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L. R. Willson and Sons, Inc. v. Occupational Safety and Health Review Commission: The State of the Employee Misconduct Defense in OSHA Adjudications Involving Serious Violations

Christopher Barber

L. R. WILLSON AND SONS, INC. V. OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION: THE STATE OF THE EMPLOYEE MISCONDUCT DEFENSE IN OSHA ADJUDICATIONS INVOLVING SERIOUS VIOLATIONS

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I. INTRODUCTION — THE PLIGHT OF L. R. WILLSON AND SONS, INC.

A. *The Issue*

Congress enacted the Occupational Safety and Health Act of 1970 (hereinafter the Act) as a means to improve safety in the workplace.[1] Among other things, this law made employers responsible for providing on-the-job safety.[2] However, the legislative history[3] of the Act and the wording of pertinent statutes[4] appear to reveal that Congress did not intend to hold employers responsible for unforseeable and unpreventable employee safety errors.

While congressional intent seems to be clear on this issue, there is conflict in the federal appellate courts regarding when, and if, an employer will be held responsible for unforseeable and unpreventable employee errors. Most appellate courts have held that to avail itself of this defense, an employer has the burden of proving it had a perfect safety program.[5] A minority of circuits hold that, if an employer invokes the defense, the government bears the burden of proving that a particular cited safety violation was not unforseeable or unpreventable.[6]

Recently, the Fourth Circuit Court of Appeals chose to remain in the minority on this issue with its holding in *L.R. Willson & Sons, Inc. v. Occupational Safety & Health Review Commission*.[7] This Note supports the Fourth Circuit's *Willson* holding. The rule followed by the Fourth Circuit and the other minority Courts of Appeals is in harmony with both the spirit and the letter of the law in question. This holding also has some sensible policy underpinnings. The Courts of Appeals holding the majority view never truly attempt to reconcile their position on this issue with federal statutory law and have never

1. *See* Occupational Safety & Health Act of 1970 § 2(b), 29 U.S.C. § 651(b) (1994).

2. *See id.* § 654(a).

3. *See generally* S. REP. No. 91-1282 (1970), *reprinted in* 1970 U.S.C.C.A.N. 5177.

4. *See* 29 U.S.C. §§ 651(b); 29 U.S.C. 654(a).

5. *See* New York State Elec. & Gas Corp. v. Secretary of Labor, 88 F.3d 98, 105 (2d Cir. 1995); Brock v. L.E. Myers Co., 818 F.2d 1270, 1276 (6th Cir.), *cert. denied sub nom.* L.E. Myers Co. v. Secretary of Labor, 484 U.S. 989 (1987); Daniel Int'l Corp. v. Occupational Safety & Health Review Comm'n, 683 F.2d 361, 364 (11th Cir. 1982); H.B. Zachry Co. v. Occupational Safety & Health Review Comm'n, 638 F.2d 812, 818 (5th Cir. Unit A Mar. 1981); General Dynamics Corp. v. Occupational Safety & Health Review Comm'n, 599 F.2d 453, 459 (1st Cir. 1979); Danco Constr. Co. v. Occupational Safety & Health Review Comm'n, 586 F.2d 1243, 1246-47 (8th Cir. 1978).

6. *See* L.R. Willson & Sons v. Occupational Safety & Health Review Comm'n, 134 F.3d 1235, 1240-41 (4th Cir.), *cert. denied sub nom.* Herman v. L.R. Willson & Sons, 119 S. Ct. 404 (1998); Pennsylvania Power & Light Co. v. Occupational Safety & Health Review Comm'n, 737 F.2d 350, 358 (3d Cir. 1984); Capital Elec. Line Builders v. Marshall, 678 F.2d 128, 130 (10th Cir. 1982); Brennan v. Occupational Safety & Health Review Comm'n, 511 F.2d 1139, 1145 (9th Cir. 1975).

7. *See* 134 F.3d 1235 (4th Cir.), *cert. denied sub nom.* 119 S. Ct. 404 (1998).

communicated a viable policy argument for burdening the employer cited with a serious safety violation with proving this defense. Part I of this Note gives a detailed narration of the *Willson* case. Part II examines portions of the Occupational Safety and Health Act of 1970 applicable to this issue. In Part III, this Note explores sample cases from courts favoring the majority view on this issue ("Employer's Burden" Circuits) while Part IV studies important decisions of minority courts ("OSHA Burden" Circuits). Part V analyzes these two positions and reveals the superiority of the minority courts' decisions. Finally, Part VI concludes this discussion and recommends that the *Willson* decision on this issue be made the law of the land.

B. *Factual Background*

L.R. Willson and Sons, Inc. (Willson) is a Maryland based steel erection contractor.[8] On April 29, 1994, Willson was a subcontractor working on the renovation of the Orange County Civic Center located in Orlando, Florida.[9] On this day, three events occurred that would result in legal skirmishing that would last over four years and end with a federal appeals court affirming the right of an employer to use employee misconduct as an affirmative defense like the United States Congress intended it to be used.

First, Willson employees Randall Manley and Donald McVay decided to work in a place not yet open for work and without prior approval of a supervisor.[10] They would eventually be working approximately seventy-five feet off the ground without fall protection devices.[11] Second, the top Willson executive at the site called a meeting of all supervisory employees in the company's office trailer.[12] He was going to leave for Maryland soon and wanted to give the supervisors final instructions.[13] The site where Mr. Manley and Mr. McVay were working was not visible from this trailer.[14] Finally, the hotel across the street from the Willson worksite had a special guest that day. Mr. Joseph Dear, the Assistant Secretary of Labor for Occupational Safety and Health was staying at this hotel.[15] From the window of his room, he observed Mr. Manley and Mr. McVay.[16] Mr. Dear telephoned the local Occupational Health and Safety Administration

8. *See* L.R. Willson & Sons, 1995-1997 O.S.H.D. (CCH) 31,262, at 43,886 (March 11, 1997).

9. *See id.*

10. *See L.R. Willson & Sons*, 134 F.3d at 1237.

11. *See id.*

12. *See* L.R. Willson & Sons, 1995-1997 O.S.H.D. (CCH) at 43,886.

13. *See id.* at 43,891.

14. *See id.*

15. *See id.*

16. *See id.*

(hereinafter OSHA) office to report what he saw.[17] Thereafter, the federal government launched its investigation.

