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**UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**

SECRETARY OF LABOR,

Complainant,

v.

PROFESSIONAL SECURITY
CONSULTANTS, INC.,

Respondent.

DOCKET NO. 22-0597

Appearances:

Emily Wu, Andrew Katz, Shawn Dhanani, Tara Stearns, U.S. Department of Labor, Office of the Solicitor, Los Angeles, CA,
For Complainant

Alka Ramchandani-Raj, Matthew Holmes, Nathan Pangrace, and Maayan Deker, Littler Mendelson, P.C., Walnut Creek, California,
For Respondent

Before: Administrative Law Judge Brian A. Duncan

DECISION AND ORDER

Procedural History

On October 25, 2021, there was a mass shooting incident at the Boise Towne Square Mall (Mall or Boise Mall) in Boise, Idaho. A customer shot and killed two people, including a mall security guard employed by Professional Security Consultants, Inc. (PSC), and also injured several others. The next day, an Occupational Safety and Health Administration (OSHA) Compliance Safety and Health Officer (CSHO) began an investigation and conducted an inspection at the Boise Mall. On April 25, 2022, Complainant issued to a Citation and Notification of Penalty to Respondent, alleging that PSC failed to protect its mall security officers from a recognized workplace hazard, committing a serious violation of 29 U.S.C. § 654(a)(1), also referred to as the

General Duty Clause, with a proposed penalty of \$14,502. In summary, OSHA alleges in this case that PSC did not implement sufficient safeguards to protect its mall security officers from a mass shooting event committed by a mall patron. PSC timely filed a notice of contest, which brought the matter before the Occupational Safety and Health Review Commission pursuant to section 10(c) of the Occupational Safety and Health Act of 1970 (OSH Act).

A trial was conducted on January 29 - February 2 and May 15 - 17, 2024, in Boise, Idaho. The following individuals testified: (1) Gary Harris, former PSC Security Director; (2) [redacted], former PSC Assistant Security Director; (3) [redacted], former PSC Security Officer; (4) Michael Murphy, former PSC Security Officer; (5) CSHO Joan Behrend; (6) Ron Winegar, Boise Chief of Police; (7) [redacted], former PSC Assistant Security Director; (8) [redacted], former PSC Security Director; (9) Chigozi Jack Yejekwe, General Manager of the Mall; (10) Dan Ryan, Senior Vice President of Security for Brookfield Properties; (11) [redacted], former PSC Security Director; (12) David Levenberg, Expert Witness; (13) Michael Lambos, PSC Senior Vice President; and (14) Dr. Russell Palarea, Expert Witness. Both parties timely submitted post-trial briefs for consideration.

Factual Background

1. PSC and the Mall

PSC is a private security company that supplies security officers to retail stores and shopping malls nationwide, including the Mall located in Boise, Idaho. (Tr. 305). Brookfield Properties owned the Boise Mall, along with 130 other retail properties in other locations. (Tr. 1129). PSC was the security guard vendor for 30 of those properties. (Ex. J-2; Tr. 1148).

PSC's workforce at the Mall consisted of security officers, security supervisors or shift supervisors, an assistant security director (ASD), and a security director (SD). (Tr. 130, 310).

Security officers worked in shifts at the Mall, with two or three security officers staffing each shift during the Mall's normal business hours. (Tr. 129). There was also typically one PSC security officer on duty at night when the Mall was closed. (Tr. 314). The total number of security officers employed by PSC at the Mall at any given time was less than 15. (Tr. 129). That number fluctuated based on the time of year and due to the position's high turnover rate. (Tr. 129, 987).

