

UNITED STATES OF AMERICA OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION

SECRETARY OF LABOR,
United States Department of Labor,

Complainant,

v.

PETSMART, INC.,

Respondent.

DOCKET NO. 18-1229

ORDER

The Secretary moved to compel PetSmart, Inc. (“PetSmart”) to respond to certain discovery requests (“Motion to Compel”). Respondent filed an Opposition and Response, which opposes all aspects of the Motion to Compel because the discovery requests are not sufficiently relevant in its view.¹ It also argues that some requests were already sufficiently complied with or are unduly burdensome. For the reasons discussed herein and in the parties’ filings, the Motion to Compel is granted in part and denied without prejudice in part.

The discovery requests at issue relate to an alleged serious violation of Section 5(a)(1) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (the “OSH Act”) for failing to provide a workplace “free from recognized hazards that were causing or likely to cause death or serious physical harm where employees were exposed to hazards associated with biting dogs,” and an alleged other-than-serious violation concerning the failure to timely provide certain requested records. (Compl. at ¶¶ 5-8.)

¹ The Secretary argues that Respondent’s Opposition and Response to the Motion to Compel was late. (Sec’y Reply at 1.) Commission Rule 4, 29 C.F.R. § 2200.4(a) specifies that when the time period prescribed is less than eleven days, weekends are not included in the computation of the time to respond. As such, Respondent’s Response was timely filed ten business days after the Secretary’s Motion.

PetSmart filed an Answer to the Secretary's Complaint, contending that it should not be held liable. The Answer includes multiple defenses, including the contention that the company "did not know and could not have known with the exercise of reasonable care of the alleged violative conditions." (Ans. at 3-4.) It also alleges that it lacked fair notice of the violation and that compliance was not feasible or possible. *Id.*

The Secretary's Motion to Compel relates to five areas of discovery: (1) hazard analyses, (2) training materials, (3) OSHA Form 300, 301, or 300A (collectively, the "OSHA Forms"), (4) PetSmart's Occupational Injury/Associate Accident Investigation Reports ("OI/AAIRs"), and (5) documents related to an independent "Review Board" PetSmart created. (Sec'y Mem. at 18-19.) Respondent argues that there were no prior Requests for Production ("RFPs") for the training materials, OSHA Forms, and OI/AAIRs. (Resp't Mem. at 3.) These claims are rejected. The Secretary identified the RFPs for each discovery request referenced in his Motion to Compel. (Sec'y Mem. at 5, 7-9, 11-1, 14, 17; Sec'y Reply at 4.) It is true that the Secretary has now agreed to narrow the scope of its RFPs, but that does not show the original broader requests did not also seek the information that is the subject of the Motion to Compel.

I. Workplace Hazard Analyses

The Secretary asks the undersigned to compel PetSmart to:

produce and identify the written workplace hazard analys(es) and/or safety assessment(s) concerning dog bites or dog attacks that PetSmart relied on or otherwise used as a basis for implementing the procedures and training materials that PetSmart contends were in effect at its stores (including Store 0781) on the date of the Injury (December 27, 2017). If no such documents exist, PetSmart must affirmatively state as such in writing.

Respondent first argues that the Secretary failed to confer about the alleged deficiencies as required by Commission Rule 40, 29 C.F.R. § 2200.40(a) ("Rule 40"). (Resp't Mem. at 4.) The Secretary repeatedly attempted to address the discovery issues and provided evidence of his compliance. (Sec'y Mem. Exs. D, F, and H.) Thus, Respondent's request to dismiss the request for failure to comply with Rule 40 is rejected.

As to the substance of the Secretary’s request, Respondent objects to the Secretary’s use of the term “dog attack” in the request and alleges it already produced responsive materials. (Resp’t Mem. at 5.) After initially proposing a broader definition, the Secretary agreed to clarify that “dog attack” refers to “an instance where a dog has bitten a human and the bite has broken the skin.” (Sec’y Mem. 4-5.) Respondent objects to this definition as “unreasonable” and claims it “fails to define the hazard as one likely to cause death or serious physical harm, as required by the General Duty Clause.” (Resp’t Mem. at n. 2.) The General Duty Clause does not alter the rules of discovery. The Secretary’s request, with the revised definition of “dog attack,” is sufficiently likely to elicit relevant, discoverable information without being unduly burdensome. Indeed, Respondent does not contest the relevance of the information the request seeks.²

Respondent also argues that this request should be rejected because it already provided training two documents in response to the Secretary’s RFPs: check-in procedures and training materials. (Resp’t Mem. at 5.) The Secretary recognizes this but argues that it seeks not just the training documents themselves, but also any written hazard analyses PetSmart relied on to implement those procedures and training materials.³ (Sec’y Reply at 2.)