Before going to the Willson worksite, the compliance officer sent to investigate Mr. Dear's report stopped at the hotel.[18] The officer videotaped Mr. Randall and Mr. McVay from the hotel's roof.[19] After doing this for approximately fifty minutes, he went to the worksite, presented his credentials and gathered representatives from Willson and another steel erection contractor working at the site.[20] They determined that the compliance officer observed Mr. Manley and Mr. McVay, and that both were Willson employees.[21] Mr. Manley and Mr. McVay were then summoned to this meeting.[22] Both admitted working in the restricted location without the use of fall protection devices.[23]

Based on the employees' admissions, the video tape and the compliance officer's observations, OSHA cited L.R. Willson and Sons, Inc. for willfully violating OSHA fall regulation standards.[24] The regulation in question required that safety nets be installed and maintained on buildings or structures not adaptable to temporary floors when scaffolds are not used and the potential fall distance exceeds two stories or twenty five feet.[25]

C. *Procedural History*

1. The Evidentiary Hearing

Willson contested this citation.[26] A hearing was held before Judge Nancy Spies, an Administrative Law Judge.[27] Judge Spies rejected Willson's unpreventable employee misconduct defense.[28] Her reasoning for the rejection was that although Willson had a good written safety program that was effectively communicated, it failed to effectively enforce the program. The judge found the safety program's enforcement inadequate because one employee caught violating the fall

17. *See id.*
18. *See id.*
19. *See id.*
20. *See id.*
21. *See id.* at 43,886.
22. *See id.*
23. *See id.*
24. *See id.*
25. *See* OSHA Safety and Health Regulations for Construction, 29 C.F.R. § 1926.750(b)(1)(ii) (1998).
26. *See* L.R. Willson & Sons, 1995-1997 O.S.H.D. (CCH), at 43,885.
27. *See id.*
28. *See* L.R. Willson & Sons, 1995-1997 O.S.H.D. (CCH) ¶ 30,874 at 42,967 (July 3, 1995).

protection requirement[29] admitted that he expected such rules to be enforced only when OSHA personnel were at the worksite.[30]

Judge Spies did characterize the violation as serious rather than willful.[31] She did this because there was proof that long term Willson employees were not as "recalcitrant" about fall protection as were new employees.[32] Outside of the characterization issue, Judge Spies affirmed the citation.[33] She assessed a penalty of $7,000.00 against Willson.[34]

2. The Occupational Safety and Health Review Commission

Both Willson and the government petitioned for review of Judge Spies' decision to the Occupational Safety and Health Review Commission (the Commission).[35] The issues contested were the admission of the videotape and the willfulness characterization.[36] The unforeseeable employee misconduct decision was not an issue before the Commission.[37] However, the discussion of the willfulness issue reveals some interesting factors about the Willson safety program.

Testimony revealed that the Willson safety program was excellent.[38] A compliance officer noted that very few companies in the steel erection business had a better safety program.[39] An OSHA representative even agreed that it was adequately communicated to the employees.[40]

However, the Commission found Willson's enforcement of the program to be lacking.[41] The enforcement system Willson created began with oral warnings.[42] Repeat offenders would get written reprimands.[43] If the write-up proved insufficient, the wayward employee would be fired.[44] In fact, some Willson employees at the Orlando worksite received written reprimands and a few had even been fired.[45] However, the Commission found the safety program insufficient because Mr. Manley's and Mr. McVay's violation occurred and continued for nearly an hour while the Willson supervisors were in a

29. *See* 29 C.F.R. § 1926.750(b)(1)(ii) (requiring safety nets be installed and maintained on buildings and structures not adaptable to temporary floors when scaffolds are not used and the potential fall distance exceeds two stories or twenty-five feet).
30. *See* L.R. Willson & Sons, 1995-1997 O.S.H.D. (CCH), at 42,967.
31. *See id.*
32. *See id.*
33. *See id.*
34. *See* L.R. Willson & Sons, 1995-1997 O.S.H.D. (CCH), at 43,891.
35. *See* L.R. Willson & Sons, 1995-1997 O.S.H.D. (CCH), at 42,967.
36. *See id.*
37. *See* L.R. Willson & Sons, 1995-1997 O.S.H.D. (CCH), at 43,885.
38. *See id.* at 43,890.
39. *See id.* at 43,891.
40. *See id.*
41. *See id.*
42. *See id.*
43. *See id.*
44. *See id.*
45. *See id.*

meeting.[46] Ultimately, the Commission affirmed the Administrative Law Judge's decision.[47] It also found the $7,000.00 fine appropriate.[48]

3. The United States Court of Appeals, Fourth Circuit and Beyond

Willson appealed the Commission's decision.[49] This time, the unforeseeable or unpreventable misconduct defense was at issue.[50] Here, the concern was whether the Administrative Law Judge properly placed the burden of proving this defense on Willson rather than placing it on the government to prove the violative acts were foreseeable or preventable.[51] The three judge panel held in favor of Willson on this issue, stating that the government had the burden of proving that the cited activity was not unforeseeable or unpreventable employee misconduct.[52]

The court noted two reasons for their judgment on the burden issue. First, the court in a prior case had already decided this issue.[53] Second, it held that putting the burden of proving an employee's cited actions were unforeseeable or unpreventable on the employer was inconsistent with case law interpreting the Occupational Safety and Health Act of 1970,[54] which specifically noted that employers were not to be insurers of employee safety.[55] Petition for certiorari was filed with the United States Supreme Court on this Fourth Circuit decision on July 27, 1998.[56] The Supreme Court denied this petition on November 2, 1998.[57]

This matter is heavily dependent on the interpretation of federal statutes. Before proceeding, a close look at the appropriate code provisions is necessary.

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46. *See id.*
47. *See id.*
48. *See id.*
49. *See* L.R. Willson & Sons v. Occupational Safety & Health Review Comm'n, 134 F.3d 1235, 1237 (4th Cir.), *cert. denied sub nom.* Herman v. L.R. Willson & Sons, 119 S. Ct. 404 (1998).
50. *See id.*
51. *See id.* at 1240.
52. *See id.* at 1240-41.
53. *See id.* at 1240 (Ocean Elec. Corp. v. Occupational Safety & Health Review Comm'n, 594 F.2d 396 (4th Cir. 1979).
54. *See id.* at 1240-41.
55. *See Ocean Elec. Corp.*, 594 F.2d at 399.
56. *See* L.R. Willson & Sons v. Occupational Safety & Health Review Comm'n, 134 F.3d 1235 (4th Cir. 1998), *petition for cert. filed,* 67 U.S.L.W. 3105 (U.S. July 27, 1998) (No. 98-188).
57. *See* Herman v. L.R. Willson & Sons, 119 S. Ct. 404, 404 (1998).