PSC security officers were responsible for patrolling the Mall common areas and parking lot, medical emergency response, enforcement of Mall rules, and general assistance with crime prevention, risk management, and customer service. (Tr. 316-18; Ex. J-3 at 10). PSC had a dispatch office in the Mall, and security officers performed "dispatch duty," which entailed fielding phone calls from Mall patrons or store employees, maintaining daily logs, and contacting local police and medical emergency services when necessary. (Tr. 317-18). Security officers rotated between patrol duty and dispatch duty. (Tr. 316). They wore a uniform consisting of a badge, a yellow shirt with the word "security" written on the back, and black pants. (Tr. 1154). Security officers were not armed, nor did they wear bullet-proof vests. (Tr. 134). They did, however, carry pepper spray. (Tr. 135).

The SD was the head of security for PSC at a particular mall. The SD was responsible for a variety of administrative duties, hiring, training, and supervising the entire security team. (Tr. 128). The ASD was second in command and supervised the security supervisors and security officers. (Tr. 851). The ASD had similar duties to the security supervisors, including working patrol and dispatch, but was also responsible for paperwork, liaising with Mall stores, and standing in for the SD. (Tr. 226, 850-51). Security supervisors directly supervised the security officers. (Tr. 131). Security supervisors also worked patrol and dispatch. (Tr. 131, 225).

2. The Mall's Code of Conduct and Firearms Ban

PSC security officers were responsible for enforcing the Mall's Code of Conduct, which was a written set of rules and regulations governing acceptable behaviors at the Mall. (J-3 at 62-63; Ex. J-4 at PSC_000188). The Code of Conduct included a no-firearms policy. (Ex. J-3 at 63; Tr. 227). Although each Brookfield property had its own Code of Conduct, all Brookfield properties had a no-firearms policy in place. (Tr. 1123). The Code of Conduct was a zero-tolerance policy, meaning the Mall patron would have to either stop the violative behavior immediately or be asked to leave the Mall. (Tr. 152).

Addressing violations of the Code of Conduct was a central responsibility of PSC security officers. (Ex. J-3 at 62; Tr. 1123). Common Code of Conduct violations included teenagers engaging in horseplay, the use of profanity or vulgar language, or, in some instances in the Boise Mall, customers openly carrying firearms. (Tr. 390; Ex. J-3 at 63). Mall patrons would sometimes become upset and swear at or verbally harass the PSC security officer enforcing the Code of Conduct. (Tr. 927-28; 931). One security officer testified that he left his position in part due to Mall patrons seemingly becoming more confrontational. (Tr. 204).

PSC security officers had to enforce the Mall's firearms ban fairly regularly, about once per week. (Tr. 230, 488). Mall patrons would enter the Mall openly carrying their firearms (colloquially referred to as "open carry"). (Tr. 145, 488). When a Mall patron was observed openly carrying a firearm, PSC security officers would ask the armed patron to either leave the Mall or go secure the firearm in his or her vehicle, then return. (Tr. 229). Generally, armed patrons would comply with the PSC security officer's directive. (Tr. 230). However, it was not uncommon for an armed patron to argue that the Second Amendment allowed him to carry firearms in the Mall, express disagreement with the Mall's firearm ban, call PSC security officers names, like "rent-a-

cop” or “Paul Blart,” swear and curse at PSC security officers, or raise their voices while arguing with the security officer. (Tr. 205, 513, 923, 931, 1040-41, 1133, 1143-44, 1210-11). The PSC security officers who testified at trial attributed this to the fact that Idaho was a strong pro-Second Amendment state, and openly carrying a firearm was legal in Boise. (Tr. 162, 249, 719, 822).

3. PSC Work Policies

PSC had in place a Security Operations Procedure Manual (SOP Manual), which set forth safety and security procedures for its security officers. (Ex. J-3). The record establishes that PSC security officers were consistently trained on the SOP Manual during initial training, and employees were provided a copy of the SOP Manual at the beginning of their employment. (Tr. 918-19). The SOP Manual specifically addressed safety protocols related to armed patrons. (Ex. J-3 at 58-59). The relevant provision provided:

D. If a Security Officer encounters or observes an armed person, other than law enforcement or a person authorized to carry the weapon, the officer should immediately:

1. Notify the security supervisor.
2. Only a senior/seasoned PSC Officer, preferably a Supervisor, that can determine if it is safe to do so (unless the subject/s acting suspicious, appear to be on drugs etc.) may approach a subject/s that are in violation of the firearms policy to ask the [sic] them to comply with the policy (Mall Code of Conduct) and explain the policy to them. At all times Officers are to utilize training/proper safety awareness and maintain safe separation/distance from subject/s. (note; it is illegal to carry a weapon and be under the influence, so if any one [sic] appears to be CWUI, carrying weapon under the influence, you are not to approach but call police).

