

DEF LEPPARD TOLD US IT'S TOO LATE FOR LOVE – AN APPEALS COURT TOLD THIS EMPLOYER IT'S TOO LATE TO CONTEST AN OSHA CITATION

Insights
Feb 22, 2022

Def Leppard reminded metal fans that it's "[too late for love](#)" – and the Fifth Circuit Court of Appeals recently reminded employers that contesting OSHA citations more than 15 working days after receipt is also "too late." What can employers learn from this heartbreaking decision – ironically issued on Valentine's Day?

Summary of Dispute

Under the Federal OSH Act, employers must contest citations and penalties within 15 working days after receipt, otherwise those citations and penalties become a final order and the employer must pay the assessed penalties. The Act specifically provides that OSHA shall "[notify the employer by certified mail of the penalty, and if any, proposed to be assessed.](#)"

In the case at issue, the Fifth Circuit Court of Appeals – which hears cases emanating from Texas, Louisiana, and Mississippi – considered whether OSHA properly served an employer with notice of citations and penalties and thereby triggered the 15-day window for the employer to file a notice of contest.

Following its inspection of D.R.T.G. Builders, L.L.C., a construction company in Houston, Texas, OSHA attempted to serve the employer with citations via certified mail at the employer's address provided during the inspection. The employer did not claim that mailing. Nevertheless, OSHA reissued the citations to the employer via UPS, with tracking, which the employer received approximately two days later.

Related People



Curtis G. Moore

Partner

704.778.4179

Service Focus

Litigation and Trials

Workplace Safety

Industry Focus

Construction

The employer ultimately contested the citations but filed its contest more than 15 working days after the initial certified mailing, and more than 15 working days after the actual delivery of the citations via UPS.

After failed attempts to obtain relief at the administrative level, the employer sought relief from the Fifth Circuit. The employer argued OSHA's failure to properly serve the citations via certified mail meant the employer's requirement to file a notice of contest was never triggered.

Too Late

On February 14, the Fifth Circuit issued its heartbreaking decision in [*D.R.T.G. Builders, L.L.C. v. Occupational Safety and Health Review Commission*](#). It disagreed with the employer and held that the test is whether the service was reasonably calculated to provide the employer with knowledge of the citation and an opportunity to contest. The Court found that OSHA's service of the citations via UPS was reasonably calculated to provide such notice, the employer had actually received notice of the citations via UPS, and the employer simply failed to timely contest them. The concurring opinion also noted that the employer received notice from the postal service to pick up the certified mail at the post office but never made reasonable efforts to pick up that mail and timely contest the citation.

As part of the Court's analysis, it also found the employer's tardiness was not excusable because the employer provided an address where there was nobody present to receive the certified mailing, it did not make reasonable efforts to retrieve its certified mailing, and the employer delayed even after actual receipt of the citations via UPS.

Lesson Learned

Employers should view this decision as a reminder to be vigilant about their 15-day deadline to contest OSHA citations – regardless of whether those citations are delivered by certified mail or other means. Moreover, employers need to have in place reasonable measures and fail-safes to avoid any appearance that they are lax in mail handling procedures. Because after those 15 working days, it will likely be too late....

We'll continue to monitor this area of law and provide updates where warranted, so make sure you are subscribed

to [Fisher Phillips' Insight System](#) to get the most up-to-date information on OSHA issues. If you have questions, contact your Fisher Phillips attorney, the author of this insight, or any member of the [Workplace Safety and Catastrophe Management Practice Group](#).