II. THE OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970[58]

A. *Purposes of the Occupational Safety and Health Act of 1970*

Congress noted that personal injuries and illnesses relating to work were substantially burdening interstate commerce.[59] This burden could be seen in lost production, wage loss, medical expenses and payments of disability compensation.[60] Congress wrote:

> The Congress declares it to be its purpose and policy, through the exercise of its powers to regulate commerce among the several States and with foreign nations and to provide for the general welfare, to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources.[61]

It appears from a plain reading of the Act that Congress did not envision this law as a means of completely eradicating work related injuries and illnesses. A review of the Act's legislative history reinforces this. In the Senate report related to this Act, it is noted that "[t]he purpose of [the Act] is to reduce the number and severity of work-related injuries and illnesses which, despite current efforts of employers and government, are resulting in ever increasing human misery and economic loss."[62] Congress saw the Occupational Safety and Health Act of 1970 as a way to lessen harm but not to necessarily eliminate it.

B. *Powers and Resources of the Secretary of Labor*

The Occupational Safety and Health Act of 1970 is a very broad and comprehensive piece of legislation. In particular, it gives the Secretary of Labor (the Secretary) some significant powers and vast resources to implement the Act. First, it creates the position of Assistant Secretary of Labor for Occupational Safety and Health.[63] Of the nine authorized Assistant Secretaries of Labor, one must fill this position.[64] The Secretary is also charged with promulgating Occupational Safety and Health Standards.[65] Whenever the Secretary determines that a rule would further the Act, he may promulgate it by requesting the recommendations of an advisory committee.[66] Furthermore, the government is given power to investigate.[67] After

58. The Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (1994).
59. *See id.* § 651(a).
60. *See id.*
61. *Id.* § 651(b).
62. S. REP. NO. 1282 (1970), *reprinted in* 1970 U.S.C.C.A.N. 5177.
63. *See* The Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, § 29(a), 84 Stat. 1618 (amending 29 U.S.C. § 553).
64. *See id.*
65. *See id.* § 655.
66. *See id.* § 655(b)(1).
67. *See id.* § 657(a)(2).

presenting credentials, the Secretary, or his representative, is authorized to enter any workplace affected by the Act at reasonable times.[68] He can also make inspections of the conditions of these worksites.[69] In doing so, the Secretary or representative may privately question "any such employer, owner, operator, agent, or employee."[70] He also has the power to subpoena witnesses and order the production of evidence.[71]

The Secretary can issue citations for violations found during investigations.[72] When a violation is found, a written citation is given to the employer.[73] The citation must describe the violation and note the portion of the Act, regulation or order alleged to be violated.[74] The Secretary of Labor created the Occupational Safety and Health Administration (OSHA) in 1971 to enforce the Occupational Safety and Health Act of 1970.[75] This organization consists of one national, ten regional, forty-nine area, and two maritime district offices around the country.[76] This is a large organization by any measure.

C. *The Occupational Safety and Health Review Commission*

The Occupational Safety and Health Act of 1970 established the Occupational Safety and Health Review Commission (hereinafter the OSHRC).[77] The OSHRC is comprised of three members appointed by the President.[78] One of the three is designated to be the chairman.[79] The OSHRC's principal office is in Washington, D.C.[80] If an employer is cited with a violation, it has fifteen working days from receipt to notify the Secretary that it will contest the citation.[81] A citation that is not contested within this time frame is considered a final order and is not subject to review by any court.[82] When an employer does contest a citation in a timely manner, the Secretary shall notify the OSHRC.[83] Then, the OSHRC will afford the opportunity for a hearing.[84] The hearing will be before an administrative law judge who will report a determination.[85] This report will become a

68. *See id.* § 657(a)(1).
69. *See id.* § 657(a)(2).
70. *Id.*
71. *See id.* § 657(b).
72. *See id.* § 658(a).
73. *See id.*
74. *See id.*
75. *See* 61 AM. JUR. 2D *Plants and Job Safety* § 5 (1981).
76. *See id.*
77. *See* 29 U.S.C. § 661(a).
78. *See id.*
79. *See id.*
80. *See id.* § 661(d).
81. *See id.* § 659(a).
82. *See id.*
83. *See id.* § 659(c).
84. *See id.*
85. *See id.* § 661(j).

final order within thirty days unless a commission member orders a review by the OSHRC itself.[86]

An employer adversely affected by any OSHRC order may obtain review by a United States Court of Appeals.[87] Such an employer may seek review in the court of appeals with jurisdiction over the area where the alleged violation took place, the court of appeals with jurisdiction over the area where the employer's principal office is located, or the District of Columbia Circuit.[88] After the OSHRC has issued an order, the affected employer has sixty days to file for review in a United States Court of Appeals.[89]

D. *Responsibilities of Employers and Employees*

An employer has two duties. These are called the General and Special Duties.[90] The General Duty states that every employer "shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees."[91] The Senate Report related to this law reveals that this clause was meant as a "catch all" requirement for employers to correct safety deficiencies that have not yet been codified by the Secretary.[92] This clause also reveals a legislative intent not to hold an employer responsible for every hazard.[93] Again, the Act's Senate Report states that "the clause merely requires an employer to correct recognized hazards after they have been discovered on inspection. . . ."[94]

The Special Duty Clause states that "[e]ach employer . . . shall comply with occupational safety and health standards promulgated under this chapter."[95] This is recognized as the law requiring employers to comply with OSHA regulations.[96] Employees are also subject to the Occupational Safety and Health Act of 1970. The Act requires that "[e]ach 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."[97]

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86. *See id.*
87. *See id.* § 660(a).
88. *See id.*
89. *See id.*
90. *See* New York State Elec. & Gas Corp. v. Secretary of Labor, 88 F.3d 98, 104 (2d Cir. 1996).
91. 29 U.S.C. § 654(a)(1).
92. *See* S. REP. No. 91-1282, at 10 (1970), *reprinted in* 1970 U.S.C.C.A.N. 5177, 5186.
93. *See id.*
94. *Id.* at 5187.
95. 29 U.S.C. § 654(b).
96. *See* New York State Elec. & Gas Corp. v. Secretary of Labor, 88 F.3d 98, 104 (2d Cir. 1996).
97. 29 U.S.C. § 654(b).

