALJ's decision was not affected by this statement. It is true that the misconduct of a supervisor constitutes evidence that an employer's safety program is lax, but it is not clear here whether the foreman was actually involved in the misconduct. The ALJ found that the foreman's attempt to excuse the employee did not rise to the level of misconduct. And even if it did, Raytheon would be able to rebut any inference of misconduct by establishing that the foreman was provided with adequate training in, and was subject to discipline for, violation of relevant work rules. Despite the foreman's involvement, Raytheon was successful in establishing the unpreventable employee misconduct defense.

Secretary of Labor v. Davis H. Elliott Company[16]

Davis H. Elliott was also successful in asserting the unpreventable employee misconduct defense. Davis H. Elliott employees were upgrading electric power lines when the crew's foreman was electrocuted while attempting to bond the ground wire to a neutral wire. The foreman was not wearing rubber gloves or sleeves, but he was working on a newly constructed pole which had no energized lines. However, he was electrocuted when a piece of ground wire contacted an energized line that was several feet away on the existing pole. The incident led to an OSHA inspection, which resulted in citations for Davis H. Elliott.

Because there was actual noncompliance with OSHA standards, Davis H. Elliott claimed that it was not liable due to the unpreventable employee misconduct defense. Davis H. Elliott argued that that accident would not have occurred if the employee had followed the company's safety procedures. Instead, the employee's actions were a departure from the work plan, and they did not comply with the safety rules. Davis H. Elliott relied on the following evidence in support of its argument.

- Safety Handbooks and Work Process Manuals contained relevant safety work rules. These rules specifically address the minimum approach distance, the use of personal protective equipment, the handling of conductive objects, and what is considered adequate protection of an employee against the hazard of electrocution.[17]

- A copy of the Safety Handbook and Work Process Manual was given to all employees, including the employee who was electrocuted.

- All newly hired employees attended orientation which specifically addressed the minimum approach distance. Following orientation, all employees were given a written examination on the materials covered during the orientation. An employee must pass the written examination in order to have been considered for permanent hire. If the employee was a lineman or apprentice, Davis H. Elliott had an accredited apprenticeship court for additional training.

- Davis H. Elliott held quarterly foremen safety meetings and conducted regular job safety meetings in the mornings for the work crew. "Tailgate meetings" were also held on occasion.

- The Field Safety Director conducted surprise visits to inspect the crews for safety compliance. Safety inspections were also conducted by the general foreman, job superintendents, upper management, and the field safety department. The crew in which the electrocuted employee was a member of was audited for safety 16 times during the previous six months. On the day the electrocution occurred, the employee in question had been observed by the general foreman, who noted that he was wearing the proper safety equipment and had secured the energized line.

- Davis H. Elliott maintained a graduated disciplinary program with verbal warnings, written warnings, and suspensions and terminations. A total of 37 written notices of safety violations were handed out over the past four years for failing to use gloves and sleeves or for failure to properly cover up.

The ALJ agreed that the unpreventable employee misconduct defense alleviated Davis H. Elliott's liability. First, it had established appropriate safety rules that addressed the hazard and conditions present when the incident occurred. If the employee had complied with the safety rules, he would not have been exposed to a hazard. Second, Davis H. Elliott adequately communicated its safety rules to the employee through its various meetings, handbooks, and a written examination. Third, Davis H. Elliott took steps to discover safety violations, and there was no history of violations made by the employee who was injured. Lastly, Davis H. Elliott properly enforced its safety rules. Most importantly, Davis H. Elliott was able to provide testimony regarding its safety program, and it had documentation to support its argument. Therefore, the actions by the electrocuted employee were unforeseeable and not anticipated.

What Employers Can Learn From These Cases

Have Established Work Rules

Employers not only need to have general safety rules, but also directives requiring or prohibiting certain conduct. The more specific, the better. And the more clearly written the better. The work rules should be written in a manner that shows that its mandatory nature is explicit and its scope is clearly understood. Most importantly, if an employee can be in violation of an OSHA standard and yet still be in compliance with a work rule, the employer will not be covered under the unpreventable employee misconduct defense.

The work rule must be written in a way that makes it effective. It must specifically prohibit the impermissible conduct. A good rule of thumb is that the work rule should be equivalent to the cited standard. It must be clear and specific enough to prevent the violation. If strict compliance with the rules would not fully protect the employee from committing a violation, the rules is not sufficient to protect an employer by the unpreventable employee misconduct defense.

