



## OSHA Has To Prove Their Case

Insights

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Employers are not guilty until proven innocent. Napoleonic justice is not the law of the land. To make out an OSHA citation, OSHA has the burden to prove four (4) elements: an applicable standard, that a hazard existed, an employee was exposed, and that the employer knew, or should have known of the violation.

Employers learn of violations or hazards through supervisory employees. So what happens when it is the supervisor who breaks the rules? OSHA may take the position that an employer is automatically liable for violations committed by the supervisor. His knowledge of his own violation is imputed to the employer. So now the burden shifts to the employer to meet the burden of proving the affirmative defense of unpreventable employee misconduct. A *contraire* said the 11th Circuit. OSHA must first prove that the supervisor's act was foreseeable. Let's review ....

When a supervisory employee has knowledge of a violation, that knowledge is "imputed" to the employer. In addition to proving the employer's "actual knowledge," OSHA can prove that, even if the supervisor did not have actual knowledge, he had "constructive knowledge" of the violation, such as where the act occurred in his plain view.

And if OSHA cannot prove actual or constructive knowledge, OSHA can try to prove the "knowledge" element by showing that the employer should have known of the violation with the exercise of due diligence. OSHA can prove this lack of diligence based on the employer's failure to implement and maintain an effective safety program, "with the rationale being that – in the absence of such a program – the misconduct was reasonably foreseeable."

Once the Secretary makes out her *prima facie* case of all four elements, only then does the burden shift to assert affirmative defenses, such as unpreventable employee misconduct.

In *Comtran*, the 11th Circuit found that the Secretary did not show that the violation was "foreseeable" because OSHA did not introduce evidence showing that the safety program was inadequate.

In *Comtran*, a low-ranking supervisor knew about the violation because he was the one who violated the standard. OSHA rightly concluded that a supervisor's knowledge of his own malfeasance should normally be imputed to the employer. Still correct. The 11th Circuit agreed, citing the 4th Circuit,

who had earlier concluded that an “employer can only act through its agents and to excuse an employer simply because its foreman was negligent would emasculate the Act.”

But the 4th and 11th Circuit, unlike OSHA in *Comtran*, both went further and said that it was not the OSHA’s intention to automatically impute the supervisor’s acts to the employer every single time. In other words, OSHA must go further than simply state that the supervisor did it and the employer is guilty, so to speak..

The 11th Circuit concluded that even where the misbehaving employee was a supervisor, OSHA must prove that the act was “foreseeable” to the employer. The 11th Circuit cited a 4th Circuit decision holding that:

“if a violation by an employee is reasonably foreseeable, the company may be held responsible. But if employee’s act is an isolated incident of unforeseeable or idiosyncratic behavior, then common sense and the purposes behind the Act require that a citation be set aside.”

A few caveats ....

- Not every Circuit agrees; notably the 6th Circuit;
- Any time a supervisor commits a bad act, there is a suggestion that the safety plan is inadequate, and the higher ranking the supervisor, the less OSHA must introduce to show that the plan was inadequate and that such behavior was “foreseeable.”
- Most employers now recognize that they can raise an affirmative defense of unpreventable employee misconduct and do so if they have the facts, but fact finders do not like the defense and most of the newer OSHA ALJ’s hate it. Focus instead on whether OSHA can prove actual or constructive knowledge or that the employer should have known of the violation or hazard with the exercise of due diligence.

Background documents ... [Secretary’s 11th Circuit Brief](#). [ALJ Decision](#).

## ***Related People***

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