E. *Potential Liabilities*

The types of violations and penalties associated with these duties can be found in Section 17 of the Act. The two kinds of violations important to this article are the "willful or repeated" and "serious" violations.[98]

A "willful" violation occurs when there is substantial evidence that an employer purposely disregarded or was plainly indifferent to OSHA's requirements.[99] This is how the compliance officer originally characterized the violation at the Willson worksite.[100] A "serious" violation exists when the cited condition could cause substantial probability of death or serious physical harm.[101] However, the employer must be aware of the violation or have been able to have known of the violation if it had exercised reasonable diligence.[102] This is how the OSHRC characterized Willson's alleged violation.[103]

The original Occupational Safety and Health Act of 1970 set penalties at no more than ten thousand dollars for a willful violation.[104] Serious violation penalties were limited to one thousand dollars per violation.[105] However, a 1990 amendment increased these penalties.[106] Currently, an employer charged with a "willful or repeated" violation can be assessed a penalty of up to seventy thousand dollars per violation.[107] The employer making a "willful or repeated" violation will be assessed at least a five thousand dollar penalty per violation.[108] An employer charged with a "serious" violation may be assessed up to seven thousand dollars for each violation.[109]

III. THE "EMPLOYER'S BURDEN" CIRCUITS

A. *Introduction*

The First, Second, Fifth, Sixth, Eighth, and Eleventh Circuits have all held that employee misconduct is an affirmative defense that an employer must prove.[110] The reasoning for this position seems to be

98. *See id.* § 666.
99. *See* Reich v. Trinity Indus., 16 F.3d 1149, 1152 (11th Cir. 1994).
100. *See* L.R. Willson & Sons, 1995-1997 O.S.H.D. (CCH) ¶ 31,262, at 43,886 (March 11, 1997).
101. *See* 29 U.S.C. § 666(k).
102. *See id.*
103. *See* L.R. Willson & Sons, 1995-1997 O.S.H.D. (CCH), at 43,891.
104. *See* 29 U.S.C. § 666(b) (1988) (current version at 29 U.S.C. § 666(b) (1994)).
105. *See id.* § 666(c).
106. *See* Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, § 3101, 104 Stat. 1388, 1388-29 (1990) (modifying 29 U.S.C. § 666(a) (1970)).
107. *See* 29 U.S.C. § 666(a).
108. *See id.*
109. *See id.* § 666(b).
110. *See* New York State Elec. & Gas Corp. v. Secretary of Labor, 88 F.3d 98, 106 (2d Cir. 1995); Brock v. L.E. Myers Co., 818 F.2d 1270, 1276 (6th Cir.), *cert. denied sub nom.* L.E. Myers Co. v. Secretary of Labor, 484 U.S. 989 (1987); Daniel Int'l Corp. v. Occupational Safety & Health Review Comm'n, 683 F.2d 361, 364 (11th Cir.

sparse in these courts. Most simply accept that the employer must prove this defense.[111] However, at least two cases do attempt to justify the "Employer's Burden" position.[112]

The "Employer's Burden" decisions espouse different burdens they expect an employer to satisfy before receiving the benefit of the unforeseeable or unpreventable misconduct defense. In the First Circuit case of *General Dynamics Corp. v. Occupational Safety & Health Review Commission*,[113] the test was whether the employer had adequately instructed employees on the practices necessary to prevent the particular violation.[114] In the Second Circuit, an employer is required to prove that it has established a work rule to prevent the violative behavior, adequately communicated the rule to employees, taken steps to discover non-compliance, and effectively enforced safety rules when violations were discovered.[115] The Fifth Circuit requires employers to prove that they effectively communicate and enforce work rules necessary to ensure compliance with OSHA standards.[116] The Eighth Circuit test is whether the employer can prove adequate training and supervision.[117] Finally, the Eleventh Circuit test is whether an employer took all feasible steps to prevent the accident, that the actions of the employees are a departure from a uniformly and effectively communicated work rule and that the employer had neither actual or constructive knowledge of the violations.[118] Despite superficial differences, all courts that have decided to burden employers with the defense in question seem to focus on the adequacy of the employer's safety program.

B. *Sample Cases*

1. *Danco Construction Company v. Occupational Safety and Health Review Commission*

Danco Construction Company (Danco) is a business that lays underground utilities.[119] One morning, a Danco work crew in North Little Rock, Arkansas was unloading steel pipe from a flat bed truck with

1982); H.B. Zachry Co. v. Occupational Safety & Health Review Comm'n, 638 F.2d 812, 818 (5th Cir. Unit A Mar. 1981); General Dynamics Corp. v. Occupational Safety & Health Review Comm'n, 599 F.2d 453, 459 (1st Cir. 1979); Danco Constr. Co. v. Occupational Safety & Health Review Comm'n, 586 F.2d 1243, 1246-47 (8th Cir. 1978).

111. *See General Dynamics Corp.*, 599 F.2d at 459; *New York State Elec. & Gas*, 88 F.3d at 105; *Brock*, 818 F.2d at 1276; *Daniel Int'l Corp.*, 683 F.2d at 364.

112. *See H.B. Zachry Co.*, 638 F.2d at 818; *Danco Constr.*, 586 F.2d at 1246-47.

113. 599 F.2d 453 (1st Cir. 1979).

114. *See id.* at 459.

115. *See New York State Elec. & Gas*, 88 F.3d at 105.

116. *See H.B. Zachry Co.*, 638 F.2d at 819.

117. *See Danco Constr.*, 586 F.2d at 1247.

118. *See* Daniel Int'l Corp. v. Occupational Safety & Health Review Comm'n, 683 F.2d 361, 364 (11th Cir. 1982).

119. *See Danco Constr.*, 586 F.2d at 1244.

a crane.[120] Two employees each held one end of the pipe while the crane operator lifted the pipe out of the truck.[121] While lifting a segment of pipe, the boom came in contact with nearby overhead electric lines.[122] The crane operator did not immediately figure out that this had happened because the sun was in his eyes and he could not see the boom.[123] The boom was apparently in contact with the electric lines for the ten to fifteen second time period that it took for the boom operator to figure out that one of the men holding an end of the pipe was screaming and that one of the worker's hands was on fire.[124] This accident resulted in the death of one Danco employee and the serious injury of the other.[125]

An OSHA compliance inspector determined that Danco violated a regulation requiring such cranes to be outside of a ten foot radius from electrical lines.[126] The inspector also discovered that Danco had a lax safety program.[127] In determining this laxity, the compliance officer noted that Danco supervisors did not hold regular safety and training meetings.[128] Instead, they gave oral safety instructions when they thought it was necessary.[129] In this particular instance, the work crew was told to stay away from electric lines without the supervisors specifically designating the required ten foot clearance requirement.[130] Also, Danco often permitted crews to work without direct supervision as it did in this instance.[131]

The Secretary of Labor issued a citation against Danco for a serious violation and proposed a six hundred and fifty dollar penalty.[132] An administrative law judge affirmed the citation, but reduced the fine to six hundred dollars.[133] Danco filed a petition to the OSHRC, which subsequently affirmed the administrative law judge's decision.[134] The case then went to the Eighth Circuit.[135]

On appeal to the Eighth Circuit, Danco contended, among other issues, that the OSHRC incorrectly placed on it the burden of establishing whether it had provided adequate training and supervision.[136]

120. *See id.* at 1244-45.
121. *See id.* at 1245.
122. *See id.* at 1244-45.
123. *See id.* at 1245.
124. *See id.*
125. *See id.*
126. *See id.*
127. *See id.*
128. *See id.*
129. *See id.*
130. *See id.*
131. *See id.*
132. *See id.*
133. *See id.*
134. *See id.*
135. *See id.* at 1245.
136. *See id.* at 1247 n.6.

