



THE IMPORTANCE OF EMPLOYEE DISCIPLINE

Reducing Injuries and Avoiding OSHA Citations

By Mark A. Lies II*
& Elizabeth Leifel Ash**

I. Introduction

The recent appointment of David Michaels as the new head of OSHA signals an aggressive OSHA with an active enforcement agenda. For employers, this means more inspections and more citations. But it also means that a greater portion of citations issued will be of higher gravity: more Willful citations, more Repeat citations, and more citations issued under OSHA's "egregious penalty policy," which gives the agency the ability to issue separate citations on a per-instance or per-employee basis.

Our previous article, "OSHA Defense 101: Avoiding the OSHA Liability Pyramid," discussed recent precedent from the Review Commission that signaled the rebirth of OSHA's egregious penalty policy. Employers have now experienced the resurgence of this policy. For example, OSHA has, in the first two months of 2010, issued eight citations under its egregious penalty policy, already topping the four egregious penalty

* Mark A. Lies, II, is a partner with the law firm of Seyfarth Shaw LLP, 131 South Dearborn Street, Suite 2400, Chicago, IL 60603 (312) 460-5877, mlies@seyfarth.com. He specializes in occupational safety and health and related employment law and civil litigation.

** Elizabeth Leifel Ash is an associate with Seyfarth Shaw, (312) 460-5845, eash@seyfarth.com. Her practice focuses on regulatory compliance and litigation, including occupational safety and health and environmental matters.

policy citations issued by OSHA throughout the entire year of 2009. Thus, it is imperative that employers ensure that they are implementing and enforcing their applicable safety programs and policies.

II. Benefits of Employee Discipline

Disciplining employees is not often an easy or pleasant task. Many times, employees are promoted to supervisory roles because they are skilled at their professional duties. Proficiency in job tasks, however, does not necessarily mean that the new supervisor is prepared to act as a supervisor. Being a supervisor also means: (1) being knowledgeable of and implementing the employer's policies and procedures, and (2) disciplining employees who violate those rules. Young supervisors who may still have their peers in non-supervisory ranks may have particular difficulty and be reluctant to discipline those employees. In addition, young or new supervisors may not yet have developed the managerial skill sets required to effectively and lawfully impose discipline on employees and to document such discipline properly.

In addition to the reluctance of supervisors to discipline employees, there are other pitfalls of employee discipline. Perhaps most obviously, employees cannot be disciplined for doing things that they have a legal right or obligation to do. For example, employers cannot discipline an employee for raising a complaint about a workplace hazard or for participating in an OSHA or other governmental inspection that may be considered to be disloyal or contrary to the employer's interests. These types of activities may be "protected" under a variety of federal or state statutes. An employer who retaliates against an employee may be liable for monetary damages,

reinstatement, and even attorneys fees. Thus, while employers must discipline employees who violate workplace health and safety rules, it must be done in a sensitive and lawful manner.

Having a robust set of rules and policies related to workplace safety and health, coupled with effective enforcement of those rules and policies by disciplining violators, benefits employers in many ways. First and foremost, effective enforcement of safety rules is critical to reducing potential injuries or illnesses in the workplace. Preventing injuries and illnesses is not only a moral responsibility for the employer, but also benefits the employer's business by reducing worker's compensation liability, reducing employee attrition, and reducing human costs to the organization. Having an effective disciplinary system, whereby those who violate safety rules and procedures are disciplined (including termination) helps reduce hazards in the workplace that increase the costs of doing business.

III. The Unpreventable Employee Misconduct Defense

In addition to the numerous human capital benefits of effective discipline, effective enforcement of safety rules can provide a shield from OSHA liability as well. Where OSHA can establish that an employer, in fact, violated a mandatory health or safety standard, there are relatively few defenses an employer has in its arsenal to avoid liability. One of those few defenses is the "unpreventable employee misconduct" defense. In essence, the defense is available where an employee violates the employer's established and enforced safety rule or policy, thereby creating the violative condition without the employer's knowledge.

The Review Commission has clear criteria for employers to avail themselves of this defense. The employer must prove that: 1) it has established work rules designed to prevent the violation; 2) it has adequately communicated those rules to its employees; 3) it has taken steps to discover violations; and 4) it has effectively enforced the rules when violations have been discovered. *Sec. of Labor v. Precast Services, Inc.*, 17 O.S.H. Cas. (BNA) 1454 (O.S.H.R.C. Nov. 14, 1995). The employer bears the burden of proving each element of this affirmative defense. When the employer is able to meet its burden of proof with respect to the four elements of the unpreventable employee misconduct defense, the defense operates as a complete bar to employer liability. Thus, the citation against the employer should be vacated.

Employers who have documented cases of employee discipline may also be able to attack a Willful citation classification. OSHA defines a willful violation as one committed with intentional, knowing, or voluntary disregard for the law's requirements, or with plain indifference to employee safety and health. If the employer has a robust set of workplace safety and health programs and can demonstrate that those programs are enforced through disciplining violators, then the employer has not acted with plain indifference to employee safety and health. Thus, it will be more difficult for OSHA to meet its criteria for establishing a willful violation.

IV. Conclusion and Recommendations

It is imperative that employers develop and implement workplace safety and health rules and policies and implement them effectively. Effective implementation involves clearly communicating those rules and policies and enforcing them through

disciplining employees who violate them. Disciplining employees is never a pleasant task, but it is a necessary step to create a hazard-free workplace. Further, in the context of OSHA citations, it is necessary to protect the employer from liability. We recommend that employers consider the following:

- Develop written policies for ensuring that required training is conducted for every employee subject to a particular requirement. This should include a method for ensuring, for example, that employees who are absent from work on the date of their scheduled training are not overlooked or forgotten.
- Maintain documentation demonstrating the receipt of training for every employee required to receive the training.
- Hold individual employees (including supervisors) accountable through appropriate disciplinary measures where an employee violates a safety or health related rule. Maintain documentation of any such disciplinary action.
- Educate supervisory employees about the importance of enforcing safety and health rules and provide intensive training to supervisory employees, particularly newly promoted supervisors, on how and when to discipline employees.