Can a Company's Internal Safety Policies Increase Exposure To Negligence Claims?

Michael K. Roberts and Steven F. Stanaszak (spr.)*

The plaintiffs' bar labels the trucking industry as wrongdoers or, at best, dangerous necessities. At the same time, plaintiffs often try to use internal policies to complicate an effective defense by blurring the standard of care. But can a company's internal safety policies increase exposure by raising the standard of care? The answer should be a straightforward "no"; internal policies, standing alone, are not enough to establish the standard of care. After a plaintiff demonstrates a standard of care, however, many courts admit internal policies and compliance therewith as evidence of negligence. The potential for undue prejudice and confusion is clear and significant.

A recent case out of the Sixth Circuit addresses this issue: *A.K. v. Durham School Services, L.P.*[1] In Durham, a minor was injured while riding his bicycle to school after missing the bus.[2] The minor's parents argued that Durham's driver contributed to the accident by leaving the pickup spot early, which violated internal policies.[3] Before trial, Durham moved to bar its employee handbook as evidence on the basis that Tennessee law does not allow the "use of guidelines" or "safety rules" to establish the standard of care.[4] The Western District of Tennessee barred the evidence and questioned whether internal policies were ever relevant for any purpose.[5] At trial, Durham was found less negligent than the minor's parents and, as such, Tennessee law barred recovery.[6] On appeal, the Sixth Circuit affirmed the jury's verdict because the minor's parents could not show prejudice, but the court did not address the admissibility of Durham's employee handbook.[7]

The Sixth Circuit's ruling does not provide the bright-line rule desired. The question of whether internal policies are admissible will change issue by issue and case by case. Nevertheless, by examining the purpose for which the internal policies are offered, there are several tactics that may bar a claim, bar evidence of internal policies, or limit the damage caused by that evidence.

1. A Plaintiff Cannot Rely on a Company's Internal Policies to Establish a Standard of Care

Most courts recognize that internal policies, by themselves, do not establish a standard of care.[8] There are two main considerations to support this consensus: 1) public policy favors increased safety procedures; and 2) ensuring a uniform standard of care for juries to judge similarly situated parties. These considerations provide a potential defense to liability.

First, public policy favors companies requiring more stringent safety standards. But admitting internal policies to establish a standard of care incentivizes companies to limit safety policies to the minimum required by law or below the industry standard where no legal duty is enumerated to limit liability.[9] If stringent safety policies increase exposure to negligence claims, a litigation-wary company's logical response will be to eliminate safety policies.[10] A company should be encouraged to hold itself and its employees to a higher safety standard, not punished.[11]

Second, if a company's internal policies define the standard of care, differing standards for parties in the same situation will result. The general standard of care directs juries to analyze a party's conduct against what a reasonable party in the same situation would do.[12] The exact standard of care changes depending on the party and the scenario (e.g., in many states, a professional driver is held to a higher standard of care than the average driver).[13] But applying the reasonable person standard to all similarly situated parties provides, at the very least, an attempt at a fair, uniform judgment of one's conduct.

Applying a company's internal policies to establish a standard of care contradicts this goal.[14] Imagine that Jones Trucking requires all steering tires to have a tread depth of at least 4/32 inches for compliance with the Federal Motor Carrier Safety Administration,[15] and Smith Trucking requires all steering tires to have a tread depth of at least 6/32 inches. If internal policies are used to establish a standard of care, steering tires with a tread depth of 5/32 inches will expose Smith Trucking, but not Jones Trucking, to a negligent maintenance claim. There is no reason for

* *Scopelitis Garvin Light Hanson & Feary, P.C. (Milwaukee, WI)

the higher bar except for Smith Trucking's aspirational standards.[16]

Identifying the purpose for which internal policies are being offered into evidence is necessary to determine the appropriate defense. The standard of care can be shown in many ways, *i.e.,* testimony on industry practices or regulatory requirements. In other cases, expert testimony is required to establish a standard of care.[17] But in all negligence cases, the standard of care is a threshold requirement. If a plaintiff offers only internal policies to establish a standard of care, the claim will be vulnerable to dismissal or a directed verdict.[18] Similarly, an expert's reliance on only internal policies to establish the standard of care is insufficient.[19] The "failure to establish a standard of care is 'fatal to a negligence claim.'"[20]

II. Violation of Internal Policy Can Be Used to Show Negligence if Relevant and Not Unfairly Prejudicial

While the standard of care is a threshold requirement, most courts will admit internal policies into evidence after a plaintiff meets or passes that threshold.[21] At this point, the question of admissibility reverts to the rules of evidence (i.e., relevance and prejudicial effect).[22] For example, Oklahoma courts admit internal policies with a cautionary instruction to show negligence even when the internal policy demands a higher standard than the applicable law.[23] In *Therrien v. Target Corporation,* Therrien proffered evidence of Target's security procedures for apprehending shoplifters and noncompliance with those procedures.[24] The trial court admitted the evidence, and the Tenth Circuit affirmed, ruling that Target's procedures were relevant to show the "measure of caution which ought to be exercised."[25] Similarly, the California Supreme Court concluded that the California Highway Patrol manual was relevant to whether it was reasonable for an officer to stop a vehicle on the center median.[26]

Other jurisdictions, such as the Western District of Tennessee, question whether a company's internal policies are "admissible for any purpose whatsoever."[27] The court's position is well taken: in most cases, evidence of an internal policy is not relevant to whether an employee violated a standard of care. For example, assume Johnson Trucking requires all of its drivers to conduct pre-trip inspections in compliance with the FMCSA. If one of Johnson Trucking's drivers fails to complete a pre-trip inspection and subsequently causes an accident, Johnson Trucking's policies are not relevant.[28] The FMCSA sets the standard of care for pre-trip inspections. Whether the driver followed Johnson Trucking's procedures does not make it more or less probable that he or she complied with the FMCSA standard.

