

11th Circuit Distinguishes ComTran Decision Regarding Supervisor Misconduct and Employer Knowledge

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You may recall the 11th Circuit's 2013 pro-employer ruling *ComTran Grp. v. U.S. DOL*, 722 F.3d 1304 (11th Cir. 2013), finding that supervisor misconduct cannot be used to establish the element of employer knowledge. Although a manager's conduct is generally imputed to the employer, *ComTran* put the burden on the Secretary of Labor to show employer knowledge of the violative condition, either constructive or actual, aside from the supervisor's misconduct.

However, in a few recent decisions, supervisor misconduct has been used to support the employer knowledge element. In an unpublished 11th Circuit case, *Florida Lemark Corp. v. Sec'y, U.S. DOL* (No. 15-10445, Dec. 14, 2015), the court was not persuaded by the employer's argument rooted in the *ComTran* precedent. Florida Lemark, a construction company, was one of many employers involved in the collapse of a garage causing the death of four workers. The accident was due to the structural failure of a column, which should have been grouted within two days of installation, but allegedly was not. Florida Lemark argued that the column had been grouted, but if the manager had failed to do so, Florida Lemark had no knowledge of such misconduct.

The 11th Circuit upheld the Occupational Safety and Health Review Commission's finding that an employer cannot rebut employer knowledge through supervisor misconduct when the employer did not take any steps to ensure that grouting was done or to audit its proper completion. Thus, the supervisor's misconduct was reasonably foreseeable.

In January 2016, the 11th Circuit issued another ruling, *Quinlan v. Sec'y, U.S. DOL*, No. 13-12347, Jan. 8, 2016), narrowing the *ComTran* precedent. In *Quinlan*, the 11th Circuit found that when a supervisor engaged in misconduct with an employee, the supervisor's knowledge of his own misconduct and the employee's misconduct satisfy the employer knowledge element. The supervisor and the employee were seen on the edge of a fifteen-foot wall without fall protection. The *Quinlan* decision turned on the fact that the supervisor was not the sole actor in the misconduct as in *ComTran*, rather the supervisor allowed misconduct to continue after observing it and participated in that misconduct.

These cases, distinguishing *ComTran*, may impose some challenges to relying on the *ComTran* decision to rebut employer knowledge in many instances involving supervisor misconduct. The employer must ensure that the alleged misconduct is the type of activity that is audited and regulated by the employer. Further, when a supervisor acts with other employees or oversees misconduct, employer knowledge may be established.