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Confusion Reigns Supreme: The United States Supreme Court's Refusal to Grant Certiorari in *L.R. Willson and Sons, Inc. v. OSHRC* Perpetuates the Split among Circuits in OSHA Employee Misconduct Cases

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CONFUSION REIGNS SUPREME: THE UNITED STATES SUPREME COURT’S REFUSAL TO GRANT CERTIORARI IN *L. R. WILLSON AND SONS, INC. V. OSHRC* PERPETUATES THE SPLIT AMONG CIRCUITS IN OSHA EMPLOYEE MISCONDUCT CASES

I.	INTRODUCTION	476
II.	THE OCCUPATIONAL SAFETY AND HEALTH ACT	477
	A. <i>History</i>	477
	B. <i>The Function of the Act</i>	478
	C. <i>Types of Inspections</i>	479
	1. Imminent Danger Inspections	479
	2. Catastrophes and Fatal Accidents	480
	3. Employee Complaints	480
	4. Programmed High-Hazard Inspections	480
	D. <i>Types of OSHA Citations</i>	481
	1. Willful Violations	481
	2. Serious Violations.....	481
	3. Violations Determined Not Serious	482
	4. Repeated Violations	482
	5. Failure to Correct Prior Violation	482
	E. <i>Employer Defenses to Citations</i>	482
	1. Greater Hazard	483
	2. Infeasibility	484
	3. Employee Misconduct.....	484
III.	TREATMENT OF THE EMPLOYEE MISCONDUCT DEFENSE BY THE FEDERAL APPELLATE COURTS	485
	A. <i>Majority</i>	485
	B. <i>Minority</i>	486
	C. <i>L.R. Willson and Sons, Inc. v. OSHRC</i>	487
	1. Procedural History and Background	488
	2. The Fourth Circuit’s Decision.....	491
IV.	THE IMPLICATIONS OF <i>L.R. WILLSON AND SONS</i>	492
V.	CONCLUSION	494

I. INTRODUCTION

Despite the increased emphasis upon safety and health programs in the workplace, employees sometimes engage in behavior that violates the Occupational Safety and Health Act of 1970 ("The Act").¹ According to the Occupational Safety and Health Administration (OSHA),² when an employee violates an employer's safety rule that is designed to implement a government requirement, the employer is guilty of violating the law.³ Early in the history of the Act, the Occupational Safety and Health Review Commission ("OSHRC"), along with the courts, recognized that employers cannot be required to guarantee the safe performance of their employees.⁴ Accordingly, employers can avoid liability for employee misconduct under the Act by showing that the violative behavior was "unpreventable" or "unforeseeable."⁵ A majority of federal appeals courts have held that unforeseeable employee misconduct is an affirmative defense that an employer must plead and prove.⁶

Recently, in *L.R. Willson and Sons, Inc. v. OSHRC*,⁷ the Fourth Circuit Court of Appeals re-affirmed its minority position that, rather than being an affirmative defense, the Secretary of Labor ("the Secretary") has the burden of proving that the employee's misconduct was preventable.⁸ The Secretary petitioned the United States Supreme Court to review the Fourth Circuit's decision. On No-

¹ 29 U.S.C. §§ 651-678 (1994 & Supp. I 1998).

² The Occupational Safety and Health Administration was created under the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (1994 & Supp. I 1998).

³ See U.S. DEPARTMENT OF LABOR, ALL ABOUT OSHA 2 (1994).

⁴ Stephen C. Yohay, Should Past Discipline Be Required To Show Employee Misconduct? OCCUPATIONAL HAZARDS, Mar. 1, 1996, available in 1996 WL 9953346.

⁵ See *National Realty and Contr. Co., Inc. v. OSHRC*, 489 F.2d 1257 (D.C. Cir. 1973).

Hazardous conduct is not preventable if it is so idiosyncratic and implausible in motive or means that conscientious experts, familiar with the industry, would not take it into account in prescribing a safety program. Nor is misconduct preventable if its elimination would require methods of hiring, training, monitoring, or sanctioning workers which are either so untested or so expensive that safety experts would substantially concur in thinking the methods infeasible.

Id. at 1266-67 & n.37.

⁶ Employee Misconduct: DOL Seeks Court Ruling on Burden of Proof For Employee Misconduct, OSHD (BNA)(August 17, 1998) [hereinafter Employee Misconduct].

⁷ 134 F.3d 1235 (4th Cir. 1998), cert. denied sub nom. *Herman v. L.R. Willson & Sons, Inc.*, 119 S. Ct. 404 (1998).

⁸ See *Ocean Electric Corp. v. Secretary of Labor*, 594 F.2d 396 (4th Cir. 1979). See also *Safety and Health: Fourth Circuit Finds No Privacy Violation In OSHA Inspector's Videotaping of Work Site*, 22 DLR (BNA) A-4 (February 3, 1998).

vember 2, 1998, this petition was denied by the Supreme Court leaving unresolved a split among the circuits regarding the issue of who has the burden of proof in OSHA enforcement proceedings.⁹

The purpose of this note is to examine the confusing split among the circuit courts on the issue of who has the burden of proof in OSHA enforcement proceedings. First, the note provides a background of OSHA and how it functions. Second, it discusses an employer's defenses to an OSHA citation. Third, the note addresses the treatment of the employee misconduct defense by the Federal Appellate Courts. Fourth, this note considers the implications of *L.R. Willson and Sons*.¹⁰

II. THE OCCUPATIONAL SAFETY AND HEALTH ACT

A. History

Although historic attempts have been made to improve workplace safety and health, it was not until 1970 that a uniform and comprehensive provision was enacted.¹¹ In 1936, Congress enacted the Walsh-Healey Public Contracts Act,¹² which limited working hours, child and convict labor, and set mild standards for working conditions in factories.¹³ The Walsh-Healey Act required that contracts entered into by any agency of the United States for the manufacture or furnishing of materials in any amount exceeding \$10,000 must contain a stipulation that the working conditions of the contractor's employees were not unsanitary, hazardous, or dangerous to health and safety.¹⁴ The Walsh-Healey Act, however, had limited coverage and failed to provide and enforce strict industrial health and safety standards.¹⁵

By 1970, job safety and health became a serious concern because the number of employment related accidents and illnesses were exceedingly high.¹⁶ In response, a bipartisan Congress passed the Occupational Safety and Health Act of 1970.¹⁷ The original intent of Congress was to "attack the problem of workplace safety by fostering a cooperative effort among employers, the government, and

⁹ Herman v. L. R. Willson and Sons, Inc., 119 S. Ct. 404 (1998).