The Eighth Circuit found no error on this question for two reasons. The court decided that when the record shows that the employer had such a dismal training and supervision program, it should be required to bring forth evidence that its methods were sound.[137] In addition, the judges said the burden appropriately fell on employers because "[employers are] in the best position to demonstrate the sufficiency of . . . [their] safety programs."[138]

2. *H. B. Zachry Company v. Occupational Safety and Health Review Commission*

The Fifth Circuit case of *H.B. Zachry Company v. Occupational Health & Safety Review Commission*[139] also involved an employee misconduct defense. The fact pattern is similar to the Danco case. H. B. Zachry was a general contractor with its principle place of business in San Antonio, Texas.[140] This company was involved in construction work at the Sooner Dam and Power Plant near Pawnee, Oklahoma in February 1976.[141] On February 11, 1976, Raymond Kitchens, a Zachry crane operator, was ordered by one of his supervisors to move some pipe from a storage area to an excavation site several hundred feet away.[142] Electrical transmission lines were located about twenty-eight feet from the path Kitchens was to take.[143] Two other employees were assigned to help Kitchens by holding the ends of the pipe to stabilize it while Kitchens lifted and moved it with a crane.[144] As was the situation in *Danco*, the crane came in contact with the electrical transmission lines.[145] One of the Zachry employees assisting Kitchens was seriously injured and the other was electrocuted.[146] The next day, an OSHA compliance officer started investigating the incident.[147] As a result of the findings of the investigation, the Secretary of Labor cited the H. B. Zachry Company.[148] This citation noted that Zachry committed a serious violation of the Safety and Health Regulations for Construction[149] that required a ten foot clearance between electri-

137. *See id.*
138. *Id.*
139. 638 F.2d 812 (5th Cir. Unit A Mar. 1981).
140. *See id.* at 813.
141. *See id.*
142. *See id.*
143. *See id.*
144. *See id.* at 813-14.
145. *See id.* at 814.
146. *See id.*
147. *See id.*
148. *See id.*
149. *See* OSHA Safety and Health Regulations for Construction, 29 C.F.R. § 1926.550(a)(15)(i) (1998).

cal transmission lines and a crane or its load.[150] The Secretary recommended a seven hundred dollar fine.[151]

H. B. Zachry Company contested the citation on three grounds.[152] One of these grounds was that it "should not be held liable for an employee's unforeseeable negligence when it has adequately trained and supervised its employees in this particular area of safety."[153] The OSHRC rejected this defense.[154] Next, Zachry filed a petition with the United States Court of Appeals for the Fifth Circuit to review the OSHRC holding.[155] Although the accident happened in the Tenth Circuit, Zachry elected to seek review in the Fifth Circuit where the company's principle offices were located pursuant to 29 U.S.C. § 660(a).[156] The Fifth Circuit also rejected the defense.[157]

The court stated that Zachry had to prove that "(i) all feasible steps were taken to avoid the occurrence of the hazard, [a]nd (ii) the actions of the employee were a departure from a uniformly and effectively communicated and enforced work rule of which departure the employer had neither actual nor constructive knowledge."[158] The court reviewed testimony from the hearings that described the Zachry safety program.[159] The program included safety films, regular safety meetings, safety manuals and bulletins that were distributed to the employees, and there was even a safety manual that required crane operators to maintain a ten foot distance from electrical wires.[160] There was evidence in the form of signatures on attendance rosters that Mr. Kitchens participated in the safety program and had received company publications.[161] There were even signs of enforcement and effective communication of the pertinent rules in this very incident since Mr. Kitchens testified that he had been warned about the electrical lines he struck and that he was aware of his employer's rule requiring a ten foot distance from electrical lines.[162]

Despite all of this, the Fifth Circuit affirmed the OSHRC's decision to reject Zachry's unforeseeable employee misconduct defense.[163] Key to this decision were two facts. First, Mr. Kitchens apparently only went to approximately half of the safety meetings but signed the

150. *See H. B. Zachry Co.*, 638 F.2d at 814.
151. *See id.*
152. *See id.* at 815.
153. *Id.*
154. *See id.*
155. *See id.*
156. *See id.* at 813 n.1.
157. *See id.* at 819 & n.17.
158. *Id.* at 818 (citing General Dynamics Corp. v. Occupational Safety & Health Review Comm'n, 599 F.2d 453, 459 (1st Cir. 1979)).
159. *See id.*
160. *See id.*
161. *See id.*
162. *See id.*
163. *See id.* at 819.

attendance rosters anyhow for fear he would be fired for his failure to attend.[164] More important was the fact that Kitchens' supervisor failed to give him adequate instructions on how to move the pipe in compliance with company rules.[165] For these reasons, the Fifth Circuit affirmed the lower courts holding that Zachry failed to completely satisfy the burden.[166]

Also important is a note in this case that discusses the burden H. B. Zachry was expected to satisfy. This court stated:

> An examination of the elements of the employee misconduct affirmative defense reveals that it is designed to demonstrate that an employer exercised reasonable diligence by providing adequate safety training and supervision to its employees. Thus, an employer's inability to establish the adequacy of the safety instructions to his employee shows a failure to exercise reasonable diligence.[167]

In essence, this court expects employers arguing the unavoidable or unpreventable employee misconduct defense to show that it had a fault free program and that employees were adequately supervised. If shown, it indicates that the employer was persistent and therefore worthy of employing this defense.

IV. THE "OSHA BURDEN" CIRCUITS

A. *Introduction*

The Third, Fourth, Ninth, and Tenth Circuits are of the opinion that it is the government's burden to disprove an employer's claim of unpreventable employee misconduct.[168] Although one circuit has accepted this rule without comment,[169] there generally seems to be more logical reasoning in these circuits' decisions on this issue than can be found in the "Employer's Burden" circuits.