Work rules should be in written form. Although there is no express requirement that the work rules be written, as a practical matter, an unwritten work is ineffective. An unwritten rule raises questions about its specificity and validity. If the rules are not important enough to write down, they are probably not taken seriously by employees.

Adequately Communicate the Work Rules

Case law is pretty clear on what actions constitute "adequate communication." Generally, the more you communicate and emphasize the work rules to employees, the better. Provide employee handbooks to each employee when hired. Provide an orientation to newly hired employees. Consider giving a written examination to new hires. Require employees to attend frequent, preferably weekly, safety meetings that address relevant safety topics. Train employees on how to use the safety equipment. Provide refresher courses on how to use the safety equipment. Remind employees constantly of the work rules and emphasize that strict compliance is mandatory.

If documented correctly, proving adequate communication should be fairly easy for an employer to do. Most work rules come in the form of an employee handbook. Employers should have employees sign a form stating that he or she reviewed the handbook. Have a sign-in sheet for meetings and training sessions. Document the topics of each safety meeting. Make sure the employee list matches the training records. Again, be overly inclusive when it comes to maintaining records of safety-related issues.

Employers should constantly be questioning how affectively they are communicating their work rules. Check to make sure that every employee is being training and informed properly – including the supervisors. One easy way to call into question the effectiveness of communication is proof of management violations. Infractions by supervisors show poor communication and implementation. Also, the training material needs to be current, and the individuals providing the training need to be current, not former, employees. Remember that the mandatory nature of the work rules must be emphasized to the employees. And the training must be on specific rules, not just on general safety. Trainers should make sure that the employees' understanding of the work rules is consistent with the actual work rules. To ensure understanding, a written examination might be an effective tool.

Take Reasonable Steps to Discover Violations

This requirement tends to trip up employers more than others. Employers must be active and proactive when it comes to discovering safety violations. The employer must show that it had no knowledge, actual or constructive, of the violation. The unpreventable employee misconduct defense will not apply if the employer could have discovered the violation by exercising reasonable diligence. This requirement does not ask that the employer be so thorough as to monitor each employee constantly. It simply asks that the employer act in a reasonable manner to seek out violations.

The work rules and safety policies discussed with the first element need to be in place and should be followed. Individuals who inspect worksites should first and foremost understand the work rules. These individuals should be able to recognize when a violation is occurring. Some employers hire outside consultants for the sole purpose of conducting inspections on worksites.

To ensure compliance with the work rules, employers need to regularly monitor employee activities. There is no clear line establishing how frequently inspections should take place. Obviously, the more the better (some companies in question conducted safety inspections several times a day). Also, more monitoring may be expected for an employee who is new, if an employee is inexperienced in a particular area, if there is a new work rule, or if the employee has had past violations. If an employee is asked to do something unusual or is often lax in his or her

safety preparations, someone should check up on the employee to ensure compliance. If a questionable employee is allowed to make his or her own decisions regarding safety and is not carefully monitored, a judge could easily conclude that the employer failed to take appropriate steps to discover violations.

Like the other requirements for the unpreventable employee misconduct defense, employers need to document every step they take to discover violations. This means that observations from inspections should be documented. Reports should be made on a regular basis concerning inspections, whether or not any violations were witnessed. This particular element of the unpreventable employee misconduct defense is especially difficult for employers partly because the "reasonable" standard is not clear. But an employer will have a much more effective argument if it has documented proof of its inspections.

Enforce the Work Rules

Many employers have failed in their attempts to use the unpreventable employee misconduct defense because they have not effectively enforced their safety programs or work rules. Courts are quite clear in their explanations of what employers must do to meet this requirement. Essentially, employers need to have a progressive disciplinary plan with increasingly harsh measures taken for repeated infractions. Most commonly, the disciplinary plan begins with a verbal warning, then a written warning, then suspension and termination. The disciplinary plan should be as detailed as possible.

Having a written disciplinary plan is not enough. And testimony of the plan's enforcement is not enough. Employers must provide evidence that the disciplinary plan was in effect and was enforced. Evidence regarding verbal warnings and written warnings is essential for the unpreventable employee misconduct defense to survive. Employers should make note of verbal warnings in employees' files and should keep copies of written warnings. Lack of evidence, alone, is enough to lose the defense.

