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PUTTING THE "SUPER" BACK IN SUPERVISOR: OSHA's Attempt To Make Hourly Employees Supervisors

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INTRODUCTION

In order to establish a violation, OSHA must prove a critical element, that is, employer knowledge, which is typically shown with evidence that a supervisor or foreman "knew or should have known" of the violation. Because employers know (as well as OSHA) that supervisors cannot possibly be present at every location all the time to observe employee conduct, OSHA has attempted to expand employer knowledge by claiming that hourly employees are "supervisors" under the OSH Act simply because one hourly employee may temporarily direct one of his or her less senior co-workers, even if this hourly employee lacks any authority to hire, fire, or discipline the other employees. Based on this interpretation, OSHA has increasingly begun to claim that an hourly employee is a temporary "supervisor" in every instance two employees are

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working together because one is able to tell the other what to do. This article addresses OSHA's increasing attempt to claim hourly employees as supervisors to issue more citations, and how it may conflict with a recent Supreme Court decision limiting who "supervisors" may be under Title VII of the Civil Rights Act of 1964 ("Title VII") involving the Equal Employment Opportunity Commission, another entity within the U.S. Department of Labor.

EMPLOYER KNOWLEDGE

The Occupational Safety and Health Act and regulations promulgated by OSHA do not impose strict liability. Employers are not liable under the Act or a particular OSHA standard simply because a violative condition exists or an accident has occurred. An OSHA citation can only be upheld if OSHA proves that the employer ***either knew, or, with the exercise of reasonable diligence, could have known of the presence of the violative condition.*** Because many employers are corporations, it may be difficult to determine what a corporation "knows." Case law involving OSHA citations, therefore, has established a general rule that the actual or constructive knowledge of an employer's foreman or supervisor can be imputed to the employer. In other words, if OSHA can prove that a supervisor or foreman knew or, with the exercise of reasonable diligence, could have known that a violative condition exists, OSHA can satisfy the employer knowledge element of its burden of proof in a contested case.

WHO IS A SUPERVISOR OR FOREMAN?

According to OSHA Review Commission precedent, "[a]n employee who has been delegated authority over other employees, even if only temporarily, is considered to be a supervisor for purposes of imputing knowledge to an employer." *M.C. Dean,*

Inc., 23 O.S.H. Cas. (BNA) 1800, 1803 (O.S.H.R.C. 2011); *Diamond Installations Inc.*, 21 O.S.H. Cas. (BNA) 1688, 1690 (O.S.H.R.C. 2006). Thus, it is not the employee's title or compensation structure that controls whether (s)he is a supervisor, but whether, in substance, the employee is empowered to **direct** other employees on behalf of the employer.

Under this broad rule, even hourly employees assigned to be a "lead" for a day could be considered part of management for purposes of imputing knowledge to the employer. Such was the case for M.C. Dean ("Dean"). On August 17, 2009, a journeymen electrician from Dean fell through a skylight on a warehouse roof and suffered fatal injuries. Following this accident, OSHA cited Dean, alleging that Dean also failed to properly guard the skylight.

Dean argued that because all of its three journeyman electricians working at the site were hourly employees, the Company could have had no knowledge of any potentially hazardous condition that they encountered on the roof, and the OSHA citation should be vacated. The Administrative Law Judge rejected the Company's argument, finding that one of the hourly journeyman electricians was, in fact, a "supervisor." The Judge found that the journeyman electrician in question had been assigned as the "lead" for the day of the accident, and had been delegated the ability to control the method and manner in which he performed the assigned tasks, as well as the ability to assign tasks to the other journeymen. Ultimately, the Judge found that Dean had delegated supervisory authority to the journeyman electrician for the day of

the accident, and that his knowledge of the potentially hazardous condition was properly imputed to the employer.

Dean appealed the decisions of the Administrative Law Judge and Review Commission to the Federal Circuit Court of Appeals for the Eleventh Circuit. The Eleventh Circuit upheld the Review Commission's decision, finding that the "lead" had sufficient supervisory authority to qualify as a supervisor. *M.C. Dean, Inc. v. Secretary of Labor*, 505 Fed. Appx. 929, 934-35 (11th Cir. 2013). The Eleventh Circuit also found that, even though the "lead" employee lacked the ability to hire, fire, or discipline other employees that was not dispositive as to his supervisory status. *Id.*

THE SUPREME COURT LIMITS "SUPERVISORS" UNDER TILE VII TO INDIVIDUALS WHO CAN HIRE, FIRE, AND DISCIPLINE

OSHA's increasing attempt to claim hourly employees as supervisors may run in conflict with a recent Supreme Court decision in *Vance v. Ball State Univ.*, 2013 U.S. LEXIS 4703 (U.S. June 24, 2013). In *Vance,* decided on June 24, 2013, the Supreme Court addressed the issue of who can be considered a "supervisor" under Title VII, which prohibits employers from discriminating and harassing employees based on race, sex, and several other characteristics. Under Title VII, an employer can be held strictly liable for a supervisor's harassment of a subordinate. Thus, an employer's ability to defend itself from a harassment claim can rest on whether the alleged harasser is or is not a supervisor.