B. *Sample Cases*

1. *L.R. Willson and Sons, Inc. v. Occupational Safety and Health Review Commission*[170]

The Fourth Circuit, in *L.R. Willson & Sons, Inc.*, found that the OSHRC was in error by placing the burden on Willson to prove "that

164. *See id.*
165. *See id.*
166. *See id.* at 820.
167. *See id.* at 819 n.17.
168. *See* L.R. Willson & Sons v. Occupational Safety & Health Review Comm'n, 134 F.3d 1235, 1241 (4th Cir.), *cert. denied sub nom.* Herman v. L.R. Willson & Sons, 119 S. Ct. 404 (1998); Pennsylvania Power & Light Co. v. Occupational Safety & Health Review Comm'n, 737 F.2d 350, 358 (3d Cir. 1984); Capital Elec. Line Builders v. Marshall, 678 F.2d 128, 130 (10th Cir. 1982); Brennan v. Occupational Safety & Health Review Comm'n, 511 F.2d 1139, 1145 (9th Cir. 1975).
169. *See Capital Elec. Line Builders*, 678 F.2d at 130.
170. 134 F.3d 1235 (4th Cir. 1998).

it made good faith efforts to comply with fall protection standards."[171] It based this holding on two factors. First, the *Willson* court believed that placing the burden on the OSHRC was consistent with the Occupational Safety and Health Act of 1970.[172] It noted that Congress did not intend employers to be insurers of employee safety.[173] Also, the Act merely tasked employers to promote safety "as far as possible."[174]

The second reason for the *Willson* court's holding was the fact that this issue had already been decided in the Fourth Circuit. In 1979, the Fourth Circuit decided that the Secretary of Labor had the burden of disproving unpreventable employee misconduct in *Ocean Electric Corporation v. Secretary of Labor*.[175] The *Willson* court found no reason to change the rule of *Ocean Electric*.[176]

OSHRC justified placing the burden on Willson because of the presence of a supervisory employee at the site of violation.[177] Mr. Manley was holding the position of "leadman" at the time of the violation.[178] When a supervisory employee is present at a violation, knowledge is imputed to the employer to satisfy the Secretary's prima facie case.[179] The OSHRC believed that through this, the government had satisfied the knowledge requirement and that Willson then had to prove "it made good faith efforts to satisfy fall protection standards."[180] The Fourth Circuit rejected this also because *Ocean Electric* held that even in situations involving violative acts of supervisory employees, the government still had the burden of proving the supervisory employee's acts were not unforeseeable or unpreventable.[181]

In *Willson*, the Fourth Circuit held for the employer because to do so was consistent with the Act and consistent with precedent. The government was unable to proffer a sufficient reason for the *Willson* court to change existing law.[182] *Willson* relied heavily on the prior opinion in *Ocean Electric*. Because of this, a review of the earlier opinion is in order.

171. *Id.* at 1240.
172. *See id.* at 1241.
173. *See id.* at 1241 n.31.
174. *See id.*
175. *See* Ocean Elec. Corp. v. Occupational Safety & Health Review Comm'n, 594 F.2d 396, 401 (4th Cir. 1979).
176. *See L.R. Willson & Sons*, 134 F.3d at 1241.
177. *See id.* at 1240.
178. *See id.*
179. *See* New York State Elec. & Gas Corp. v. Secretary of Labor, 88 F.3d 98, 105 (2d Cir. 1995).
180. *See L.R. Willson & Sons*, 134 F.3d at 1240.
181. *See id.*
182. *See id.* at 1241.

2. *Ocean Electric Corporation v. Secretary of Labor*

Ocean Electric was a Virginia corporation involved in electrical contracting.[183] This company was under contract to install a piece of electrical equipment next to an existing piece of energized electrical equipment at a Navy power station in Virginia Beach, Virginia.[184] The job superintendent assigned Jack Watson, Marcel Burger, and Jerry Kephart to set the new device in place.[185] Watson was a foreman and experienced electrician.[186] Burger was also an experienced electrician.[187] Kephart was apparently less experienced, but still had three years in the electrical business and was noted as being an outstanding electrician.[188]

A portion of the existing electrical device was positioned in a way that hindered placement of the new equipment.[189] Watson opened the door on the energized equipment to determine how to move the portion of the equipment that was in his way.[190] He managed to solve the problem, but he failed to close the door.[191] The new device was then lowered into place with a crane.[192] When the cables attached to the new unit became slack, Watson ordered Burger and Kephart to grab them.[193] Kephart grabbed some cables with his right hand and he apparently stuck his left hand into the exposed and energized existing unit.[194] Kephart's left hand touched an energized portion of the unit and he was electrocuted.[195]

Shortly thereafter, a compliance officer from OSHA visited the site.[196] He determined that Ocean Electric failed "to provide a barricade, a barrier, or insulating equipment that would prevent accidental contact by employees with conductors energized by high voltage electricity."[197] This failure was alleged to violate 29 C.F.R. § 1926.950[198] that requires "extraordinary caution . . . be used in the handling of bus bars, tower steel materials, and equipment in the vicinity of energized facilities. The requirements set forth in Section 1926.950(c) shall be

183. *See* Ocean Elec. Corp. v. Occupational Safety & Health Review Comm'n, 594 F.2d 396, 397 (4th Cir. 1979).
184. *See id.*
185. *See id.*
186. *See id.*
187. *See id.*
188. *See id.*
189. *See id.*
190. *See id.*
191. *See id.*
192. *See id.*
193. *See id.* at 397-98.
194. *See id.* at 398.
195. *See id.*
196. *See id.*
197. *Id.*
198. *See id.*

complied with."[199] The OSHA Safety and Health Regulations for Construction set forth required clearances.[200] Because the alleged violation involved a death, Ocean Electric was cited with a serious violation and fined one thousand dollars.[201] The fine was reduced to seven hundred dollars because Ocean Electric had no prior violations.[202]

Ocean Electric contested this citation, claiming that it should not be held liable for an accident that was unforeseeable or unpreventable.[203] The administrative law judge assigned to this case rejected this defense based on the doctrine of respondeat superior.[204] Because a foreman was present at the accident, the administrative law judge held that knowledge was imputed to the employer.[205] Although the OSHRC rejected this imputed knowledge theory, it affirmed the holding.[206] It recognized the defense Ocean Electric used in the hearing, but held that the company failed to prove the adequacy of its safety program.[207] The Fourth Circuit rejected the holdings of the administrative law judge.[208] It also rejected the OSHRC's holding.[209]

On the imputed knowledge holding of the administrative law judge, the court believed that Congress did not intend employers to be the insurers of employee safety.[210] It believed that respondeat superior in such cases as this "would . . . not tend to promote the achievement of safer workplaces. If employers are told that they are liable for violations regardless of their efforts to comply, it would only tend to discourage such efforts."[211]

The court rejected the OSHRC's burdening Ocean Electric with proving the unforseeability or unpreventablity of the accident for two reasons. First, it noted that OSHRC procedures state that "[i]n all proceedings commenced by the filing of a notice of contest, the burden of proof shall rest with the Secretary."[212] Second, Ocean Electric apparently was not informed that its safety program would be at issue before the OSHRC.[213] Because there had previously been stipulations that Mr.Watson's actions were the result of human error that the