¹⁰ 134 F.3d 1235 (4th Cir. 1998).

¹¹ MARK A. ROTHSTEIN, OCCUPATIONAL SAFETY AND HEALTH LAW § 3 (4th ed. 1998).

¹² 41 U.S.C. §§ 35-40 (1936).

¹³ *Id.*

¹⁴ ROTHSTEIN, *supra* note 11, § 3.

¹⁵ *Id.*

¹⁶ See Marjorie Gross, OSHA: Much Ado About Something, 3 LOY. U. CHI. L.J. 247, 249 (1972).

¹⁷ 29 U.S.C. § 651-678 (1994 & Supp. I 1998).

labor (worker and work unions).”¹⁸ The Act was intended to provide a means of identifying causes of work-related illness and injury, and also “to achieve compliance through provision for inspection and penalties.”¹⁹ Since the adoption of the Act, however, this vision of cooperation “has been replaced by litigation over interpretation of standards and penalty assessments.”²⁰

B. *The Function of the Act*

The Act covers all non-public employers in the United States “engaged in a business affecting commerce.”²¹ The Act authorizes the Secretary to promulgate specific occupational safety and health standards with which all employers covered by the Act must comply.²² The law also obligates employers to provide each employee with a workplace free from recognized hazards that are likely to cause death or serious physical injury.²³ These provisions are often referred to as the specific and general duty clauses. Although the Act states that an employee must comply with all occupational safety and health rules and regulations,²⁴ there is no penalty for the failure to comply with this duty.²⁵

To enforce employer compliance with the Act, OSHA compliance officers conduct unannounced inspections to determine if a safe workplace is being provided to employees.²⁶ The consequence of a citation can range from a reprimand to a penalty of up to \$70,000 or possibly even imprisonment.²⁷ Once cited, an employer has the option of contesting the citation or assessed penalty by filing a Notice of Contest within fifteen working days from receipt of the citation.²⁸ Thereaf-

¹⁸ Joseph R. Demato, Responding to an EEOC Charge or OSHA Investigation, in AVOIDING WORKPLACE LITIGATION, 1997, at 421, 461 (PLI Litig. & Admin. Practice Course Handbook Series No. H4-5261, 1997).

¹⁹ *Id.*

²⁰ *Id.*

²¹ 29 U.S.C. § 652(5) (1994 & Supp. I 1998). See also Robert E. Rader et al, *How to Handle an OSHA Case: An Employer's Rights and Options*, 33 BAYLOR L. REV. 493, 494 (1981). “Employers covered by the Act include but are not limited to workplaces, offices, factories, yards, mills, and construction sites.” Demato, *supra* note 18, at 461.

²² 29 U.S.C. § 654 (a)(2) (1994), 29 U.S.C. § 655(b) (1994 & Supp. I 1998).

²³ 29 U.S.C. § 654 (a)(1) (1994 & Supp. I 1998).

²⁴ 29 U.S.C. § 654 (b) (1994 & Supp. I 1998). “Each employee shall comply with occupational safety and health standards and all rules, regulations, and orders issued pursuant to this chapter which are applicable to his own actions and conduct.” *Id.*

²⁵ See *Atlantic & Gulf Stevedores, Inc. v. OSHRC*, 534 F.2d 541, 553 (3rd Cir. 1976).

²⁶ See U.S. DEPARTMENT OF LABOR, *supra* note 3, at 16.

²⁷ 29 U.S.C. § 666(a)-(e) (1994 & Supp. I 1998).

²⁸ 29 U.S.C. § 659(a) (1994 & Supp. I 1998).

ter, OSHRC must afford the employer an opportunity for a formal hearing by an appointed Administrative Law Judge ("ALJ").²⁹ A party aggrieved by the decision of the ALJ may petition OSHRC for a discretionary review within ten days.³⁰ In addition, any party that is adversely affected by a final order of OSHRC has sixty days to appeal to a federal court of appeals.³¹

C. Types of Inspections

Compliance inspections are conducted without advance notice.³² If an employer refuses to admit an OSHA compliance officer, or if an employer attempts to interfere with the inspection, the Act permits appropriate legal action.³³ Because not all workplaces covered by the Act can be immediately inspected, OSHA has established a system of inspection priorities.³⁴

1. Imminent Danger Inspections

The first priority of OSHA is to inspect workplaces that expose employees to an imminent danger. An imminent danger is any condition where there is reasonable certainty that a danger exists that can be expected to cause death or serious physical harm³⁵ immediately, or before the danger can be eliminated through normal enforcement procedures.³⁶ If an imminent danger is known to exist at a work site, the Secretary must immediately conduct an inspection.³⁷ In addition, the Secretary has the authority to petition the United States District Court for an order re-

²⁹ 29 U.S.C. § 659(c) (1994 & Supp. I 1998).

³⁰ Rules of Procedure of the Occupational Safety and Health Review Commission, 29 C.F.R. § 2200. *et. seq.* (1998).

³¹ 29 U.S.C. § 660 (1994 & Supp. I 1998). A petition for discretionary review is a prerequisite to an appeal. *Id.*

³² 29 U.S.C. § 657 (1994 & Supp. I 1998).

³³ 29 U.S.C. § 666 (1994 & Supp. I 1998).

³⁴ See U.S. DEPARTMENT OF LABOR, *supra* note 3, at 16.

³⁵ *Id.* Serious physical harm is any type of harm that could cause permanent or prolonged damage to the body or which, while not damaging the body on a prolonged basis, could cause such temporary disability as to require in-patient hospital treatment. OSHA considers that "permanent or prolonged damage" has occurred when, for example, a part of the body is crushed or severed; an arm, leg, or finger is amputated; or sight in one or both eyes is lost. For a health hazard to be considered imminent danger, there must be a reasonable expectation (1) that toxic substances such as dangerous fumes, dusts or gases are present, and (2) that exposure to them will cause immediate and irreversible harm to such a degree as to shorten life or cause reduction in physical or mental efficiency, even though the resulting harm is not immediately apparent. See U.S. DEPARTMENT OF LABOR, *supra* note 3, at 17-18.

³⁶ 29 U.S.C. § 662(a) (1994 & Supp. I 1998).

