

The Anatomy of Corporate Criminal Liability: Appellate Court Sustains Organizational Conviction and Imposition of Maximum Penalty for Violations of Civil Safety Regulations

by Alex Hontos and RJ Zayed

In recent years the buzz in organizational criminal liability has come from so-called “individual liability” for acts of corporate wrongdoing—the idea that managers and employees are not immune from individual prosecution for alleged misdeeds performed within the scope of their employment. But vigorous debate about the effect of the “Yates Memorandum” and the shifting (or not shifting) enforcement priorities of the Department of Justice should not distract from the fact that organizations remain the primary targets of prosecution for organizational misconduct. Organizational prosecutions raise unique evidentiary and proof issues and can—to the surprise of some—arise from alleged violations of the civil laws. A recent decision of the United States Court of Appeals for the Eighth Circuit is a case in point.

While working on a project constructing a warehouse in Kansas City, Missouri, one of DNRB’s employees fell off a truss thirty-six feet to his death. Although the employee had a personal fall-arrest harness and connectors, the employee was not using them to anchor himself to the warehouse’s frame at the time of the fall. After the death, the Department of Justice charged DNRB with willfully violating OSHA safety regulations, which provide that employees “shall be protected from fall hazards” and which make such violations enforceable as criminal offenses. *See* 29 U.S.C. § 666(e); 29 C.F.R. § 1926.760. At a bench trial, the district court found the company guilty and imposed a \$500,000 fine—the statutory maximum. On appeal, the Eighth Circuit affirmed and, in the process, clarified the standard for a corporation’s “willful” violation of the law, the admissibility of “other bad acts” evidence to establish knowledge, and the viability of a statutory maximum penalty even when the evidence should that the organization was no longer viable. *See United States v. DNRB, Inc.*, No. 17-3148 (8th Cir. July 17, 2018).

The Court explained that an organization “willfully” violates the standards when it “intentionally disregard[s] or was plainly indifferent to the requirements” of them. Here, two pieces of evidence were decisive to sustain the company’s conviction. First, the company had previously been cited for violating the same OSHA standard—something

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that implied that the company knew of the OSHA standard. Second, witnesses testified that the employee had previously been observed by a manager walking on the trusses of the warehouse without being connected to an anchorage point. The manager's failure to ensure that the employee properly engaged the safety equipment, the Court explained, could be imputed to the organization. And it was no defense that the company had, in fact, provided the employee with fall-arrest equipment. It was sufficient that there was evidence that the company knew the employee was not using the equipment and that the company failed to ensure that the employee used the equipment.

The Court also explained that "other acts" evidence, which the district court had admitted under Federal Rule of Evidence 404(b), was properly admissible. The "other acts" evidence included a DNRB OSHA citation some eight years before, as well as other instances at the project jobsite. Although such evidence could not be used to prove the company's bad character directly, it was admissible to show DNRB's "intent or knowledge." The Court explained that it was admissible because it was similar to the charged conduct and relevant, and that it was not unduly prejudicial because it was corroborated by other evidence of the company's intent.

Finally, the Court affirmed the statutory maximum sentence—a \$500,000 fine—even though the presentence report indicated that the company could not pay the fine. DNRB argued that the district court had to make findings before rejecting the presentence report's conclusion. On a thin district court record, the Eighth Circuit still sustained the fine, explaining that the district court knew that DNRB had "closed up shop" and imposed the fine anyway.

DNRB underscores the speed with which violations of civil laws and safety standards can become criminal offenses and the importance of compliance with these laws to keep employees safe and to maintain orderly business operations. Organizations operating in industries subject to civil safety standards—construction, manufacturing, agriculture, and mining in particular—should understand these standards may well have criminal dimensions and create outsized risk for the organization. *DNRB* also highlights the need for a corporate culture of compliance. Even though the organization had provided safety equipment to its employees, the Court essentially said that was not enough—the organization's crime was to fail to ensure that its employees used that equipment properly. Policies and near-compliance are not enough; compliance must flow down to supervisors and be part of every process and project.

A copy of the *DNRB* decision is [here](#).