199. OSHA Safety and Health Regulations for Construction, 29 C.F.R. § 1926.957(a) (1999).
200. *See id.* § 1926.950(c).
201. *See Ocean Elec. Corp.*, 594 F.2d at 398.
202. *See id.*
203. *See id.*
204. *See id.* at 399.
205. *See id.*
206. *See id.* at 398.
207. *See id.* at 401.
208. *See id.* at 399.
209. *See id.* at 401-02.
210. *See id.* at 399.
211. *Id.*
212. *Id.* at 401-02 (quoting 29 C.F.R. § 2200.73(a) (1998)).
213. *See id.* at 403.

employer could not have foreseen, the Fourth Circuit disposed of the action by reversing the OSHRC's judgment rather than remanding it.[214]

V. ANALYSIS

A. *Analysis of the "Employer's Burden" Position*

The "Employer's Burden" decisions are fatally flawed. These decisions have no basis in applicable statutes. The application of the various burdens violates the spirit, if not the letter, of federal law. Finally, they present faulty policy reasoning. The weakest factor in the "Employer's Burden" courts is their failure to reconcile multiple parts of the Occupational Health and Safety Act of 1970 to their position. Many simply ignore the Act in their decision. Some recite key passages, but do not truly justify why the Act is not against employers having the initial burden of proving that a violative action was the result of employee misconduct. The very burdens themselves have no basis in the Act. All of these circuits have different tests.[215]

However, they all basically require the employer to prove that it had an adequate safety program at the time of the accident. Considering the underlying statutory law, these tests are questionable. The Occupational Safety and Health Act of 1970 states that a serious violation exists "in a place of employment if there is a substantial possibility that death or serious physical harm could result . . . *unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.*"[216] The focus of this stat-

214. *See id.*

215. *See* New York State Elec. & Gas Corp. v. Secretary of Labor, 88 F.3d 98, 105 (2d Cir. 1995) (Secretary's prima facie case to show violation of special duty clause consists of four elements: (1) relevant safety standard applies, (2) employer failed to comply with it, (3) employees had access to the violative condition, and (4) the employer had knowledge or constructive knowledge of the condition); Brock v. L.E. Myers Co., 818 F.2d 1270, 1276 (6th Cir. 1987) (unforseeable employee misconduct constitutes an affirmative defense to be proved by the employer after the secretary has made out a prima facie case of a violation of the act); Daniel Int'l Corp. v. Occupational Safety & Review Comm'n, 683 F.2d 361, 363 (11th Cir. 1982) (unforseeable employee misconduct constitutes an affirmative defense); H.B. Zachry Co. v. Occupational Safety & Health Review Comm'n, 638 F.2d 812, 818 (5th Cir. Unit A Mar. 1981) (to prevail in defense, employer must demonstrate that (i) all feasible steps were taken to avoid the occurrence of the hazard including training of employees as to dangers and supervision of work-site and (ii) actions of employee were a departure from a uniformly and effectively communicated and enforced work rule of which departure the employer had neither actual nor constructive knowledge); General Dynamics Corp. v. Occupational Safety & Health Review Comm'n, 599 F.2d 453, 458 (1st Cir. 1979) (employer may defend by showing it took all necessary precautions to prevent occurrence of violation); Danco Constr. Co. v. Occupational Safety & Health Review Comm'n, 586 F.2d 1243, 1246 (8th Cir. 1978) (employer bears burden of establishing affirmative defense of unforseeable employee misconduct).

216. Occupational Safety & Health Act of 1970 § 17(k), 29 U.S.C. § 666(k) (1994) (emphasis added).

ute is on whether an employer could have or should have been aware of the violation. The focus is not on whether the employer had an effective safety program. Certainly, the safety program is probably a factor. In the case of *Danco Construction*, this employer probably should have known a haphazard safety program could lead to death or injury of its employees. Still, in light of this statute, an employer's safety program should not solely determine whether the employee misconduct defense is allowed.

Another problem arises in applying these burdens. In the case of *H. B. Zachry*, the safety program was found lacking because an employee found a way around a fairly elaborate safety training system.[217] Ocean Electric's program was called into question because a highly experienced employee on a crew of highly experienced employees made a mistake. Willson's safety program was apparently deemed insufficient because a supervisor was not directly managing another supervisor.

The purpose of the Occupational Safety and Health Act of 1970 was to provide safe working conditions *so far as possible.*[218] The "Employer's Burden" courts seem to want employer safety programs that eliminate all error. They also tend to demand constant supervision of employees despite the supervised employees' abilities and experience. This clearly goes beyond the intent of Congress. Also, employees are required to comply with the Act and "all rules, regulations, and orders . . . which are applicable to his own actions and conduct."[219] Holding employers responsible for one time employee errors, like leaving a door open or working in an area he was specifically told not to, weakens if not nullifies this portion of the Act. The fact that "Employer's Burden" courts go against applicable statutes in applying their burdening rules is troublesome.

The "Employer's Burden" circuits have also tried to justify this position through at least three policy reasons. These reasons can be found in *Danco* and *H.B. Zachry*. The *Danco* court justified the burden as a means to punish employers with dismal safety programs.[220] There is nothing in the Occupational Safety and Health Act that permits this kind of punishment. If Danco, or any other employer, has a poor safety program, the OSHA inspector should cite such a company for having a poor safety program.[221]

Another justification noted by the *Danco* court was that the burden should be on the employer to prove that it had an adequate safety program because the employers have better access to their safety pro-

217. *See H.B. Zachry Co.*, 638 F.2d at 819.
218. *See* 29 U.S.C. § 651(b) (emphasis added).
219. *Id.* § 654(b).
220. *See Danco Constr.*, 586 F.2d at 1246-47.
221. As an example, one regulation requires employers to train employees to control and eliminate safety hazards. *See* 29 C.F.R. § 1926.21(b)(2) (1998).

gram.[222] Basically, this court believes that the employer has the necessary facts on hand and is in a better position to handle the burden. However, OSHA has the power to employ experts and consultants, and can use personnel and facilities of federal and state agencies if such agencies permit.[223] OSHA also conducts research and has investigatory powers.[224] Finally, OSHA has subpoena power.[225] The only thing keeping OSHA from the safety documents and personnel of any company is the formality of getting a subpoena. In light of these broad powers, the government is arguably in a much better position than employers to prove that a given act was not the result of unforeseeable or unpreventable employee misconduct.