³⁷ See Rader, *supra* note 21, at 494 (citing OSHA Field Operations Manual, Chapter IX).

straining such conditions or practices when necessary.³⁸

2. Catastrophes and Fatal Accidents

Second priority is given to the investigation of fatalities and catastrophes.³⁹ Employers are required to orally report any on-the-job accident that results in the death of one employee or the hospitalization of three or more employees.⁴⁰ Such situations must be reported to OSHA by the employer within eight hours.⁴¹ Investigations are made to determine if OSHA standards were violated and to avoid the recurrence of similar accidents.⁴² OSHA also will inspect accidents which receive significant publicity, even in the absence of injuries.⁴³

3. Employee Complaints

Next, the Act gives each employee the right to request an OSHA inspection when the employee feels that he is in imminent danger from a hazard or when the employee feels that there is a violation of an OSHA standard that threatens physical harm.⁴⁴ An employee may file a formal written complaint which specifically describes the nature of the alleged violation and the location on the employer's premises where such condition exists.⁴⁵ Other types of complaints are considered non-formal.

4. Programmed High-Hazard Inspections

Finally, OSHA provides programmed or planned inspections which are aimed at specific high-hazard industries, occupations, or health substances.⁴⁶ Industries are selected for inspection on the basis of factors such as death, injury and illness incident rates, and employee exposure to toxic substances.⁴⁷ States with their own occupational safety and health programs may use a different system to identify

³⁸ See *id.*

³⁹ 29 C.F.R. § 1904.8 (1998).

⁴⁰ *Id.*

⁴¹ See U.S. DEPARTMENT OF LABOR, *supra* note 3, at 19.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ 29 U.S.C. § 657(f)(1) (1994 & Supp. I 1998).

⁴⁵ 29 C.F.R. § 1903.11 (1998).

⁴⁶ See U.S. DEPARTMENT OF LABOR, *supra* note 3, at 19.

⁴⁷ *Id.*

high-hazard industries for inspection.⁴⁸

D. *Types of OSHA Citations*

After the OSHA compliance officer reports his findings, the area director determines what, if any, citations will be issued and what penalties will be assessed. The employer will receive citations and notices of assessed penalties by certified mail.⁴⁹ For three days, or until the violation is abated,⁵⁰ the employer must post a copy of each citation at or near the place where a violation occurred.

1. Willful Violations

A citation for a willful violation is often issued by OSHA when an employer is considered to have intentionally and knowingly committed a violation.⁵¹ Penalties of up to \$70,000 may be assessed for each willful violation, with a minimum penalty of \$5,000 for each violation.⁵² An assessed penalty for a willful violation may be adjusted downward, depending on the size of the business and its history of previous violations.⁵³ If an employer is convicted of a willful violation of a standard that has resulted in the death of an employee, the offense is punishable by a court-imposed fine or by imprisonment for up to six months, or both.⁵⁴

2. Serious Violations

A serious violation citation will be issued by OSHA where there is substantial probability that death or serious physical harm could result, and that the employer knew, or should have known, of the hazard.⁵⁵ A mandatory penalty of up to \$7,000 for each violation is assessed.⁵⁶ A penalty for a serious violation may be adjusted downward, based upon the employers good faith, history of previous vio-

⁴⁸ There are currently 25 approved state plans. These states include: Arkansas, Arizona, California, Connecticut, Hawaii, Indiana, Iowa, Kentucky, Maryland, Michigan, Minnesota, Nevada, New Mexico, New York, North Carolina, Oregon, Puerto Rico, South Carolina, Tennessee, Utah, Vermont, Virgin Islands, Virginia, Washington, and Wyoming. See U.S. DEPARTMENT OF LABOR, *supra* note 3, at 44.

⁴⁹ See U.S. DEPARTMENT OF LABOR, *supra* note 3, at 19.

⁵⁰ *Id.* at 24.

⁵¹ 29 U.S.C. § 666(a) & (c) (1994 & Supp. I 1998).

⁵² See *id.*

⁵³ See U.S. DEPARTMENT OF LABOR, *supra* note 3, at 25.

⁵⁴ See *id.*

⁵⁵ 29 U.S.C. § 666(k) (1994 & Supp. I 1998).

⁵⁶ 29 U.S.C. § 666(b) (1994 & Supp. I 1998).

lations, the gravity of the alleged violation, and the size of the business.⁵⁷

3. Violations Determined Not Serious

OSHA may cite an employer for a violation that has a direct relationship to workplace safety and health, but will most likely not cause death or serious physical harm.⁵⁸ An assessed penalty of up to \$7,000 for each violation is discretionary.⁵⁹ A penalty for an other than serious violation may be adjusted downward by as much as 80 percent.⁶⁰

4. Repeated Violations

An employer who repeatedly violates any standard, regulation, rule, or order where, upon re-inspection, a substantially similar violation is found, may be subject to a citation for a repeated violation and up to a \$70,000 penalty per violation.⁶¹ To be the basis of a repeated citation, the original citation must be final; a citation under contest may not serve as the basis for a subsequent repeated citation.⁶²

5. Failure to Correct Prior Violation

Finally, if OSHA finds that an employer has failed to correct a prior violation a civil penalty of up to \$7,000 for each day the violation continues beyond the prescribed abatement date may be assessed.⁶³

E. Employer Defenses to Citations

In all OSHA proceedings which are initiated by the filing of a notice of contest, the Secretary has the burden of proving that a violation exists.⁶⁴ If a cita-

⁵⁷ 29 U.S.C. § 666(j) (1994 & Supp. I 1998). In determining gravity, consideration is given to the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the degree of probability that any injury would occur. *J.A. Jones Const. Co.*, 15 BNA OSHC 2201, 2214, 1991-93 CCH OSHD P 29,964, p. 41,033 (No. 87-2059, 1993); *Caterpillar, Inc.*, 15 BNA OSHC 2153, 2178, 1993 CCH OSHD P 29,962, p. 41,011 (No. 87-922, 1993).

⁵⁸ 29 U.S.C. § 666(c) (1994 & Supp. I 1998).

⁵⁹ See U.S. DEPARTMENT OF LABOR, *supra* note 3, at 25.

⁶⁰ See *id.*

⁶¹ 29 U.S.C. § 666(a) (1994 & Supp. I 1998).

⁶² See U.S. DEPARTMENT OF LABOR, *supra* note 3, at 25.

