

CELLY SERVICES, INC.

Environmental, Health and Safety Services

Discipline Employees

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An employee is seriously injured on the job and the employer calls OSHA as part of notification requirements. OSHA investigates and slaps a \$12,000 fine against the employer. This happened to an automobile dealer in Los Angeles. The employee had partially amputated a finger while diagnosing the engine on an automobile. In their defense, the employer pled that the act of the employee that had caused the injury was an independent act of the employee and the employer should not be held liable.

In order to prevail in this affirmative defense, which must be pled on the appeal following the citation, an employer in California must prove and prevail on all five elements as follows:

1. **The Employee was Experienced and Trained on the Job Being Performed:** In the case at hand, the employee was a diagnostic specialist on automobiles and the employer presented 79 training certifications from the automobile manufacturer out of which 30 were on engine diagnostic and performance checks. Training certification from a nationally recognized body was also presented. OSHA accepted the employer's claim on this issue. Interestingly, OSHA looked at all safety training completed by the technician. CSI advice is to keep your monthly safety training handy.
2. **Employer Has A Well Devised Safety Program:** Employer must prove that a well-devised safety program, which includes employee training for their particular job assignments, is in effect. The employee presents its IPP Program and training from the service manual from the automobile manufacturer relevant to the service operations being done when injury occurred. OSHA accepted this element of the defense as well.
3. **Policy of Sanctions Against Employees Violating Safety Program:** The employer must have a policy of sanctions against employees violating safety rules or involved in unsafe acts. The employer stated that one had never been required as the injuries were virtually non-existent and one was never deemed necessary. The employer lost on this elements as no earlier enforcement/disciplinary action had been documented.
4. **Employer Effectively Enforces the Safety Program:** The written disciplinary policy should be implemented. OSHA held that the enforcement element of the safety program had "no teeth" and that the safety program had not been enforced.
5. **Employee Caused the Safety Infraction Which He or She Knew was Contra to Employer's Safety Requirement:** The employer must prove that the employee had knowledge of this safety requirement, violation of which caused the injury. The employees pled that the safety rules, acknowledged and signed by the employee were available. Also, the shop manual (to service automobiles), which technicians reference repeatedly had outlined the safety procedures including relevant safety issues.

In summary, the employer lost for not having a policy enforcing sanctions against employees violating the safety program. Written policy without implementation is not sufficient either. A written IIPP where the facility is inspected on a periodic basis and hazards corrected is not enough. A "Write-Up Policy" is needed. Further, such policies should be enforced consistently without discrimination. A safety disciplinary form is available in the Black Box. Disciplining employees is also a labor law issue and the advice of qualified counsel should be solicited. (Ref.: Mercury Service, Inc. Docket No. 77-R4D1-1133)

The article was authored by Sam Celly of Celly Services, Inc. Sam has been helping automobile dealers comply with EPA & OSHA regulations in California, Nevada, Arizona, Hawaii & Idaho since 1987. Sam received his BS & MS in Chemical Engineering followed by a JD from Southwestern University. Sam is a Certified Safety Professional & a Registered Environmental Assessor (CA). Your comments/questions are always welcome. Please send them to sam@cellyservices.com.