The final reason for the burden to be on the employer is the *H.B. Zachry* "diligence" justification. This court thought it was important for an employer to show it was diligent in creating, implementing and executing its safety plan before allowing an employee misconduct defense.[226] Again, the Act itself does not extend the diligence requirement prior to actual misconduct.[227] Also important is the amount of diligence this court expected. The *H. B. Zachry* court found the employer's persistence lacking because the crane operations employee missed safety meetings even though he was aware that he could lose his job.[228] It appears that this diligence requirement conflicts with the safety "as far as possible" standard set forth by Congress in the Act.

The "Employer's Burden" Circuits' position has no grounding in the underlying statute. In application of their position, these courts hold employers to a higher standard than that intended by Congress. Although these courts have expressed a few policy reasons for burdening the employer with proving the employee misconduct defense, none of these reasons can surmount federal law.

B. *Analysis of the "OSHA Burden" Position*

The "OSHA Burden" decisions seem to be in sync with the Occupational Health and Safety Act of 1970. The Act states that a serious violation cannot exist if an employer was not aware of the violation and could not have found the violation by exercising reasonable diligence.[229] The "OSHA Burden" position is also in line with congressional intent. Congress created the Occupational Safety and Health Act of 1970 to assure safe and healthful working conditions *as far as*

222. *See Danco Constr.*, 586 F.2d at 1247.
223. *See* 29 U.S.C. § 657.
224. *See id.*
225. *See id.*
226. *See Danco Constr.*, 586 F.2d at 1246-47.
227. 29 U.S.C. § 666(k).
228. *See H.B. Zachry Co. v. Occupational Safety & Health Review Comm'n*, 638 F.2d 812, 819 (5th Cir. Unit A Mar. 1981).
229. *See* Occupational Safety & Health Act of 1970 § 17(k), 29 U.S.C. § 666(k) (1994).

possible.[230] Certainly, not holding an employer liable for acts it was not aware of or those that it could not reasonably find complements the purpose set forth by Congress.

The *Danco* court takes the position that burdening an employer with a questionable safety program is appropriate.[231] There is probably some value to this belief. Allowing a company with a dismal safety program like Danco to claim this defense could waste valuable court time and OSHA resources. However, the "OSHA Burden" position has considered this dilemma and presented a solution. In *Pennsylvania Power & Light Company v. Occupational Safety & Health Review Commission*,[232] the Third Circuit's Justice Hunter considered this problem.[233] Speaking for the court, he noted that it would be acceptable to require an employer to provide some evidence that it took reasonable precautions.[234] He noted this was especially true when the employee violating the standard was a supervisor.[235] The "OSHA Burden" position does require some evidence from the employer in pleading the employee misconduct defense. But, as in *Pennsylvania Power & Light*, the government should have the burden of proving the employee misconduct was foreseeable or preventable.

Although its harmony with the federal statute is probably sufficient to justify the "OSHA Burden" position, there is a sound policy behind requiring the government to ultimately prove that an employee's misconduct was foreseeable and preventable in serious violation scenarios. The *Ocean Electric* court noted that imputing knowledge through supervisory employees for this defense was improper because it would tend to discourage employers from taking measures to make work places safer.[236] Since "Employer's Burden" courts go to great lengths to hold employers liable for employee mistakes, this proposition probably applies to this issue beyond just imputed knowledge.

An employer in the Fifth Circuit aware of the *H.B. Zachry* decision may very well tend to direct profits away from improving safety programs when it could be liable for its employees' violations even when those employees were aware of the violated rule. In contrast, a Fourth Circuit employer might invest in enhanced safety programs since it is more likely to benefit from such a policy. The greatest strength of the "OSHA Burden" position is that it meshes well with the Occupational Safety and Health Act of 1970. Additionally, it may very well encourage employers to develop better safety programs.

230. *See id.* § 651(b) (emphasis added).
231. *See Danco Constr.*, 586 F.2d at 1247 n.6.
232. 737 F.2d 350 (3d Cir. 1984).
233. *See id.* at 352.
234. *See id.* at 357.
235. *See id.*
236. *See Ocean Elec. Corp.*, 594 F.2d at 399.

VI. CONCLUSION

Any decision by the Supreme Court on the employee misconduct defense would be welcome. Currently, there is a split in the circuits on whether employers or the government has the burden to prove or disprove this defense. To make matters worse, the circuits favoring burdening employers have created a multitude of tests. There is only one OSHRC. It must use the appropriate test for the appropriate circuit or face reversal on appeal. Any decision will at least have the benefit of simplifying this very muddled area of the law.[237]

The "Employer's Burden" should not be held to be the law of the land. It defeats congressional intent. Besides being in conflict with the very scheme of the Occupational Safety and Health Act of 1970, it unduly restricts one section of the Act (the portion that requires employers to be aware of or reasonably able to discover serious violations) and tends to nullify another (the section that requires employee compliance). Those courts favoring burdening employers with proving they have an adequate safety program have not come forth with any justification that would warrant ignoring congressional intent.

The "OSHA Burden" position should be made the law in all parts of the nation. Under this scheme, an employer charged with a serious violation will be allowed to plead employee misconduct after offering proof that the violative act was unpreventable or unforeseeable. If the employer can do this, then the government must bring forth its awesome powers and resources to prove that the cited act was neither unforeseeable nor unpreventable.

The United States Supreme Court denied certiorari on *L.R. Willson*.[238] This is good for employers in the Fourth Circuit, in general, and L.R. Willson, in particular.[239] However, there are many circuits in the nation that insist on burdening employers with proving the employee misconduct defense. As this Note has shown, this conflicts with congressional intent, federal statutes, and has no justifiable policy underpinnings.

Hopefully, this issue will arise again and the Supreme Court will grant certiorari. In such a case, the Justices should hold in favor of the "OSHA Burden" position and require all courts to follow the proce-

237. Justices White and O'Connor noted this as a primary reason they would have granted certiorari on this issue in *L.E. Myers Co. v. Secretary of Labor*, 484 U.S. 989, 990 (1987).

238. *See* Herman v. L.R. Willson & Sons, 119 S. Ct. 404 (1998).

239. Agencies can exercise nonacquiesence and refuse to accept a judicial decision as precedent beyond an immediate case. *See* CHARLES H. KOCH, JR., ADMINISTRATIVE LAW 863 n.2 (3d ed. 1996). In fact, OSHA has been known to nonacquiesce. *See, e.g.*, Jones & Laughlin Steel Corp. v. Marshall, 636 F.2d 32 (3rd Cir. 1980). However, an employer wishing to use the defense that can avail itself of Fourth Circuit jurisdiction at least has the option of appealing the matter to a receptive court.

dure described in this Note. This would be in line with congressional intent and federal statutes.

Christopher Barber

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