⁶³ 29 U.S.C. § 666(d) (1994 & Supp. I 1998).

⁶⁴ See *Brennan v. OSHRC*, 511 F.2d 1139, 1142 (9th Cir. 1975).

tion is for a violation of the general duty clause of the Act,⁶⁵ the Secretary's prima facie case consists of proof that

(1) the employer failed to render his workplace free of a hazard; (2) the hazard is one recognized by the employer or the industry of which the employer is a part; (3) the hazard is likely to cause death or serious physical harm; and (4) the employer's employees were exposed or had access to the hazard.⁶⁶

If the citation is for a violation of the special duty clause of the Act,⁶⁷ the Secretary's prima facie case consists of proof that "(1) a specific standard applies to the factual situation; (2) there was a failure to comply with the specific standard; and (3) employees of the cited employer had access to the hazard."⁶⁸

If and when the Secretary has made a prima facie case of a violation, the employer may still prevail by establishing an affirmative defense. An employer must raise all affirmative defenses at the earliest time possible, and all objections and defenses must be raised no later than the OSHRC hearing before an appointed ALJ.⁶⁹ The failure to timely raise an affirmative defense has been deemed a waiver and precludes the issue from being raised later by the party, by the ALJ, or by OSHRC upon review.⁷⁰

The OSHRC affirmative defense doctrine applies to a number of defenses available to employers involved in a citation proceeding. Affirmative defenses commonly used include, but are not limited to, greater hazard, infeasibility, and unpreventable employee misconduct.⁷¹

1. Greater Hazard

To establish the greater hazard affirmative defense, the employer must prove that (1) the hazards caused by complying with the standard are greater than those encountered by not complying; (2) alternative means of protecting employees were either used or were not available; and (3) application for a variance under the Act would be inappropriate.⁷² Before an employer elects to ignore the requirements

⁶⁵ 29 U.S.C. § 654(a)(1) (1994 & Supp. I 1998).

⁶⁶ Richard P. Shafer, Annotation, *Employee Misconduct as Defense to Citation*, 59 A.L.R. FED. 395 § 2(b) (1982 & Supp. 1997).

⁶⁷ 29 U.S.C. § 654(a)(2) (1994 & Supp. I 1998).

⁶⁸ See Shafer, *supra* note 66, § 2(b).

⁶⁹ 29 U.S.C. § 660(a) (1994 & Supp. I 1998).

⁷⁰ See *id.*

⁷¹ See Shafer, *supra* note 66, § 2(b).

⁷² 29 U.S.C. § 655(d) (1994 & Supp. I 1998).

of a standard because it believes that compliance creates a greater hazard, the employer must explore all possible alternatives and is not limited to those methods of protection listed in the standard.⁷³

2. Infeasibility

In order to prove the defense of infeasibility, a respondent must demonstrate that (1) literal compliance with the requirements of the standard was infeasible, under the circumstances, in that (a) its implementation would have been technologically or economically infeasible, or (b) necessary work operations would have been technologically or economically infeasible after its implementation, and (2) either an alternative method of protection was used or no alternative method of protection was feasible.⁷⁴ When an employer seeks to avoid liability for its non-compliance with a standard on the ground that compliance is infeasible, it must show that it explored all possible alternative means of protecting its employees and that none of them was available, just as it must do to prove the greater hazard affirmative defense.⁷⁵

3. Employee Misconduct

To prove the unpreventable employee misconduct defense, an employer must establish that (1) it had established work rules to prevent the violation; (2) the rules were adequately communicated to employees; (3) it took steps to discover violations; and (4) it effectively enforced rules when infractions were discovered.⁷⁶ Regardless of the extensive experience of an employee with respect to an assigned task, in the absence of any effort to evaluate compliance with pertinent safety rules, an employee's subsequent misconduct will not be classified as unpreventable.⁷⁷

OSHC precedent essentially has extended the unpreventable employee misconduct defense to supervisors, holding that when the alleged misconduct is that of a supervisory employee, the employer must establish that it took all feasible steps to prevent the accident, including adequate instruction and supervision of its supervisory employee.⁷⁸ A supervisor's involvement in the misconduct is strong evidence that the employer's safety program was lax.⁷⁹ Moreover, where a supervi-

⁷³ Secretary of Labor v. State Sheet Metal Co., 16 BNA OSHC 1155, 1159 (No. 90-2894, 1993).

⁷⁴ Secretary of Labor v. Gregory & Cook, Inc., 17 BNA OSHC 1189, 1190 (No. 92-1891, 1995).

⁷⁵ *State Sheet Metal Co.*, 16 BNA OSHC at 1161.

⁷⁶ Secretary of Labor v. Nooter Construction Co., 16 BNA 1572, 1578 (1994).

⁷⁷ Secretary of Labor v. American Sterilizer Co., No. 91-2494, 1997 WL 694094 (Nov. 5, 1997).

⁷⁸ Secretary of Labor v. L.E. Meyers Co., 16 BNA OSHC 1037 (No. 90-945, 1993); Secretary of Labor v. Daniel Construction Company, 10 BNA OSHC 1549 (No. 16265, 1982).

⁷⁹ *L.E. Meyers Co.*, 16 BNA OSHC 1037; *Daniel Construction Company*, 10 BNA OSHC 1549.

sory employee is involved, the proof of unpreventable employee misconduct is more rigorous and the defense is more difficult to establish since it is considered the supervisor's duty to protect the safety of employees under his supervision.⁸⁰

III. TREATMENT OF THE EMPLOYEE MISCONDUCT DEFENSE BY THE FEDERAL APPELLATE COURTS

Unpreventable employee misconduct is one of the most frequently litigated defenses to OSHA citations. The purpose of the defense is to establish that the employer did not know, and could not have known, of the violation, for he had done everything reasonably possible to prevent it. Currently, a split of authority exists among circuits regarding the issue of who has the burden of proof in OSHA enforcement proceedings.