However, employers must have evidence that the plan was *followed*, as well as enforced. For example, if an employer has evidence that an employee committed three infractions, and there is no evidence of a written warning, it appears that the employer did not follow its own disciplinary plan. If a violation occurs in spite of the employer's efforts otherwise, it does not automatically mean that its safety program is ineffectively enforced. But if the program is not adequately documented, it is possible that the employer will fail in its attempts to use the unpreventable employee defense.

Conclusion

Reliance upon the unpreventable employee misconduct defense as a means to avoid liability for OSHA violations can be frustrating and ultimately unsuccessful. However, it can also completely exonerate an employer from liability caused by an employee. To successfully argue that the unpreventable employee misconduct defense, an employer will have to prove each element of the defense. A minor deficiency in any of the elements can easily prevent the employer from being shielded by the defense.

An employer must think ahead and plan in advance in order to be successful in arguing that the unpreventable employee misconduct defense applies. If an employer waits until the violation occurs, it is too late. By the time the violation occurs, work rules must have already been in place, communication of the rules should have already happened, multiple worksite inspections should have been conducted, and violators hopefully were already punished.

Employers should constantly be checking their safety programs to ensure compliance with the rules behind the unpreventable employee defense. Doing so will not only assist with future liability issues, but the added benefit of having a safer work environment would be achieved as well.

---

[1] *Sec'y of Labor v. Donahue Indus., Inc.*, No. 99-0191, slip op. at 5 (Occupational Safety & Health Review Comm'n Aug. 29, 2003).

[2] *H.B. Zachry Co. v. OSHRC*, 638 F.2d 812, 818 (5th Cir. 1981).

[3] *Sec'y of Labor v. Davis H. Elliott Constr. Co.*, 21 BNA OSHC 1320 (No. 04-0836, 2005).

[4] *Sec'y of Labor v. Dover Elevator Co.*, Inc., No. 91-862, slip op. at 11 (Occupational Safety & Health Review Comm'n July 16, 1993) (citing *Sec'y of Labor v. Baytown Constr. Co., Inc*., 15 BNA OSHC 1705, 1710 (No. 88-2912A, 1992), *aff'd without published opinion*, 983 F.2d 282 (5th Cir. 1993)).

[5] *W.G. Yates & Sons Constr. Co.*, 459 F.3d at 607-09; *Pennsylvania Power & Light Co. v. OSHRC*, 737 F.2d 350, 358 (3 rd Cir. 1984); *Mountain States Tel & Tel. Co*., 623 F.2d at 158.

[6] *Sec'y of Labor v. Boh Bros. Constr. Co., L.L.C.*, No. 99-1590 (Occupational Safety & Health Review Comm'n Mar. 10, 2000).

[7] *Sec'y of Labor v. S&G Packaging Co., L.L.C.*, No. 98-1107 (Occupational Safety & Health Review Comm'n July 1, 1999).

[8] *Sec'y of Labor v. Staz-On Roofing, Inc.*, No. 02-2229 (Occupational Safety & Health Review Comm'n July 30, 2003).

[9] *Sec'y of Labor v. North Dallas Acrylic & Stucco*, No. 01-0727 (Occupational Safety & Health Review Comm'n Jan. 28, 2002).

[10] *Sec'y of Labor v. CB&I Constr.*, Inc., No. 03-1357 (Occupational Safety & Health Review Comm'n Mar. 10, 2000).

[11] *Sec'y of Labor v. Boh Bros. Constr. Co*., No. 99-1590 (Occupational Safety and Health Review Comm'n Mar. 10, 2000).

[12] *Sec'y of Labor v. GEM Indus., Inc.*, No. 93-1122 (Occupational Health & Safety Review Comm'n Dec. 16, 1996).

[13] *Id.*

[14] *Sec'y of Labor v. Rawson Contractors, Inc.*, No. 99-0018, slip op. at 1 (Occupational Safety & Health Review Comm'n Apr. 4, 2003).

[15] *Sec'y of Labor v. Raytheon Constructors*, No. 00-0128 (Occupational Safety & Health Review Comm'n Sept. 8, 2000).

[16] *Sec'y of Labor v. Davis H. Elliott Co.*, No. 03-1362 (Occupational Health & Safety Review Comm'n Dec. 16, 2004).

[17] The actual company rules are located within the text of the case.