Thus, the Secretary’s request, with the clarified definition of “dog attack,” is granted:

PetSmart must produce the written workplace hazard analys(es) and/or safety assessment(s) concerning dog bites or dog attacks (i.e., instances where a dog has bitten a human and the bite has broken the skin), that PetSmart relied on or otherwise used as a basis for implementing the procedures and training materials that PetSmart contends were in effect at its stores (including Store 0781) on the date of the Injury (December 27, 2017). If no such documents exist, PetSmart must affirmatively state as such in writing.

II. Adjustments to Policies and Procedures

The Secretary next seeks to discover whether PetSmart made any adjustments to its procedures and/or training materials as they relate to dog attacks in the two years prior to

² Respondent does argue that some of the Secretary’s other requests relate to irrelevant information.

³ If there are no such materials, PetSmart may indicate that in response to the Secretary’s request.

December 27, 2017. (Sec’y Mem. at 18-19.) He asks:

Insofar as PetSmart made any adjustments to its procedures and/or training materials concerning dog bites or dog attacks that were in effect at its stores (including Store 0781) in the two years prior to the Injury (i.e., between December 28, 2015 and December 27, 2017), PetSmart must produce and identify documents sufficient to describe each such change made and the reason(s) for the change. If no such adjustments were made in the two years preceding the Injury, PetSmart must affirmatively state as such in writing.

This request is more limited in scope than what the Secretary initially sought. (Sec’y Reply at 4.)

The Secretary agreed to limit the referenced time period to two years instead of four and narrowed the definition of “dog attack” to instances where a dog has bitten a human and the bite has broken the skin. *Id.* As narrowed by the Secretary, the term “dog attack” seeks nothing more than information about instances where a dog has bitten a human, i.e., those instances involving a “dog bite.” Respondent does not deny knowing what is meant by “dog bite” and so the Secretary already addressed the concerns it raises about the terminology initially used. (Resp’t Mem. at 17-18; Sec’y Mem. at 19.)

PetSmart also argues that it sufficiently complied with the RFPs by producing the procedures and training materials related to dog bites that were in effect on December 27, 2017 at Store 0781. (Resp’t Mem. at 5.) To the extent that different procedures were in place or different training materials were used at other times, PetSmart asserts they are irrelevant. *Id.* at n. 3. It also objects to the Secretary’s request to compel production of “any adjustments to” training materials and procedures. *Id.* at 5.

Considering the claims and defenses raised, including knowledge and feasibility, the Secretary is entitled to all training materials and procedures that relate to dog bites for the identified two-year period. Such information is directly relevant to what the Secretary must establish at the hearing as well as to the defenses Respondent asserts. Respondent’s claims as to the relevancy of such information are rejected.

But, the Secretary request seeks more than just the procedures and training materials used

in the two years before the injury leading to the Citation. He also asks Respondent to specify any adjustments to the policies and identify the reasons for the changes.⁴ (Sec’y Mem. at 10, 18-19.) While the documents themselves are discoverable, the Secretary’s request for Respondent to describe each such change made and the reason or reasons for each change, may be duplicative of the Secretary’s first request for hazard analyses and might also be obtained more easily through the authorized depositions. Thus, this aspect of the request produces a greater burden with a small potential for new relevant information. *See* 29 C.F.R. § 2200.52(c) (permitting a Judge to limit the extent of discovery). As such, it is denied without prejudice to the Secretary’s ability to elicit such information through the already approved depositions.

Therefore,

If PetSmart made any adjustments to its procedures and/or training materials concerning dog bites or dog attacks (i.e., instances where a dog has bitten a human and the bite has broken the skin) that were in effect at its stores (including Store 0781) in the two years prior to December 27, 2017, PetSmart must produce such documents and/or training materials.

III. OSHA 300, 301 and 300A logs

The Secretary next seeks those OSHA Forms that reference or otherwise reflects a dog attack. (Sec’y Mem. at 19-20.) Respondent objects to the request on the grounds of relevancy and because the request is unduly burdensome. (Resp’t Mem. at 7-11.)