A. *Majority*

When there is a violation of the general duty clause and an employer asserts the defense of unpreventable employee misconduct, the burden of proof is on the Secretary of Labor.⁸¹ Because of the broad scope of the general duty clause, the Secretary has broad discretion in selecting defendants and in proposing penalties.⁸² In some circuits, when the Secretary has made out a *prima facie* case of violation of the special duty clause, an employer may assert the affirmative defense of unpreventable or unforeseeable employee misconduct.⁸³ The unpreventable or unforeseeable employee misconduct affirmative defense to an alleged violation of the special duty clause requires an employer to demonstrate that it (1) established a work rule to prevent violative behavior; (2) adequately communicated the rule to its employees; (3) took steps to discover noncompliance; and (4) effectively enforced safety rules when violations were discovered.⁸⁴ Another group of federal circuits place the burden on the employer to establish a defense that it has established and enforced adequate safety rules, without imposing a *prima facie* burden on the Secretary other than showing that a violation occurred.⁸⁵

⁸⁰ *L.E. Meyers Co.*, 16 BNA OSHC 1037; *Daniel Construction Company*, 10 BNA OSHC 1549.

⁸¹ *See National Realty and Construction Co., Inc. v. OSHRC*, 489 F.2d 1257, 1263 (D.C. Cir. 1973).

⁸² *See id.* at 1263.

⁸³ *See D.A. Collins Construction Co., Inc., v. Secretary of Labor*, 117 F.3d 691, 695 (2nd Cir. 1997); *Daniel International Corp. v. OSHRC*, 683 F.2d 361, 363 (11th Cir.1982).

⁸⁴ *See Brock v. L.E. Myers Co., High Voltage Div.*, 818 F.2d 1270, 1277 (6th Cir.1987), *cert. denied*, 484 U.S. 989 (1987); *Danco Construction Co. v. OSHRC*, 586 F.2d 1243, 1246 (8th Cir.1978).

⁸⁵ *See H.B. Zachry Co. v. OSHRC*, 638 F.2d 812, 818-19 (5th Cir. Unit A Mar. 1981); *General Dynamics Corp. v. OSHRC*, 599 F.2d 453, 458 (1st Cir. 1979).

B. *Minority*

The Third, Fourth, and Tenth Circuits require the Secretary to establish, as part of his *prima facie* case, that the violation was not the result of unforeseeable employee misconduct.⁸⁶ In *Ocean Electric Corp. v. Secretary of Labor*,⁸⁷ the Fourth Circuit held that the Secretary has the burden to show an employee's act was not idiosyncratic and unforeseeable, rejecting the Commission's position that unpreventability is an affirmative defense to be established by the employer.⁸⁸ In cases where the Secretary proves that a company supervisor had knowledge of, or participated in, conduct violating the Act, the Secretary may not impose upon the employer the risk of non-persuasion in a case where the inference of employer knowledge is raised only by proof of a supervisor's misconduct.⁸⁹ The participation of an employer's supervisory personnel may be evidence that an employer could have foreseen and prevented a violation through the exercise of reasonable diligence, but it will not end the inquiry into foreseeability. The Third and Tenth Circuits have held that the Secretary must disprove "unpreventable conduct" in the special situation where the alleged violative conduct is that of a supervisor.⁹⁰ When the general rule that a supervisor's knowledge is imputed to the employer is applied, it is easier for the Secretary to prove the knowledge requirement. These decisions are based upon the idea that it is unfair to require that the employer prove unforeseeability under such circumstances.⁹¹

In *Capital Electric Line Builders of Kansas, Inc. v. Marshall*,⁹² the Tenth Circuit Court of Appeals held that the Secretary must shoulder the burden of proving that a violation of OSHA clearance regulations by electric line workers was preventable, even though a supervisor had participated in the violation.⁹³ The burden could be discharged "by showing that the violation was foreseeable because of inadequacies in safety precautions, training of employees, or supervision."⁹⁴

⁸⁶ See *Pennsylvania Power & Light Co. v. OSHRC*, 737 F.2d 350, 357 (3d Cir. 1984); *Capital Elec. Line Builders of Kansas, Inc. v. Marshall*, 678 F.2d 128, 130 (10th Cir. 1982); *Ocean Elec. Corp. v. Secretary of Labor*, 594 F.2d 396, 401 (4th Cir. 1979).

⁸⁷ 594 F.2d 396 (4th Cir. 1979).

⁸⁸ See *id.* at 401-02. But cf. *Forging Indus. Ass'n v. Secretary of Labor*, 773 F.2d 1436, 1450 (4th Cir. 1985) (referring to "unforeseeable employee misconduct" as a "defense" available to the employer under the Act).

⁸⁹ See *Mountain States Tel. & Tel. Co. v. OSHRC*, 623 F.2d 155, 158 (10th Cir. 1980); see also *Ocean Elec. Corp.*, 594 F.2d at 401.

⁹⁰ See *Pennsylvania Power*, 737 F.2d at 358; *Mountain States*, 623 F.2d at 158.

⁹¹ See *Pennsylvania Power*, 737 F.2d at 357-58; *Mountain States*, 623 F.2d at 158.

⁹² 678 F.2d 128 (10th Cir. 1982).

⁹³ See *id.* at 129.

⁹⁴ *Id.* at 130.

Again, in *Ocean Electric Corp. v. Secretary of Labor*,⁹⁵ the Fourth Circuit also held that the Secretary of Labor had the burden of proof to show foreseeability and preventability.⁹⁶ In a proceeding to review a determination that the petitioner had committed a serious violation of an OSHA regulation by failing to provide a barricade or barrier between its employees and energized electric bus-bars and where it was stipulated between parties that the petitioner's foreman accidentally left a door in front of the bus-bars open purely due to human error, the court found that the Secretary failed to show that the foreman's action was reasonably foreseeable and not an isolated incident of unforeseeable or idiosyncratic behavior.⁹⁷

C. *L.R. Willson and Sons, Inc. v. OSHRC*⁹⁸

L.R. Willson and Sons, Inc. (Willson), contested a citation issued by the Secretary on May 12, 1994.⁹⁹ The citation resulted from an inspection conducted by OSHA compliance officer Ron Anderson on April 29, 1994.¹⁰⁰ The citation alleged that Willson committed a willful violation of 29 C.F.R. section 1926.750(b)(1)(ii),¹⁰¹ or, in the alternative, of 29 C.F.R. section 1926.105(a),¹⁰² by failing to require two of its employees to use fall protection while they were working approximately 80 feet above the ground.¹⁰³ OSHRC affirmed the citation by the Secretary and Willson appealed to the United States Court of Appeals for the

⁹⁵ 594 F.2d 396 (4th Cir. 1979).

⁹⁶ See *id.* at 403.

⁹⁷ See *id.*

⁹⁸ 134 F.3d 1235 (4th Cir. 1998).

