The "Unpreventable Employee Misconduct" Defense

- All it takes is just one employee’s misconduct and failure to follow the employer’s safety rules and procedures for OSHA to issue a citation and propose thousands of dollars (sometimes hundreds of thousands) in penalties against the employer.
- One of the most important defenses on the books for:
  - Alleged "employee" OSHA citations
  - Supervisory misconduct? (e.g., allowing violations, participating in violations, training violations, etc.)
History Of The Defense

- “Unpreventable employee misconduct” was established as an affirmative defense, that is one that the employer has the burden of proving, in 1972 by the federal Occupational Safety and Health Review Commission (i.e., the administrative “court” for OSHA cases)...
- ...but employers have consistently lost on this key defense in cases in the last 46 years since then

History Of The Defense

- Why? Proof of employee misconduct – no matter how intentional or egregious – alone is never enough
- In each and every one of these losses, the employer was missing at least one crucial, additional element of the defense

Essential Elements

1. The employer has a work rule or policy designed to prevent the violation
2. The employer has adequately communicated the rule or policy to employees
3. The employer has taken steps to discover rule/policy violations
4. The employer has effectively enforced the rule or policy when it has discovered violations
Regular Employee v. Supervisor Misconduct

- Establishing the defense of supervisory employee misconduct is more difficult.
- Supervisory misconduct cannot be characterized as “unpreventable” unless the company establishes that it took all necessary precautions to prevent the cited incident, including adequate instruction and supervision of its supervisor.
- Supervisor misconduct can lead to willful citations ($129,336) based on imputed knowledge to the company.

“Avoiding” Citations With The Employee Misconduct Defense

- “Avoiding” – not just what you do to ensure compliance under OSHA statutes and regulations but, often just as important, how you effectively and efficiently go about establishing the defense.
- During an OSHA inspection.
- During an Informal Conference with OSHA.
- In litigation against OSHA and its attorneys.

Documentation...documentation...documentation

Element #1

The Employer Has An Established Work Rule Or Policy Designed To Prevent The Violation
Internal Audits and Revision of Safety Programs, Training Materials and Safety Rules

- General and site/work area specific programs – what is your facility’s top 10...top 20?
- Work rule must be specific to the alleged violation
- Audit your own “books” – stay current with regulatory requirements and deadlines for revision

Explicit safety rules and disciplinary provisions, specificity is key, e.g., “failure to wear assigned PPE” versus “failure to wear assigned ½ mask HEPA respirator, failure to wear assigned hard hat, failure to wear assigned hearing protection...”

Overwriting the old with the new

Element #2

The Employer Has Adequately Communicated The Work Rule Or Policy To Employees
Element #2

- Written safety rule or policy acknowledgements/training records
  - Avoiding the “what’s __________?” syndrome
  - Shooting for “the document speaks for itself”
  - Multi-language issues
  - Training tests – avoiding the “we sign documents all the time, but don’t know what they say”

- Postings?
- Overwriting training materials
- Third-party training records
- Truth and consequences – often overlooked opportunities in written safety programs and training (recommend both), not only what employees need to know – but what they must/cannot do and what will happen if they don’t or do

Element #2

**MCSC LOCK OUT / TAG OUT SAFETY PROGRAM & TRAINING GUIDE**

**ACKNOWLEDGMENT FORM**

I acknowledge that I have received a copy of the MCSC November 17, 2016 written Lock Out / Tag Out Safety Program & Training Guide. I understand that it is my responsibility to ask questions about anything I do not understand.

I also acknowledge that it is my responsibility to follow all lock out / tag out procedures and safety rules in the MCSC November 17, 2016 Lock Out / Tag Out Safety Program & Training Guide and that my failure to do so may result in discipline up to and including the termination of my employment.

<table>
<thead>
<tr>
<th>Employee's Name (printed)</th>
<th>Employee signature</th>
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<tbody>
<tr>
<td>Employee ID #</td>
<td>Date</td>
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Element #2

Again, shooting for "the document speaks for itself"

MCISC
SAFETY TRAINING

<table>
<thead>
<tr>
<th>Topic</th>
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<tbody>
<tr>
<td>Trainer</td>
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<td>Date</td>
<td>10/16/16</td>
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Employees provided training:

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<th>Name</th>
<th>Signature</th>
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COPY OF ALL TRAINING MATERIALS MUST BE ATTACHED

Certification of Attendance:

<table>
<thead>
<tr>
<th>Name (printed)</th>
<th>Signature</th>
<th>MCISC Title</th>
<th>Date</th>
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Element #2

MCISC
PERSONAL PROTECTIVE EQUIPMENT ACKNOWLEDGMENT FORM

I hereby acknowledge that MCISC has issued me a complete set of the personal protective equipment identified below at no cost to me personally, and that my failure to utilize all of this personal protective equipment at all times while performing work as a BLS Operator may result in discipline up to and including termination of employment.

- Safety glasses
- Leather gloves
- Coveralls
- Ear plugs
- Leather Apron

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<th>Date</th>
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Element #3

The Employer Has Taken Steps To Discover Rule/Policy Violations

- Avoiding the “paper-only policy” claim by OSHA
- Regular and frequent
- Supervisors and non-supervisors
- Supervise the supervisors
- Inspect the inspectors
- Detailed written inspection checklists – specificity, again, is key
Element #4

The Employer Has Effectively Enforced The Rule Or Policy When It Has Discovered Violations

- Consistency...consistency...consistency
- Detailed documentation of warnings and discipline
- Again, shoot for the “document speaks for itself”
  - Type of discipline
  - Work rule violated
  - Background facts
  - Mitigating circumstances?
Thank You!

Eric E. Hobbs
Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
1243 N. 10th Street, Suite 200
Milwaukee, WI 53205
414-239-6414
eric.hobbs@ogletree.com
www.ogletree.com

Dean F. Kelley
Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
1243 N. 10th Street, Suite 200
Milwaukee, WI 53205
414-239-6409
dean.kelley@ogletree.com
www.ogletree.com