As to Respondent’s relevancy objection, the Secretary does not seek all OSHA Forms, only those which reference or reflect a dog attack within a two-year period. (Sec’y Mem. at 19-20; Sec’y Reply at 4.) Such information is relevant to Respondent’s denial of the existence of a hazard, its knowledge as to whether there was a hazard, and whether the Citation violated the due process

⁴ Respondent argues that the Secretary never asked for “any adjustments” to procedures and/or training materials. (Resp’t Mem. at 6.) The Secretary’s use of the phrase “any adjustments” in his Motion to Compel is an example of the Secretary agreeing to narrow the discovery request to reduce the burden on Respondent. (Sec’y Reply at 4.) The Secretary’s initial requests asked broadly for “all documents” related to “dog bites, dog aggression, or dog attacks,” and “all documents related to any review of Pet Smart’s safety standards or procedures.” (Sec’y Mem. Ex. A; Sec’y Reply at 4.) These requests sought the same information being requested now, as well as additional documents the Secretary is no longer seeking. *Id.*

clause.

As to the burdensomeness of the request, the Secretary argues that Respondent is required by 29 C.F.R. § 1904 *et seq.* to log each time an employee is injured and receives treatment beyond first aid.⁵ (Sec’y Mem. at 20.) The OSHA Forms being sought are to be prepared in the regular course of Respondent’s business. *Id.* The Secretary is not asking Respondent to create a log or other document; it only seeks the production of OSHA Forms Respondent created before this litigation. *Id.* The Secretary also agreed to reduce the burden on Respondent by: (1) limiting the scope of the request to two years instead of four; and (2) requiring the production of only those OSHA Forms related to instances where a dog has bitten a human and the bite has broken the skin.⁶ (Sec’y Reply at 4-5.)

Respondent cites the high number of stores but admits that OSHA Forms from all locations are maintained in an electronic database at corporate headquarters. (Resp’t Mem. at 11, Ex. 1.) It does not deny that this database is electronically searchable. *Id.* While it claims that searching the database will take ten minutes per store, it does indicate there are OSHA Forms for every store. *Id.* Nor does Respondent indicate that has even undertaken a cursory search of the database. *Id.* Its claims about the perceived amount of time it will take to respond to the request are premature and unsupported. The relevancy of the requested information sufficiently outweighs the potential burden on Respondent.

⁵ Respondent claims that OSHA lacks jurisdiction over stores located in so-called “state-plan” states. (Resp’t Mem. at n. 4.) First, Respondent has admitted that the Occupational Safety and Health Review Commission (“Commission”) has jurisdiction over this litigation. (Ans. at 1.) Second, having a state plan does not mean that businesses located in that state are exempt from health and safety standards. 29 U.S.C. § 667(c)(2) (requiring all standards in state plan states to be “at least as effective” as those in non-state plan states). Having a state plan means that the state elected to assume the responsibility for the enforcement of occupational safety and health standards, not that there are no such standards. 29 U.S.C. § 667(b). The Secretary’s discovery request does not alter any obligations for those stores located in state plan states. It only seeks OSHA Forms that were created in the normal course of business. (Sec’y Mem. at 20.) If there are no OSHA Forms for a particular location, nothing further is required.

⁶ In the alternative, the Secretary offered to permit Respondent to produce all of its OSHA Forms and place the burden on the Secretary to determine which ones relate to a dog bite or dog attack. (Sec’y Mem. at 21; Sec’y Reply at 5.) Respondent may elect to accept the Secretary’s offer.

Therefore,

For each of PetSmart's stores in the United States, PetSmart must produce copies of each OSHA Form 300, 301, or 300A (collectively, the "OSHA Forms") that references or otherwise reflects a dog bite or an instance where a dog has bitten a human and the bite has broken the skin at any such store in the two years prior to December 27, 2017. This shall include copies of any OSHA Forms concerning the dog attack on a PetSmart Groomer that occurred on or about March 29, 2016 at the PetSmart store located at or adjacent to 2360 W. Oregon Ave., Philadelphia, Pennsylvania.

IV. OI/AAIR Forms

The Secretary all OI/AAIRs that reference or otherwise reflect a dog attack or "near miss" at any store in the two years prior to December 27, 2017. (Sec'y Mem. at 19-21.) In particular, the Secretary seeks any OI/AAIRs concerning the dog attack on a PetSmart Groomer that occurred on or about March 29, 2016 at the PetSmart store located at or adjacent to 2360 W. Oregon Ave., Philadelphia, Pennsylvania. *Id.* at 9-10. PetSmart objects on the grounds of relevancy, and to the extent that the documents are relevant, it alleges production will impose an undue burden. (Resp't Mem. at 3.)