If the subject/s become confrontational or refuse to comply then we are to disengage and call for assistance from police. If we do not feel it a [sic] safe to approach the subject/s or a Seasoned Officer/ Supervisor [sic] is not available, we are to monitor on the CCTV System and at a safe distance until the subjects leave [the] property.

(Ex. J-3 at 58-59).

In practice, if a PSC security officer on patrol observed a patron openly carrying a firearm, he or she would call dispatch and confirm the presence of the firearm on camera. (Tr. 253, 329). Then, the security officer would evaluate the situation and determine whether it was safe to approach based on that officer's experience and training. (Tr. 253-54, 329). Different supervisors had different practices about whether a security officer (rather than a supervisor) could approach an armed patron. (Tr. 167-68, 321). The security officer or supervisor would then advise the armed patron of the Mall's firearms policy and ask the patron to either store the firearm in the patron's vehicle and return or leave the Mall. (Tr. 854). Then-Security Officer [redacted] would occasionally allow the armed patron to conceal the firearm to avoid an unnecessary confrontation, although his supervisor testified that he did not know about that practice. (Tr. 329-30, 920). If a patron refused to leave, the security officer was trained to walk away from the patron and report the incident to dispatch, who would then notify a supervisor. (Tr. 919). The supervisor would then decide whether to contact the police. (Tr. 919).

A PSC security officer had the authority to ban a Mall patron for certain violations of the Code of Conduct. (Tr. 1124-25; Ex. J-3 at 64). The SOP Manual set forth procedures for giving a verbal warning or banning a patron from the Mall, which was based on a template provided by Brookfield Properties. (Ex. J-3 at 64; Tr. 1126). The SOP Manual provided that if a violation was minor, a verbal warning was sufficient. (Ex. J-3 at 65). If there were "[d]ocumented repeated instances of violations of property regulations that suggest future compliance is unlikely," then PSC had the authority under the SOP Manual to formally ban an individual from accessing the property. (Ex. J-3 at 65). Bans could be one day, one year, three years, or five years in length. (Ex. J-3 at 68). PSC had to notify the Mall's general manager of any ban, who then had the discretion to change the length of the ban. (Ex. J-3 at 68).

A security officer could verbally ban a Mall patron for one day without Mall management's approval. (Ex. J-3 at 65). A one-day verbal ban required the security officer to explain to the patron the reason for the ban, where the ban applied, and that violation of the ban could result in arrest for trespassing. (Ex. J-3 at 66). Any verbal ban had to be documented as an incident report and "contain a detailed account of the actions which led to the decision to ban the subject." (Ex. J-3 at 67).

A written ban was required for any ban longer than one day and had to be personally issued to the patron and witnessed by another security officer, law enforcement officer, or other reliable third party. (Ex. J-3 at 67). The SOP Manual specifically noted that a written ban was usually issued after the commission of a crime (e.g., shoplifting) while the patron was in custody for the offense. (Ex. J-3 at 62, 67). The security officer would have to complete a form, photograph the subject for future identification, request that the patron sign the form, have a witness sign the form, and provide the patron and law enforcement with copies of the form. (Ex. J-3 at 67). The security officer would also have to submit a "detailed incident report" containing an account of the actions that led to the decision to ban the patron (Ex. J-3 at 67).