⁹⁹ See *L.R. Willson and Sons, Inc.*, O.S.H.R.C. No. 94-1546, 1995 WL 389291, at *1 (July 3, 1995).

¹⁰⁰ See *id.*

¹⁰¹ This regulation states, in pertinent part: "On buildings or structures not adaptable to temporary floors, and where scaffolds are not used, safety nets shall be installed and maintained whenever the potential fall distance exceeds two stories or 25 feet." 29 C.F.R. § 1926.750(b)(1)(ii) (1998).

¹⁰² This regulation states: "Safety nets shall be provided when workplaces are more than 25 feet above the ground or water surface, or other surfaces where the use of ladders, scaffolds, catch platforms, temporary floors, safety lines, or safety belts is impractical." 29 C.F.R. § 1926.105(a) (1998). The applicability of section 1926.750 and section 1926.105(a) to fall hazards during steel erection has been extensively litigated before the Commission and the courts of appeals. The position taken by the Commission, which is in line with that of the courts of appeals in four different circuits, is that section 1926.750 applies to falls to the interior of a structure during steel erection, and that section 1926.105(a) applies to falls to the exterior of a structure during steel erection. See *Brock v. Williams Enter. of Ga.*, 832 F.2d 567, 569 (11th Cir. 1987); *Brock v. L.R. Willson and Sons, Inc.*, 773 F.2d 1377, 1379 (D.C. Cir. 1985); *Donovan v. Adams Steel Erection, Inc.*, 766 F.2d 804, 806 (3d Cir. 1985); *Donovan v. Daniel Marr & Son Co.*, 763 F.2d 477, 483 (1st Cir. 1985).

¹⁰³ See *Willson*, 1995 WL 389291, at *1.

Fourth Circuit.¹⁰⁴ The Fourth Circuit held that OSHRC incorrectly placed the burden upon Willson of showing that the employees' conduct was unforeseeable or unpreventable.¹⁰⁵

1. Procedural History and Background

Willson operates a steel erection business which is headquartered in Gambrills, Maryland.¹⁰⁶ In 1994, Willson was working as a subcontractor on the renovation of the Orange County Civic Center ("the Center") in Orlando, Florida.¹⁰⁷ The project covered approximately 3,000,000 square feet, and constituted one of the largest such projects in the Southeast.¹⁰⁸ The general contractor on the project was C.R.S.S./Kelsey/Hardin ("CKH").¹⁰⁹ CKH had contracted with Addison Steel, who acted as the steel fabricator and supplier on the project.¹¹⁰ Addison Steel subcontracted the steel erection work to Willson.¹¹¹

In February 1994, Ron Anderson ("Anderson"), in response to a complaint, conducted a comprehensive inspection of the Center.¹¹² As a result of the inspection, Willson was cited for, among other things, violating section 1926.750(b)(2)(i).¹¹³ Anderson had observed a Willson ironworker working approximately thirty feet above the ground without using fall protection.¹¹⁴ During an informal conference regarding the citation, Willson produced three written warnings that it had issued to employees as evidence that Willson previously disciplined employees for safety infractions.¹¹⁵ This documentation convinced the Secretary that the fall protection violation was the result of unpreventable employee miscon-

¹⁰⁴ See *L.R. Willson and Sons, Inc. v. OSHRC*, 134 F.3d 1235 (4th Cir. 1998).

¹⁰⁵ See *id.* at 1240-41.

¹⁰⁶ See *Willson*, 1995 WL 389291, at *1.

¹⁰⁷ See *id.*

¹⁰⁸ See *id.*

¹⁰⁹ See *id.*

¹¹⁰ See *id.*

¹¹¹ See *Willson*, 1995 WL 389291, at *1.

¹¹² See *id.*

¹¹³ See *id.* The regulation states in part that "[w]here skeleton steel erection is being done, a tightly planked and substantial floor shall be maintained within two stories or 30 feet, whichever is less, below and directly under that portion of each tier of beams on which any work is being performed." 29 C.F.R. § 1926.750(b)(2)(i) (1998).

¹¹⁴ See *Willson*, 1995 WL 389291, at *1.

¹¹⁵ See *id.*

duct.¹¹⁶ Within the terms of an overall settlement, the Secretary withdrew the item alleging the section 1926.750(b)(2)(i) violation.¹¹⁷

On April 29, 1994, Joseph A. Dear ("Dear"), then Assistant Secretary of Labor for the Occupational Safety and Health Administration, was staying at a hotel across the street from the Civic Center.¹¹⁸ From his hotel room, Dear observed individuals working without fall protection at a height of approximately eighty feet.¹¹⁹ A call was placed to the local OSHA compliance officer and a compliance officer was sent to investigate the situation.¹²⁰

Before going to the worksite, the compliance officer went to the hotel, where he obtained permission to go to the hotel's roof accompanied by a hotel security officer.¹²¹ For approximately fifty minutes, using a video camera with a 16-power zoom lens, the compliance officer videotaped two individuals without fall protection working on structural steel beams approximately eighty feet above the ground.¹²² When he finished videotaping the employees, the compliance officer went to the worksite, where he presented his credentials to representatives of the general contractor and the steel erection prime contractor, who then gathered representatives of Willson and the other steel erection subcontractor.¹²³ Eventually it was determined that the two individuals the compliance officer had videotaped were Willson employees and that one of them was a foreman.¹²⁴ When the employees were called to the meeting, they admitted that they were working without fall protection despite Willson's policy of tying off at all times at elevations above ten feet.¹²⁵ Based upon the compliance officer's observations and the employees' admissions, OSHA cited Willson for a willful violation of fall protection standards.¹²⁶ Based on the videotape, the compliance officer's testimony, and the testimony proffered by other witnesses, the ALJ found a serious but not willful violation.¹²⁷

Willson asserted the affirmative defense that any violation it committed

¹¹⁶ See *id.*

¹¹⁷ See *id.*

¹¹⁸ See *id.*

¹¹⁹ See *Willson*, 1995 WL 389291, at *1.

¹²⁰ See *id.*

¹²¹ See *id.*

¹²² See *id.* at *1-2.

¹²³ See *Willson*, 134 F.3d at 1237.

¹²⁴ See *id.*

¹²⁵ See *Willson*, 1995 WL 389291, at *2.

¹²⁶ See *Willson*, 134 F.3d at 1237.