As to the Secretary's specific request for the OI/AAIR for the dog attack that occurred on or about March 29, 2016, Respondent's arguments as to the burdensomeness and relevancy of the request are rejected. PetSmart is aware of both the date and store location of the information sought and provides no information as to why it cannot comply. (Resp't Mem. at 11-12.)

As to the OI/AAIRs from all other stores, Respondent argues that they "are retained in paper form at each store location and are not centrally housed within a computer database or other software solution." *Id.* at 12. It alleges that it would have to have each store location review their files and then scan and send the documents to a centralized location for consolidation. *Id.*

The Secretary counters that the documents are created in the searchable Microsoft Excel program and can be transmitted electronically. (Sec'y Reply at 6-7.) Indeed, PetSmart already transmitted some OI/AAIR to the Secretary in their original searchable electronic format. *Id.* at 6.

The Secretary also indicates that PetSmart instructs employees to email completed forms to one specific central email address, which contradicts Respondent's claims that all the forms would have to be scanned or mailed to a central location. *Id.*

The undersigned accepts Respondent's arguments about the undue burden for those forms that are only maintained on paper at individual store locations. The Secretary has not demonstrated a sufficient need for Respondent to individually search and scan paper records. So, the extent to which the Secretary's discovery request could be construed as requiring a search of non-digital records held only at individual store locations, it is rejected.

However, Respondent's claims about the amount of time it will take to search digital records that have already been transmitted to a single email address were overstated. To the extent that such records pertain to dog bites, the relevance of such documents outweighs the burden on Respondent.⁷ The undersigned notes that the discovery request also seeks information about instances where a dog nearly bit a worker, in other words, there was a "near miss." While such information could potentially be relevant, in light of the other information the Secretary already received and will receive in response to this Order, the undersigned finds that the potential relevance is outweighed by the burden. The Secretary has not shown sufficient need for OI/AAIRs that relate only to a "near miss." Therefore:

PetSmart must produce copies of any Occupational Injury/Associate Accident Investigation Report ("OI/AAIR") concerning the dog attack on a PetSmart Groomer that occurred on or about March 29, 2016 at the PetSmart store located at or adjacent to 2360 W. Oregon Ave., Philadelphia, Pennsylvania. In addition, PetSmart must produce copies of each OI/AAIR from any store that was transmitted to the email address safety@ssg.petsmart.com between December 27, 2015 and December 27, 2017 and references or otherwise reflects a dog bite or dog attack (i.e., an instance where a dog has bitten a human and the bite has broken the skin).

⁷ The undersigned also notes that the OI/AAIR form includes a checkbox for the employee to indicate whether the form relates to an "animal bite." (Sec'y Mem. at 20.) Respondent may, if it chooses, produce all OI/AAIR forms related to "animal bites," rather than just those that refer to a dog bite. *Id.*

V. Independent Review Board Materials

The Secretary also seeks the production of:

any quantitative and qualitative assessments or analysis of PetSmart's safety standards and safety training procedures created by members of the PetSmart independent Review Board and provided to an external consultant and all documents created by or concerning Dr. Valarie Tynes' involvement with the PetSmart independent Review Board.

This request relates to a Review Board PetSmart convened in 2018, after the injury that led to the instant Citation. (Resp't Mem. at 13.) Respondent already produced a summary of the Review Board's findings. *Id.* It objects to providing the additional information sought on the grounds that: (1) the documents are privileged under Arizona state law, (2) the documents are not relevant, and (3) the Secretary's request is overly broad and unduly burdensome. *Id.* at 13-17.

Respondent first claims that Ariz. Rev. Stat. § 12-2322 protects the discovery of the assessments sought by the Secretary. *Id.* at 14-16. The present matter relates to a Citation issued pursuant to a federal statute, the OSH Act, and is being litigated before the Commission, which is also a creation of federal law. 29 U.S.C. § 661. Respondent admits that the Commission has jurisdiction over this action. (Ans. at 1.) It also admits that it is an employer engaged in a business affecting interstate commerce. *Id.* Respondent's claims under state law are rejected.⁸

As to Respondent's relevancy claims, the Secretary is entitled to information Dr. Tynes relied upon in forming her opinions. As explained in the October 23, 2018 Scheduling Order, if a party elects to retain an expert witness, that witness must produce a report that includes "a complete statement of all opinions to be expressed and the basis and reasons therefor," "the data or other information considered by the witness in forming the opinions," and "any exhibits to be used as a summary of or support for the opinions." (Scheduling Order at 5.) Respondent must comply with the Scheduling Order as it relates to its expert, Dr. Tynes. But the Secretary has not

⁸ This Order does not alter the Protective Order granted on January 31, 2019. Respondent may address concerns regarding privacy and confidentiality through the framework of the Protective Order and/or by cooperatively working with the Secretary regarding appropriate privacy-related redactions.

demonstrated a need for additional materials from Dr. Tynes beyond what is required to be disclosed by the Scheduling Order.

