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Adam: [00:00:30] Welcome back, Workplace Safety Review podcast fans, really excited to have everybody. Mike and I are really excited about our guest today. It is Deborah Harris and she is the chief of the United States Department of Justice Environmental Crimes Section. She supervises an office of 36 attorneys responsible for the prosecution [00:01:00] nationwide of pollution, wildlife, animal welfare and worker safety crimes. Ms. Harris works extensively with a wide range of federal investigative agencies, including the EPA, Coast Guard, OSHA, the USDA, NOAA, and the U.S. Fish and Wildlife Service. She chairs the Department of Justice's Environmental Crimes Policy Committee and serves on the advisory board of Interpol's Environmental Compliance and Enforcement Committee.

[00:01:30] Prior to joining ECS, Ms. Harris was a criminal defense attorney with the public defender service for the District of Columbia. She received a BA in English and political science from the University of North Carolina and a JD from the University of North Carolina School of Law. A lot of time down in North Carolina, following law school, she was a Prettyman fellow at the Georgetown University Law Center, Criminal Justice Clinic, where she received her LLM in trial advocacy. Deborah, thanks so much for coming on the Workplace [00:02:00] Safety Review podcast.

Deborah Harris: Thank you for having me.

Mike: Deborah. This is Mike. I concur. Thank you so much for being on our show. How long have you been chief of the ECS and what is your role in the prosecution of environmental and worker safety and health crimes?

Deborah Harris: I have been the chief coming up on eight years and as to what I do on the micro level, focusing solely on prosecutions, I determine which cases that we are going [00:02:30] to open for investigation. And then at the end of an investigation, what charges, if any, are we going to pursue or what are the parameters of a plea agreement. On the macro level, I work to ensure that the government is consistent across the nation, in how these cases are being prosecuted and provide training and resources for investigators, prosecutors, and agency council. And we propose or comment on relevant legislation or policy.

Adam: Deborah, how does an environmental case, [00:03:00] or really any case under your jurisdiction come to you for potential criminal prosecution? Can you walk us through that process?

Deborah Harris: Well, there are several routes. The most usual route is that an investigative agent, let's say Environmental Protection Agency, Criminal Investigation

Division, a special agent who's been working with an attorney in our section, just does a direct referral. They bring a case to the attorney they like. We otherwise have a request for assistance from [00:03:30] a U.S. Attorney's office. We work two thirds of our cases as co-counsel with the U.S. Attorneys' offices. And, of course, they have quite a different portfolio. So, when it comes to these very complex white collar cases, sometimes they just need someone else to handle it, so we get them the request from them. They can arise out of a task force that we participate in. And on a rare occasion, we're contacted by another section within our division, [00:04:00] the Environment and Natural Resources Division, because there's a civil matter that they've determined has a criminal component.

Mike: These cases when they are referred to your office, is it really early on in the process or is it sometimes right in the middle or the thick of things? Like where in the process do these cases get referred to you?

Deborah Harris: That too can vary because it depends on what the agent needs. If the agent needs a search warrant, for example, that's going to be early in the process and you're going to need an attorney to process [00:04:30] that search warrant. You're also going to need an attorney for a grand jury subpoena. It's very rare that an agent brings you a case that's like ready to go; ready just to present to a grand jury. So it's usually early and we actually participate in the investigation.

Adam: Deborah, it's Adam, what are some of the factors that you, or the division consider in deciding whether to prosecute a matter involving worker safety and health? We're sort of moving beyond the environmental [00:05:00] stuff, but the worker safety and health side.

Deborah Harris: On the worker safety and health side, let me see. First of all, I want to point out that we can't prosecute OSHA violations in state plan states. So, we're limited to about half the country right there. Then we have to decide whether we can overcome the many hurdles to prosecution. That's going to include the definition of an employer, which is really limited, the required mental state, which is willful, that's higher than almost all of the statutes [00:05:30] that we work with in the pollution realm.

We have to have a violation of a specific safety or health standard, as opposed to the general duty clause. And we have to also show the "but for" and proximate cause of the fatality. So this is a lot that we have to consider. One of the things we no longer have to consider is an environmental nexus because we started back in 2003 in my section with this Worker Safety Initiative. And finally, [00:06:00] by 2015, we got the OSH Act assigned to us as a statute so that we can actually take a case that doesn't have an environmental nexus. So, it's difficult to actually bring it, I think an OSHA case.