¹²⁷ See *Willson*, 1995 WL 389291, at *8.

was the result of unpreventable employee misconduct.¹²⁸ According to OSHRC, in order to prove the affirmative defense of unpreventable employee misconduct, an employer must prove that (1) it had established work rules designed to prevent the violation; (2) the work rules had been adequately communicated to its employees; and (3) it had taken steps to discover violations, and had effectively enforced the rules when violations had been discovered.¹²⁹

The only element of the defense that the Secretary disputed was whether Willson effectively enforced its work rule.¹³⁰ Willson asserted that it had an excellent safety program that focused on the use of fall protection.¹³¹ Because the contract required that ninety percent of its employees on the job be hired locally, Willson had to use ironworkers who had not previously undergone its general training program, so it sent its newly-hired employees to a school in the area that was conducted by the Associated Builders and Contractors.¹³² Willson also put its new employees through the general contractor's safety training program and its own safety training.¹³³ In addition, Willson's insurance carrier conducted safety training for its employees on the site and outside safety consultants were brought in to instruct the employees.¹³⁴ Willson also held safety meetings at least once a week, and the use of fall protection was always stressed.¹³⁵

In its defense, Willson asserted that it had a disciplinary program by which employees were reprimanded for safety infractions.¹³⁶ Willson hired a safety consultant periodically to inspect its worksite to ensure compliance with safety standards.¹³⁷ Willson had issued at least three written reprimands to employees for not using proper fall protection, and it had fired employees for safety violations.¹³⁸

The testimony of Willson's foreman, however, weakened Willson's argument regarding the enforcement of its safety rules.¹³⁹ When asked if he expected to

¹²⁸ See *id.* at *6.

¹²⁹ See *id.* at *6 (citing *Secretary of Labor v. Falcon Steel Co.*, 16 BNA OSHC 1179, 1193 (No. 89-3444, 1993)).

¹³⁰ See *id.*

¹³¹ See *L.R. Willson and Sons, Inc., O.S.H.R.C. No. 94-1546*, 1997 WL 111084, at *6 (Mar. 11, 1997).

¹³² See *id.*

¹³³ See *id.*

¹³⁴ See *id.*

¹³⁵ See *id.*

¹³⁶ See *Willson*, 1997 WL 111084, at *7.

¹³⁷ See *Willson*, 1995 WL 389291, at *6.

¹³⁸ See *Willson*, 1997 WL 111084, at *7.

¹³⁹ See *Willson*, 1995 WL 389291, at *6.

be disciplined by Willson for failing to tie off, Manley responded that he expected to be disciplined only if an OSHA compliance officer was on the site.¹⁴⁰ OSHRC concluded that the foreman's admission provided insight into Willson's attitude towards enforcement.¹⁴¹ OSHRC held that Willson failed to establish that its work rules were effectively enforced and Willson's unpreventable employee misconduct defense failed.¹⁴² OSHRC agreed with the ALJ that the violation was serious and assessed a penalty of \$7,000,¹⁴³ the maximum permissible for a serious violation under the Act.¹⁴⁴

2. The Fourth Circuit's Decision

On appeal, Willson argued that OSHRC incorrectly placed upon Willson the burden of showing that the conduct of employees Manley and McVay was unforeseeable or unpreventable.¹⁴⁵ Specifically, Willson disagreed with OSHRC's conclusion that, because a "supervisory employee" committed the violations in question, the knowledge of those violations should be imputed to Willson, and that Willson must "establish that it made good faith efforts to comply with the fall protection standards."¹⁴⁶

The court also disagreed with OSHRC's decision and relied upon *Ocean Electric Corp. v. Secretary of Labor*¹⁴⁷ for support.¹⁴⁸ In *Ocean Electric Corp.*, the court held that despite a finding of knowledge of the violation on the part of a supervisory employee, the Secretary, not the employer, bore the burden of proving that the supervisory employee's acts were not unforeseeable or unpreventable.¹⁴⁹ The court determined that OSHRC ignored precedent, and incorrectly placed the burden of showing "good faith efforts to comply with the fall protection standards" upon Willson.¹⁵⁰ The court found that shifting the burden of proof was inconsistent

¹⁴⁰ See *id.*

¹⁴¹ See *id.*

¹⁴² See *id.*

¹⁴³ See *id.* at *8.

¹⁴⁴ See 29 U.S.C. § 666 (1994 & Supp. I 1998).

¹⁴⁵ See *Willson*, 134 F.3d 1235, 1240.

¹⁴⁶ See *id.* (quoting *Willson*, 1995 WL 389291).

¹⁴⁷ 594 F.2d 396 (4th Cir. 1979).

¹⁴⁸ See *Willson*, 134 F.3d at 1240.

¹⁴⁹ See *Ocean Elec.*, 594 F.2d at 401.

¹⁵⁰ See *Willson*, 134 F.3d at 1240. "Significantly, the improper burden-shifting complained of in *Ocean Electric* consisted of the Commission's requirement of a 'showing by the employer that the supervisory employee with knowledge of the violation was himself adequately supervised with regard to safety matters.'" *Id.* at 1240 n.27 (quoting *Ocean Elec.*, 594 F.2d at 401 (citations omitted)).

with the court's decision in *Ocean Electric*.¹⁵¹ Thus the court reversed OSHRC's decision.¹⁵²

In *Willson*, the ALJ found the prima facie case of a violation because of Manley's status, and placed upon Willson the burden of rebutting with the "affirmative defense" of employee misconduct, and OSHRC affirmed.¹⁵³ The court stated that although some circuits have held that unpreventable employee misconduct "is an affirmative defense that an employer must plead and prove,"¹⁵⁴ the Fourth Circuit, as well as other circuits,¹⁵⁵ agree that misconduct must be disproved by the Secretary in his case-in-chief.¹⁵⁶ The court found *Ocean Electric's* reasoning to be consistent with the clear intent of Congress.¹⁵⁷ Thus, the Fourth Circuit reaffirmed its position in *Ocean Electric*, and held that OSHRC's burden-shifting was erroneous.¹⁵⁸

IV. THE IMPLICATIONS OF *L.R. WILLSON AND SONS*

The OSHA statutory framework places an employer in an untenable position when confronted with employee misconduct. Although the Act imposes a duty upon employers to obey OSHA rules and regulations, it does not address employee noncompliance. Moreover, if an employee contributes to any unsafe working condition, the employer inevitably faces potential liability. When an employee is guilty of violating the Act on the employer's behalf, however, an employer may be able to raise an employee misconduct defense if he can prove that he has taken steps to enforce the safety rule in the past.¹⁵⁹ The Secretary will most likely argue that while the employer may have taken steps in the past to enforce the rule, this instance shows that enforcement efforts have been ineffective. Conversely, the employee will suffer no repercussion for the misconduct, except perhaps a subpoena to testify

¹⁵¹ See *id.*

¹⁵² See *id.*

¹⁵³ See *Willson*, 1995 WL 389291, at *6.