The Respondent also questions the relevancy of Review Board materials unrelated to dog bites or dog attacks. (Resp't Mem. at 16-17.) The undersigned agrees that the Secretary has not demonstrated the relevancy of such information. Thus, Respondent's obligation to produce assessments created by the Review Board is limited to materials that relate to dog bites or dog attacks.

The Secretary's request also could be construed as seeking preliminary materials or notes individual Review Board members created. *Id.* at 17. While final conclusions and reports created by the Review Board about dog bites or dog attacks are relevant, the Secretary has not presented a sufficient need for preliminary materials drafted by individual members.

Respondent also represents that it did not maintain possession of materials the Review Board considered or analyses individual members may have created. *Id.* at 17. The undersigned agrees that the Secretary's request is overbroad to the extent that it could be viewed as requiring PetSmart to obtain documents not in its possession from unrelated third parties. While the Review Board's final conclusions and reports related to dog bites are relevant and discoverable, the Secretary has not presented a sufficient need to compel PetSmart to seek documents from third parties or provide preliminary materials.

Therefore,

PetSmart must produce copies of any final assessments of PetSmart's safety standards and safety training procedures created by the PetSmart independent Review Board if such materials were retained by PetSmart and relate to dog bites or dog attacks (i.e., instances where a dog has bitten a human and the bite has broken the skin).

VI. Conclusion

Respondent is ordered to take each of the following actions within ten business days of this

Order:

- PetSmart must produce the written workplace hazard analys(es) and/or safety assessment(s) concerning dog bites or dog attacks (i.e., instances where a dog has bitten a human and the bite has broken the skin), that PetSmart relied on or otherwise used as a basis for implementing the procedures and training materials that PetSmart contends were in effect at its stores (including Store 0781) on the date of the Injury (December 27, 2017). If no such documents exist, PetSmart must affirmatively state as such in writing.
- If PetSmart made any adjustments to its procedures and/or training materials concerning dog bites or dog attacks (i.e., instances where a dog has bitten a human and the bite has broken the skin) that were in effect at its stores (including Store 0781) in the two years prior to December 27, 2017, PetSmart must produce such documents and/or training materials. If no such adjustments were made in the specified two-year period, PetSmart must affirmatively state as such in writing.
- For each of PetSmart's stores in the United States, PetSmart must produce copies of each OSHA Form 300, 301, or 300A (collectively, the "OSHA Forms") that references or otherwise reflects dog bite or an instance where a dog has bitten a human and the bite has broken the skin at any such store in the two years prior to December 27, 2017. This shall include copies of any OSHA Forms concerning the dog attack on a PetSmart Groomer that occurred on or about March 29, 2016 at the PetSmart store located at or adjacent to 2360 W. Oregon Ave., Philadelphia, Pennsylvania.
- PetSmart must produce copies of any Occupational Injury/Associate Accident Investigation Report ("OI/AAIR") concerning the dog attack on a PetSmart Groomer that occurred on or about March 29, 2016 at the PetSmart store located at or adjacent to 2360 W. Oregon Ave., Philadelphia, Pennsylvania. In addition, PetSmart must produce copies of each OI/AAIR from any store that was transmitted to the email address safety@ssg.petsmart.com between December 27, 2015 and December 27, 2017 and references or otherwise reflects a dog bite or dog attack (i.e., an instance where a dog has bitten a human and the bite has broken the skin).
- PetSmart must produce copies of any final assessments of PetSmart's safety standards and safety training procedures created by the PetSmart independent Review Board if such materials were retained by PetSmart and relate to dog bites or dog attacks (i.e., instances where a dog has bitten a human and the bite has broken the skin).

This Order does not alter Respondent's obligations to disclose the information required by the Scheduling Order. Nor does it alter the Protective Order granted on January 31, 2019.

SO ORDERED.

/s/
COVETTE ROONEY
Chief Judge, OSHRC

Date: April 2, 2019