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APPEALS COURT SETS OSHA STRAIGHT ON "WILLFUL" VIOLATIONS OF LAW

by
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The U.S. Court of Appeals for the District of Columbia Circuit has just held what should have been obvious all along — that an employer who commits an OSHA violation through negligence has not committed a "willful" violation. *American Wrecking Corp. v. Secretary of Labor*, No. 02-1370 (Dec. 19, 2003). In recent years, the Occupational Safety and Health Administration (OSHA) has alleged that violations were "willful" if the employer "should have known" that his conduct was unlawful. Decisions by the independent Occupational Safety and Health Review Commission (OSHRC or "the Commission") had approved of this fallacious notion. The emphatic language in the D.C. Circuit's decision should now put an end to such prosecutions and decisions.

Background. The Occupational Safety and Health Act (OSH Act) has a staggered penalty structure. For "other than serious" and "serious" violations, the maximum penalty is $7,000. For "repeated" violations, the maximum penalty is $70,000. For "willful" violations, the minimum penalty is $5,000 and the maximum penalty is $70,000.

An employer accused of a "willful" violation faces more than just high penalties. It faces a public relations nightmare, for OSHA will frequently issue a press release, studded with quotes from OSHA officials accusing the employer of having willfully violated OSHA requirements. The allegation can disqualify an employer from being able to bid on public and private contracts. It can also strip the employer of insulation from tort suits by injured employees; the willfulness allegation can be used as evidence that the harm was "intentional" and thus bring the suit within "intentional harm" exceptions to workers' compensation exclusivity. A "willfulness" charge can also raise the possibility of federal criminal prosecution if a fatality occurred.

The Wages of Vagueness: Negligence As Willfulness. With so much riding on the term, one might think that either the OSH Act would define it, or that the case law would prescribe a clear and narrow test for it. Unfortunately, neither is the case. The OSH Act contains no definition of "willful," and the case law sets out widely varying interpretations. For example, one common test is whether the employer had an "intentional disregard of, or plain indifference to, OSHA requirements." *E.g.*, *Reich v. Trinity Indus.*, 16 F.3d 1149 (11th Cir. 1994).

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The chief problem with such tests is their amorphousness: They permit undisciplined accusations of willfulness by OSHA, and provide no clear or predictable yardstick for decision by the Commission. As a result, some Commission decisions found willfulness on grounds that amounted to mere negligence — for example, because the employer "should have known" that it was required to comply with an OSHA standard, or "should have known ... that its policy was incorrect." *Capeway Roofing Systems, Inc.*, 20 BNA OSHC 1331, 1342 (No. 00-1986, 2003) (violation willful because employer "should have known" that exception did not apply); *Atlantic Battery Co.*, 16 BNA OSHC 2131, 2161 (OSHRC 1994) (violation willful because employer "should have known" of incorrect policy). In one case often cited by OSHA attorneys, the Commission held that an employer may negate willfulness by showing that its belief in the legality or safety of the cited condition was "reasonable." *Morrison-Knudsen Co.*, 16 BNA OSHC 1105 (OSHRC 1993). Although the Commission likely was cognizant of the much-stated notion that negligence does not amount to willfulness (*e.g., United States v. Ladish Malting Co.*, 135 F.3d 484, 489 (7th Cir. 1998)), it seemed not to realize that by employing phrases such as "reasonable" and "should have known," it was doing what the case law forbade — finding willfulness on the basis of negligence. Congressional testimony in 2003 had sharply protested this trend in the case law. *See* the testimony of this writer at a hearing entitled "H.R. 1583 — Assessing The Impact On Small Business," before the House Subcommittee on Workforce Protections of the Committee on Education and the Workforce (June 17, 2003), *available at* <http://edworkforce.house.gov/hearings/108th/wp/osha061703/sapper.htm>.

The D.C. Circuit States the Obvious. In *American Wrecking Corp. v. Secretary of Labor*, No. 02-1379 (D.C. Cir., Dec. 19, 2003), the D.C. Circuit dealt what is likely a death blow to this notion. An administrative law judge had found willfulness because a certain unsafe condition was "so obvious" as to render "unreasonable" the employer's belief in its safety. "This reasoning is patently flawed," the court stated. Noting that the OSH Act requires a showing that the employer knew or "should have known" of a violative condition to prove non-willful violations, the court stated that to find willfulness because the employer should have known of hazardousness "would erase the distinction between violations that are willful and those that are not." On this point, it quoted the U.S. Court of Appeals for the Seventh Circuit in *Ladish Malting*, 135 F.3d at 490: "A distinction between serious and willful violations exists only if willfulness means knowledge that the conditions violate the statute or regulations — actual rather than imputed knowledge, for otherwise we are back to negligence."

Counsel faced with an accusation by OSHA that an employer committed a willful violation because it "should have known" or "must have known" that something was hazardous or illegal, or was "unreasonable" in believing that a condition was lawful or safe, should demand that the charge be withdrawn by OSHA or vacated by the administrative law judge. No longer should OSHA accuse employers of, or the Commission find employers guilty of, willful violations by relying on wrongly-decided cases such as *Morrison-Knudsen* or *Capeway*.

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