Mike: And do those cases come to you early on, or your office early on like the environmental side? Or, can they sometimes be after the investigation's

completed, citations have been issued, and then somebody calls [00:06:30] you up and says, "Hey, we think we have a referral."

Deborah Harris: The typical worker safety case comes to us after the citations have been issued. So, the six month investigation has been done. That doesn't mean that we're not going to do more investigation on our own. There are the catastrophic cases where there's a lot of media coverage where we might be involved earlier. And that's when there's just this hue and cry to figure out what happened quickly and a lot of agencies are involved. Those [00:07:00] we are often in, like right after it happened.

Adam: So Deborah, given all the hurdles with prosecuting a worker safety and health case, in your opinion, does the OSH Act need to be amended to sort of make things easier and make a willful violation causing the death of a worker, a higher level of crime, like a felony?

Deborah Harris: I'm a definite advocate of that; was actually involved in some of the Protect America Workers Act efforts in the past. And, [00:07:30] it hasn't been amended since 1970, the same penalties.

Mike: And, right now it's just a misdemeanor, right? And I think you can, a company and individuals can get fined up to \$250,000 as individuals and \$500,000 for a corporate entity for a worker safety criminal violation. Is that right?

Deborah Harris: Yes, the maximum incarceration for this misdemeanor is six months. [00:08:00] Of course, that's very hard to achieve given the definition of employer because you're usually going to have a defendant that's a corporate entity. With respect to the fines, there is a statutory cap of, I think it says \$10,000. That has changed by what we call the Alternative Fines Act. So yes, they are \$250,000 for an individual, \$500,000 for corporation. But, using the actual Alternative Fines Act, we can get that penalty up to twice the gross loss or gross gain to any [00:08:30] victim.

And one of the things that we have been doing in our cases of late is pursuing restitution for the victim's family. And the last two cases we had, I think \$1.6 million in restitution, and then the next one was \$1 million in restitution so that, it carries a bigger wallop to the criminal than just going after penalties. And I would want to remark, though, that we also [00:09:00] take that into consideration. If a corporation has dealt fairly with the victim's families and there has been some kind of settlement, we will take that into consideration as well, with respect to the penalty that we are going to ask for and the number of counts that we're going to pursue.

Mike: You know, I've been practicing OSHA law for about 20 years and early on in my career, looking at this very issue, I thought that there weren't a lot of prosecutions. One being that in a normal OSHA [00:09:30] case, OSHA has the burden of proving by preponderance of the evidence. Whereas if you're going to

go after a company or an individual for criminal violation for worker safety, the burden of proof is beyond a reasonable doubt. Does that come into play in your decision making and has it, so it's two questions, and number two, when you get the file from the OSHA folks, are they looking for this overwhelming evidence, if you will?

Deborah Harris: I've got a few [00:10:00] comments about that. First of all, the beyond a reasonable doubt burden is something that we also have always had to consider. And, like I said, it's heightened in an OSH Act case because you have to show willful violation, which means not only did they know what they were doing, but they knew that it was wrong. So, that's heightened. As I said, we don't have that in our run of the mill environmental statutes. My general impression of the files that we get from the CSHOs, [00:10:30] they're doing excellent work. And this is of course without any kind of criminal training, but generally we have very fulsome files. And one of the things that I would want to stress is that we don't have to have OSHA issue a willful citation or find willfulness for us to go into our criminal case because we can prove that on a completely separate track and using the grand jury, we might find out information that the CSHO never had [00:11:00] access to. So, there is that big difference there.

Mike: Interesting. I didn't know that. Adam?

Adam: Yeah, hey Deborah, so obviously you can't talk about pending cases, but you've been in this role for about eight years, is there any case or cases, whether on the worker safety and health side or environmental side that you're particularly proud of or thought were particularly interesting that you could tell our audience about?

Deborah Harris: Yes, actually I was a prosecutor in that eight month long Atlantic State's Cast Iron Pipe [00:11:30] trial involved a McWane facility in Phillipsburg, New Jersey. This trial was with, let me see, we had four prosecutors total and, lots and lots of defense counsel because we had so many defendants. But, this was a cast iron pipe facility that had years and years of putting production above worker safety. And what we had at the end of our investigation was a combination of worker safety violations and environmental violations. [00:12:00] And we knew that, bringing OSH Act misdemeanors, wasn't going to do it. Plus, we had instances of accidents that were not fatalities that you couldn't bring criminally under the OSH Act. So, combining that with environmental crimes, like Clean Water Act, Clean Air Act, and with title 18 offenses, which is something that we stress because in our environmental cases, we, the statutes allow us to go administratively, [00:12:30] civilly or criminally.