¹⁵⁴ See *Willson*, 134 F.3d 1235, 1240 & n.29 (citing *New York State Elec. & Gas Corp. v. Secretary of Labor*, 88 F.3d 98, 107 (2d Cir. 1996) (holding that unforeseeability and unpreventability are affirmative defenses and citing authority from the First, Fifth, Sixth, Eighth, and Eleventh Circuits in support of this proposition)).

¹⁵⁵ But see cases cited *supra* note 78.

¹⁵⁶ See *Pennsylvania Power*, 737 F.2d 350, 358; *Capital Elec.*, 678 F.2d 128, 129; *Mountain States*, 623 F.2d 155, 158; *Ocean Elec. Corp.*, 594 F.2d 396, 401.

¹⁵⁷ See *Willson*, 134 F.3d at 1241 n.31 (citing *Ocean Elec.*, 594 F.2d at 399 (Congress clearly did not intend employer to be insurer of employee safety: Rather, employers are to promote such safety "as far as possible" (quoting 29 U.S.C. § 651 (1994)))).

¹⁵⁸ See *id.* at 1241.

¹⁵⁹ *Nooter Construction Co.*, 16 BNA at 1578.

against the employer's company.

The affirmative defense of employee misconduct does not appear to offer an employer a great deal of protection. In a majority of circuits, where the burden is on the employer to prove unpreventable employee misconduct, an employer can successfully establish the first three elements of the defense, but fails in proving the fourth element, that the employer's rules were effectively enforced, if infractions are discovered. The reason employers find it difficult to prove the fourth element is because many managers only impose oral warnings as a means of discipline. Also, where a workplace is unionized, concern over litigation may discourage managers from imposing discipline, especially formal written disciplinary action. Most importantly, employers are currently moving towards a behavior-based approach to safety which relies upon positive reinforcement methods to improve safety compliance.¹⁶⁰

The case of *L.R. Willson and Sons, Inc. v. OSHRC*,¹⁶¹ provides employers in the Fourth Circuit with more protection from an OSHA citation. The court's rejection of OSHA's position that an employer must prove employee misconduct as an affirmative defense has shifted the burden of proof to the Secretary. Therefore, if an employee's misconduct has resulted in an OSHA citation, it may now be less difficult for an employer to defeat a citation. Perhaps, this decision will encourage OSHA to consider a plan that places some responsibility upon employees to comply with the Act.

The employee misconduct defense is still one of the most litigated defenses to an OSHA citation.¹⁶² In *L.R. Willson and Sons*, the Secretary petitioned the Supreme Court to review the issue, but certiorari was denied leaving a split among the circuits.¹⁶³ A spokesman for OSHA stated that the case is one of only a handful that the Secretary has appealed to the Court since the creation of the Act.¹⁶⁴ In 1987, the Supreme Court was confronted with the same issue in *L. E. Myers Company, High Voltage Division v. Secretary of Labor*.¹⁶⁵ Although the Court denied certiorari, Justice White issued a dissenting opinion joined by Justice O'Connor.¹⁶⁶ Justice White asserted that the holding in *L. E. Myers*, "reinforced the already confusing patchwork of conflicting approaches to this [employee miscon-

¹⁶⁰ See, e.g., Carl Graf Hoyos, *Occupational Safety: Progress in Understanding the Basic Aspects of Safe and Unsafe Behavior*, 44 APPLIED PSYCHOLOGY 233-250 (1995).

¹⁶¹ 134 F.3d 1235 (4th Cir. 1998).

¹⁶² *Employee Misconduct*, *supra* note 6.

¹⁶³ See *Willson*, 119 S. Ct. 404.

¹⁶⁴ *Employee Misconduct*, *supra* note 6.

¹⁶⁵ 818 F.2d 1270 (6th Cir. 1987), *cert. denied*, 484 U.S. 989 (1987).

¹⁶⁶ See *L.E. Myers Co., High Voltage Div. v. Secretary of Labor*, 484 U.S. 989 (1987).

duct] issue.”¹⁶⁷ He concluded his dissent by acknowledging that certiorari should have been granted because the conflict among the Circuits “shows no signs of abating and the issue is central to OSHA’s enforcement efforts.”¹⁶⁸

V. CONCLUSION

When an employee violates an employer’s safety rule that is designed to enforce a government requirement, the employer is guilty of violating the law. If the employer can prove that it has taken steps to enforce the safety rule in the past, it *may* be able to raise an employee misconduct defense at a formal hearing. The Fourth Circuit’s ruling in *L.R. Willson and Sons* created a split in the circuit courts regarding the issue of the burden of proof when an employer contends that lack of compliance with a governmental standard was the result of unpreventable employee misconduct. In the Fourth Circuit, the burden is on the Secretary of Labor to prove that the employee’s misconduct was preventable. Nonetheless, the majority of circuits have held that the burden is on the employer to demonstrate unpreventable employee misconduct.

The United States Supreme Court’s failure to address the issue in *L.R. Willson and Sons* has only perpetuated the longstanding conflict among the circuits. For the most part, employers have been placed in an untenable position when confronted with employee misconduct because employees have only rights, not responsibilities, under the Act. Admittedly, in many instances the employer may be in the best position to eradicate even those unsafe conditions created by his employee’s misconduct. In numerous other instances, however, employers are helpless, despite their best efforts, to control employee behavior. As employers know, there is no disciplinary program that will prevent all employees from violating rules. Thus, the Fourth Circuit’s decision in *L.R. Willson and Sons* makes it easier for employers to overcome an OSHA citation. This decision, however, may also be destructive because it enables employers to blame a safety violation on the misconduct of an employee in order to escape liability. Ultimately, there is need for uniformity in the law; therefore, the United States Supreme Court should rule upon a definitive standard regarding the issue of who has the burden of proof in OSHA enforcement proceedings.

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¹⁶⁷ See *id.* at 990.

¹⁶⁸ See *id.*

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