Employer Solutions Law

The Unpreventable Employee Misconduct Defense:

IS IT A UNICORN?

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Introduction

You provide hours of training. You have weekly safety reviews and frequent toolbox talks. You have safety meetings every morning. Still, your employees take short cuts and don't follow your policies and the law. On any given day, DOSH may appear, and you get cited for what your employee knew was wrong. Like a child, your employee gives DOSH a bunch of excuses like they did not know, they forgot, or the worst thing, their supervisor told them it was okay.

Presumably recognizing how incredibly difficult it is for an employer to make sure that their workers are always complying with safety laws, the Legislature in 1999 gave employers a defense to a WISHA citation when there is "unpreventable employee misconduct." As the Legislature explicitly stated in its final Bill Report, "it would be inappropriate to penalize employers who have demonstrable safety programs, in cases of employee misconduct."

Using the Employee Misconduct Defense

To use the Unpreventable Employee Misconduct Defense, RCW 49.17.120(5), an employer must present evidence of:

1. A thorough safety program, including work rules, training, and equipment designed to prevent the violation;
2. Adequate communication of these rules to employees;
3. Steps to discover and correct violations of its safety rules; and
4. Effective enforcement of its safety program as written in practice and not just in theory.

Ever since 1999, DOSH has actively worked to prevent employers from using this defense and, unfortunately, the courts have also neutered its effectiveness. Thus, the unpreventable employee misconduct defense has become a unicorn.

Because employers frequently have the evidence to meet the first three requirements, the erosion of the defense focuses on the fourth element: effective in practice. Presently, DOSH inspector training includes the direct effort to thwart the unpreventable employee misconduct defense. In the paraphrased words of one DOSH supervisor: "if the compliance officer comes to me and says it looks like employee misconduct, I'm going to tell them they're not working hard enough and to go back and get the evidence to prevent that."

Bad Law

Most disheartening are the court and Board decisions that have required employee discipline over other reasonably compelling evidence. "The Board and federal courts have concluded that in order for the enforcement of a safety program to be 'effective,' the misconduct could not have been foreseeable." Wash. Cedar & Supply Co., Inc. v. Dep't of Labor & Ind, 119 Wn. App. 906, 913, review denied, 152 Wash.2d 1003, 101 P.3d 866 (2004). The Board has labeled this type of idiosyncratic and unforeseeable violation an "isolated occurrence." Time and again, the courts have found that a history of employee discipline was required to show a safety program is effective in practice when an employer had a history of prior violations. BD Roofing, Inc. v. Dep't of Labor & Indus., 139 Wn. App. 98, 111, 161 P.3d 387 (2007) (prior violations for similar misconduct were sufficient evidence that the employer's safety program was not effective in practice); Wash. Cedar, supra. (the employer's two prior fall protection violations supported the Board's determination that the employer's program was not effectively enforced); Legacy Roofing, Inc. v. State, L & I, 119 P.3d 366, 129 Wn. App. 356 (2005)(one prior fall protection violation is sufficient evidence that the employee conduct was foreseeable and preventable).

Legal Nonsense

This is legal nonsense. Although foreseeability means one can and must take reasonable steps to prevent something, it does not mean it always can be prevented. Many, many safety violations are predictable: that a roofer won't always tie off, that a machine operator won't always wear their safety goggles or ear plugs, that a worker will forget to put on their high viz vest. Even where an employer has caught, or been cited, for prior violations, it does not follow that future violations are preventable. Surely, the Legislature did not intend for an employer cited for one offence to be unable do anything to protect itself from a second offense. The foreseeability standard is irrational and bad law.

So is the disregard of a stellar safety history. In one instance, an employer underwent twenty three inspections by DOSH over three years, an average of one inspection every 48 days, with no violations found. Still, because that employer did not have voluminous discipline records, the Board and Superior Court rejected the unpreventable employee misconduct defense. What better evidence is there of a safety program effective in practice than three years of inspections with no violations?

DOSH's Position

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FORESEEABLE? PREVENTABLE?

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Document!

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Discipline Must Be Frequently Documented and Appropriate

For now, an employer has little chance of successfully asserting the unpreventable employee misconduct defense explicitly provided by the Legislature unless that employer has significant documentation of employee discipline. Anyone who has experienced a DOSH compliance investigation knows that regardless of what you tell DOSH, if there's no document, it did not happen. Sadly, the Board of Industrial Insurance Appeals almost always takes the same legally dubious position.

So, what's the bottom line: **if you want to have a chance at successfully asserting the unpreventable employee misconduct defense, you must have an extensive history of well-documented disciplinary incidents which include the imposed corrections**. Our strong advice is to "write-up" everything, every time. Instead of a quick and easy verbal warning, you must write up a violation and include the verbal "re-training." If the worker does it again, you write it up and impose discipline: maybe send them home for the day or suspend them for a day. With baseball, we culturally default to a "three strikes, you're out" expectation, but the discipline can depend upon the severity of the hazard. Still, if the hazard truly is death, broken bones or permanent injury, the Department will likely argue a policy that does not terminate a repeat offender is not "effective." Obviously, this can create a combative relationship with your workers. However, keep in mind that you are only correcting conduct that risks their safety (at least as defined by the Department). Moreover, you are the one receiving the citation and paying the fine or legal defense, not the worker**. You want to identify repeat offenders and terminate them before they injure themselves and you end up with a worker's compensation claim.**

Additional Critical Evidence

It's more than a check box.

Additional critical evidence for the unpreventable employment misconduct defense is consistent and random site audits. The third element of the defense requires the employer to prove they are taking steps to discover safety violations and correct them. This requires a regular program of surprise site inspections by the employer. **The inspections must be truly random – they cannot be always on a Friday, or always in the morning.**

The documentation of the surprise inspection cannot simply be a check box form where, if your workers are doing everything correctly, every box is checked, and most inspection forms look identical. The Department and the judge will view these types of forms as unreliable. First, the Department's default position is that, like the caselaw above, **if your inspections don't document at least one issue most of the time, then the inspections are not reliable.** While this is a presumption with no actual evidence, our experience is the judges take the same view.

"…Create the doumentation that provides the possibility of catching the unicorn."

Our Strong Advice

Our strong advice is to always include some narrative in the inspection form which distinguishes it from other inspections. If the inspection confirms your workers are complying with the safety laws, then the narrative can be that the inspector reminded the workers about certain lapses in judgment that may be common, or any other safety reminder. The point is that the site inspection documents must look genuine and not routine.

Summary

Although the Legislature gave employers the reasonable and rational defense of unpreventable employer misconduct, the present approach of the Department, the Board and the courts effectively renders the defense almost unattainable. As with most Department situations, your only chance is to document, document and document.

We Can Help

At Employer Solutions Law we frequently assist our clients in developing the processes to create the documentation that provides the possibility of catching the unicorn that is successfully proving the unpreventable employee misconduct defense. It's a constant battle, but you can improve your chances.

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