So there's got to be something different to make the case criminal given that you can go so many different directions. And one of the things that makes a case criminal, clearly, is lying, cheating and well, scheming. So title 18 offenses are those that you find in title 18 of the U.S. code and they're conspiracy, false

statements, obstruction of justice, money laundering, all kinds of things. And so we brought a combination of obstruction, false statement and environmental, [00:13:00] and we also introduced evidence of a death by forklift, amputations, a lost eye from a saw blade, a broken back from a fall, unprotected fall, third degree burns and broken bones, and ended up with convictions of four of the managers of the facility. Once again, they were not employers, they were managers. That's something that we were able to accomplish by using the environmental instead of the OSH Act, and got sentences [00:13:30] up to seven years. So, that's one of the cases I'm most proud of.

Mike: Wow.

Adam: Yeah, as we're sitting here, Deborah, I'm looking up the news articles about it and it looks like it was about a three or a four year process in total from indictment all the way to verdict.

Deborah Harris: Yes. These can be very protracted. In New Jersey it's particularly slow. It took us three years just to get to sentencing...

Mike: Wow.

Deborah Harris: ...After the convictions, because of all of the post-trial briefing and other issues. So, that was quite an odyssey.

Adam: [00:14:00] Deborah, just switching gears for a second, but what are some of the strategic goals of ECS enforcement? What have been some of the strategic goals and how are they different now and are they, do you see them changing over the next year or two?

Deborah Harris: I think that given that on day one, the Biden administration announced that both environmental justice and climate change were priorities that, not that we weren't working on them already, but now we're looking at, we've [00:14:30] got the wind behind our backs to go forward on that. And we're doing what we can to make an impact there. There's a lot of work going on in environmental justice. We're creating task forces and we're definitely moving forward with climate change. We've got a growing program; it's pretty, it's international, but a growing program, just for example, in the timber smuggling. People go and cut down rainforests and cut down wood in the [00:15:00] forest of Siberia to make furniture and everything else. And we're doing what we can to protect that. Carbon sinks and things like that. So, those are, I'd say our biggest priorities right now. But then again, since I joined the section, we were originally just a pollution section. Then we became pollution and wildlife. Then we got the animal welfare. So we do dog fighting. And then we got the worker safety because I wanted it. So we've got quite [00:15:30] a portfolio.

Mike: It sounds like you're great at your job. It sounds like it's no good deed goes unpunished. They keep giving you more work. That's a lot to tackle; for some of

our audience may not know what environmental justice is. And I kind of know, but not really. I mean, if you had to narrow it down in a nutshell, what would you, for the listeners who may not know what environmental justice is, what would you say it is?

Deborah Harris: There are [00:16:00] communities that are overburdened when it comes to bad air or cancer streaks, or bad water, you have lead in the water, that kind of thing. And you can drive through neighborhoods and see the overburdened communities. That's what we want to focus on because, generally of course, these are going to be lower income, lower socioeconomic. And that's what we want to do is to make their lives a little bit better by [00:16:30] giving them what everybody deserves here in the U.S.; clean air, clean water, and no contaminated items in their backyard, that kind of thing.

Mike: Right. Making sure there's a level playing field so that companies just don't go to poor socioeconomic communities and set up shop and pollute the water if you will, right?

Deborah Harris: Exactly.

Mike: Last question, Deborah, this has been awesome. This is my question, so I'm proud of this one. [00:17:00] What advice would you give to a company or employer with, when they're faced with an ECS criminal prosecution?

Deborah Harris: My first piece of advice is to get experienced criminal counsel. I've seen instances where companies rely on in-house counsel or people who don't have the proper experience and that ends up hurting them. And the second piece of advice is to cooperate. The more you cooperate, [00:17:30] the better the outcome is going to be for you in all kinds of ways, whether it's a total declination of prosecution or de minimis fine, whatever. It's very important to cooperate.

Mike: Terrific. Hey Deborah, thank you so much for being on our show. We really appreciate it. We know that you're very busy in your office and again, thank you for being on the show.

Deborah Harris: Well thank you again for having me.

Mike: You bet [00:18:00] and stay tuned to the next episode of the Workplace Safety Review podcast. Stay safe out there, America.