In *Vance*, the Supreme Court found that the term "supervisor" encompasses only management-level employees who have the ability to effect "'a significant change in employment status, such as hiring, firing, failing to promote, reassignment with

significantly different responsibilities, or a decision causing a significant change of benefits.'" *Id.* at *17-*18. In so holding, the Court expressly rejected the EEOC's definition of "supervisor" and held that "supervisor" status is equated with the ability to exercise "significant direction over another's daily work." *Id.*

HOW *VANCE* MAY AFFECT OSHA'S INTERPRETATION OF SUPERVISOR

Although the *Vance* decision addressed a different statute than the OSH Act, the Supreme Court's logic seemingly applies to OSHA. Similar to the EEOC in *Vance*, OSHA attempts to make hourly employees supervisors on the mere fact they may direct or assign less senior employees, even if such employee has no authority hire, fire, or discipline the other employees. The Supreme Court, however, affirmatively rejected the EEOC's approach, which raises the question whether the Supreme Court would strike down OSHA's definition of "supervisor." But until more employers continue to challenge OSHA's approach to Federal circuit courts (and potentially the Supreme Court), the question of who is a "supervisor" for OSHA will remain unclear.

IMPLICATIONS OF OSHA'S ATTEMPT TO MAKE HOURLY EMPLOYEES "SUPERVISORS"

Particularly troubling about OSHA's claim that hourly employees can be considered "supervisors" is that it may act differently during the inspection. Under existing case authority, the employer has a right to be present for interviews of management representatives, but not for hourly employee interviews. Thus, during the inspection, OSHA may claim that an employee is hourly to prevent the employer from being present during the interview, but then later claim that the employee was a supervisor based on what (s)he said during that exact same interview.

This conduct by OSHA during its inspection is an example of the difficult quandary into which OSHA can place an employer on deciding how to respond:

- On the one hand, if the "lead" employee is an hourly employee, he would have the right to be voluntarily interviewed by the OSHA inspector in private (although any employee has the right to have another individual of their selection present for the interview), but his knowledge of an alleged hazard could not be imputed to the employer.

- On the other hand, if the "lead" employee is a management employee, his knowledge could be imputed to the employer, but his interview would have to be held in the presence of counsel or another management representative at the employer's election.

Thus, employers must be aware that they cannot rely on an inspector's representation that a particular employee will not be considered as part of management during the interview process and the employer may have to assert its rights or they are waived.

Accordingly, it is recommended that all employers carefully evaluate the degree to which they delegate authority to a shift "lead," "field supervisor," or other hourly employees and consider the following:

- In assigning a shift "lead" who is an hourly employee, ensure that the individual is fully trained to inspect the worksite and identify potentially hazardous conditions and report any such conditions immediately to management. On construction sites, this individual would be the "competent person."

- Consider alternatives to assigning a shift "lead," such as assigning a management point person to direct the method and manner of the work with input from field personnel as the job progresses.

- When assigning a shift "lead" who is an hourly employee, delegate specifically rather than broadly. Instead of giving the "lead" person a general instruction to "get the job done safely," give specific instructions as to the method and manner in which the job is to be done, i.e., specific practices to be followed or equipment to be used to limit the assertion that the employee has general supervisory authority.

- In the event of an OSHA inspection, ensure that the inspector is immediately directed to a management point person instead of the informal shift "lead." If the OSHA inspector remotely infers or somehow states that a shift "lead" is a supervisor, then the employer should insist on having legal counsel and/or another management representative present during any interviews with the "lead." Ask OSHA to commit to its position in writing and if the inspector will not do so, which is likely, then the employer must memorialize in writing what the inspector represented.

- If OSHA considers an hourly employee to be a member of management, legal counsel and/or another management representative have the right to attend the employee's interview. If the inspector refuses to permit legal counsel or other members of management to attend the interview, the employer may refuse to allow the interview to proceed until legal counsel is consulted or the Area Director is called to address the issue.

- If the employer decides to allow the interview to proceed, notify the inspector in writing that the interview is being allowed "under protest," and that the employer will object to the introduction of any evidence obtained during the interview.

If the employer carefully assesses the status and responsibilities of each of its employees prior to an OSHA interview and asserts its rights to be present at the interview, if warranted, the employer can avoid a potential waiver of its rights and the prospect of an unrepresented employee making binding admissions of legal liability during an OSHA interview.