

PUBLICATION

Eleventh Circuit Declines to Impute Supervisor's Knowledge of Misconduct to the Employer

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On July 24, 2013, the Eleventh Circuit joined several other courts of appeal in declining to allow the Secretary of Labor to lay blame for a supervisor's knowledge of his own misconduct to his employer in establishing a *prima facie* case of liability under OSHA.

The case involved ComTran Group, Inc. (ComTran), a communications utilities company that performs indoor and outdoor utilities work. In 2010, a ComTran foreman working on a utility relocation project dug a six-foot-deep trench with a five-foot-high spoil pile at the edge of the excavation. This resulted in an eleven-foot-high wall of dirt that was not separated from the trench, and was not sloped, benched or otherwise supported, as required by OSHA regulations.

In establishing a *prima facie* case of violation of an OSHA standard, the Secretary of Labor must show: (1) that the regulation applied; (2) that it was violated; (3) that an employee was exposed to the hazard that was created; and (4) that the employer "knowingly violated" the regulation at issue. In establishing its *prima facie* case against ComTran, the Secretary argued that the supervisor's knowledge that his own misconduct was a violation of the Act was imputed to ComTran – essentially relieving the Secretary of her burden to establish the knowledge element of her case. The Review Commission agreed.

In reversing the Commission's decision, the Eleventh Circuit expressly distinguished the instant action from the "ordinary case" where a supervisor's knowledge is generally imputed to the employer. In such "ordinary cases," the supervisor knew or should have known that subordinate employees were engaged in misconduct – not that he himself had committed malfeasance. The Court found that this was an important factual distinction, as to impute a supervisor's knowledge of his own misconduct to his employer, when such misconduct was not foreseeable, would be fundamentally unfair. Accordingly, the Court held:

[T]he Secretary does not carry her burden and establish a prima facie case with respect to employer knowledge merely by demonstrating that a supervisor engaged in misconduct. A supervisor's "rogue conduct" cannot be imputed to the employer in that situation. Rather, employer knowledge must be established, not vicariously through the violator's knowledge, but by either the employer's actual knowledge, or by its constructive knowledge based on the fact that the employer could, under the circumstances of the case, foresee the unsafe conduct of the supervisor [that is, with evidence of lax safety standards]. Without such evidence, a supervisor's misconduct may be viewed as an isolated incident of unforeseeable or idiosyncratic behavior, which is insufficient, by itself, to impose liability under the Act.

With this ruling in mind, employers should be careful not to automatically accept liability for violations of OSHA where a supervisor is involved, and consider arguing that the supervisor's misconduct was not reasonably foreseeable to the organization.