Similarly, the argument that internal policies represent "what ought to have been done" does not hold water.[29] The standard of care instructs the jury on what ought to have been done. Internal policies are not relevant.[30]

The danger of unfair prejudice and confusion is another reason to challenge admissibility. Admitting evidence of internal policies possesses the distinct risk that the jury will treat the violation of internal policies as a violation of the appropriate standard of care.[31] Further, the skilled plaintiff's attorney may use this evidence to portray the company as a wrongdoer, thereby further inciting the jury's anger. Because the internal policies are not relevant, the danger of undue prejudice and confusion significantly outweighs any probative value.[32]

Relevancy and prejudice should be challenged in most circumstances. At the very least, the court should provide cautionary instruction with evidence of internal policies.[33] In *Therrien*, the court instructed the jury that evidence of Target's procedures were not admitted as a legal standard and violation of the procedures should not be equated with a finding of negligence.[34] While cautionary instruction is not a fix-all, it may help ameliorate potential undue prejudice or confusion.

Endnotes

1 *A.K. a Minor by and Through his Parent, Timothy Kocher v. Durham Sch. Servs., L.P.,* 969 F.3d 625 (6th Cir. 2020).
2 *Id.* at 628.
3 *Id.*
4 *Id.* at 628-29.
5 *Id.* at 629.
6 *Id.*
7 *Id.*
8 *Briggs v. Washington Metro. Area Transit Auth.,* 481 F.3d 839 (D.C. Cir. 2007) (transit authority's internal policies, standing alone, did not demonstrate a standard of care); *Therrien v. Target Corp.,* 617 F.3d 1242, 1256 (10th Cir. 2010) (Target's internal policies did not alter the applicable standard of care under Oklahoma law); *FFE Transp. Servs. Inc. v. Fulgham,* 154 S.W.3d 84, 92 (Tex. 2004) (trucking company's self-imposed policy for inspecting trailers, taken alone, does not establish a standard of care); *Mayo v. Publix Super Mkts., Inc.,* 686 So. 2d 801 (Fla. Dist. Ct. App. 1997) (internal policy for placing equipment for public use did not fix a legal standard and was not relevant).
9 *Briggs,* 481 F.3d at 848 (*citing D.C. v. Arnold & Porter,* 756 A.2d 427, 435 (D.C. 2000)).
10 *Mayo,* 686 So. 2d at 801-02.
11 *Id.*
12 *McGonagle v. U.S.,* 155 F. Supp. 3d 130, 134 (D. Mass. 2016) (negligence is determined by comparing the party's conduct to that which a reasonable person would exercise in the circumstances); s*ee generally Colburn v. U.S.,* 45 F. Supp. 2d 787 (S.D. Cal. 1998) (a physician breaches the standard of care only if the physician's peers find an inappropriate deviation from the standard of care).
13 *Dakter v. Cavallino,* 2014 WI App 112, 358 Wis. 2d 434, 856 N.W.2d 523.

[14] *See Marolla v. Amer. Fam. Mut. Ins. Co.,* 38 Wis. 2d 539, 157 N.W.2d 674, 678 (1968).
[15] 49 USC § 393.75.
[16] *Marolla,* 157 N.W.2d at 678.
[17] *Briggs,* 481 F.3d at 845; *Troutwine Estates Development Co. v. Comsub Design and Eng'g, Inc.,* 854 N.E.2d 890, 902 (Ind. Ct. App. 2006) (generally, for a jury to know if a professional has complied with the applicable standard of care, a party must present expert testimony establishing that standard of care).
[18] *Clark v. D.C.,* 708 A.2d 632, 636 (D.C. 1997) (admission of internal policies was not sufficient to overcome a motion for directed verdict); *Mayo v. Publix Super Mkts., Inc.,* 686 So.2d 801 (Fla. Ct. App. 1997).
[19] *FFE Transp. Servs.,* 154 S.W.3d at 91-92.
[20] *Briggs,* 481 F.3d at 848 (citing Scott v. D.C., 101 F.3d 748, 757 (D.C. Cir. 1996)).
[21] *Dine v. Williams,* 830 S.W.2d 453, 457 (Mo. Ct. App. 2017) (internal rules and regulations may be admissible if and only when the proper standard is proven).
[22] Fed. R. Evid. 401 and 403.
[23] *Therrien,* 617 F.3d at 1256.
[24] *Id.*
[25] *Id. (citing Robinson v. Mo. Pac. R.R. Co.,* 16 F.3d 1083, 1091 (10th Cir. 1994) (internal policies were admissible to inform the jury on what precautions are reasonable in light of the risk)).
[26] *Lugtu v. California Highway Patrol,* 28 P.3d 249, 259-60 (Cal. 2001).
[27] *Durham,* 969 F.3d at 629.
[28] Rule 401.
[29] *Robinson,* 16 F.3d at 1091.
[30] *Mayo,* 686 So. 2d at 802 (internal policies manual proffered for evidence at trial was not relevant to the issue of reasonable care).
[31] Rule 403.
[32] *Id.*
[33] *Mayo,* 686 So. 2d at 802.
[34] *Therrien,* 617 F.3d at 1256.