4. PSC & the Boise Police Department

If a Mall patron did not comply with the PSC security officer's request to leave or store the firearm in their vehicle, the security officer *could* call the Boise police department to report the Mall patron's failure to comply. (Tr. 720). Boise police typically responded to calls about an individual violating an existing ban (trespassing), an individual involved in criminal activity or criminally suspicious behavior, or an individual having a mental health episode. (Tr. 719-20). The Boise police would not, however, respond to a call regarding an individual openly carrying a firearm in the Mall unless that individual exhibited some other criminal or suspicious behavior that

warranted a police response. (Tr. 735). This practice was in place because open carry was legal in Boise. (Tr. 719). PSC security officers were aware that the police would not physically come to the Mall for a report of a patron solely carrying a firearm, and the Boise police confirmed this practice to PSC corporate officials after the shooting. (Tr. 440-41, 1092). The Boise Chief of Police also confirmed this practice at trial. (Tr. 722-23). PSC security officers were trained on how to best interact with the Boise police and how to try to foster a partnership with Boise police officers responding to a call at the Mall. (Ex. R-72).

5. PSC's Training for Security Officers

a. Formal Training Program

PSC had a formal training program, including pre-deployment training and trainings that had to be completed within the first 90 days of employment¹ (also referred to as “30-day training,” “60-day training,” and “90-day training”). (Tr. 1496). PSC's formal training program consisted of PowerPoints, videos, booklets, and testing. (Tr. 216, 227, 1249, 1513-14). PSC security officers also underwent monthly and holiday refresher trainings. (Tr. 1050, 1514).

PSC required its security officers to complete a “multi-faceted workplace violence program” as part of their formal training, which included: (1) the Department of Homeland Security's (DHS) Shopping Center Security Terrorism Awareness Training Program; (2) PSC's Conflict Resolution training; (3) PSC's Customer/Subject Interaction/Use of Force/Officer Safety-Positioning training; (4) the DHS Active Shooter – How to Respond training; and (5) PSC's “Preventing Violence in the Workplace” training.² (Tr. 1492; Exs. J-5, J-6, J-7, J-13, J-15, J-16,

¹ Security Supervisor Acker underwent these initial trainings, as well as additional trainings throughout Acker's employment. (Tr. 1021-23, Ex. R-62).

² PSC's formal training also included “Powers of Arrest,” “Management of Crowds,” “Use of Force OC and the Use of Force Verbal and Physical,” “Comprehensive Patrol,” “Reporting

R-75, R-76). PSC also required its security officers to complete Code of Conduct Enforcement training. (Ex. J-4).

DHS Shopping Center Security Terrorism Awareness Training Program

The DHS Shopping Center Security Terrorism Awareness training program consisted of PowerPoint slides that instructed the security officer on how to identify different types of terrorism targeting shopping facilities. (Ex. J-13 at OSHA-NCBRT-00520). DHS defined “terrorism” as the “[u]nlawful use of force or violence against persons or property to intimidate or coerce a government, the civilian population, or any segment thereof, in furtherance of political or social objectives.” (Ex. J-13 at OSHA-NCBRT-00526). Shopping centers were described as “soft targets” because they were open to the public and had fewer security measures than airports and government facilities. (Ex. J-13 at OSHA-NCBRT-00541, OSHA-NCBRT-00542).

The training contained information on identifying actions of individuals conducting hostile surveillance, like watching a potential target, capturing information about the target (in the form of reports, maps, photography or video), identifying the best route to maximize casualties, physical damage, and media coverage, and noting the security measures in place, such as guards, cameras, and physical obstacles. (Ex. J-15 at OSHA-NCBRT-00578). Methods used by individuals conducting hostile surveillance included “exhibiting repetitive and unusual behavior.” (Ex. J-15 at OSHA-NCBRT-00582). Individuals conducting hostile surveillance also engaged in “boundary probing,” which involved pressing forward to the target to gauge the point at which security became aware of their presence and initiated a response. (Ex. J-15 at OSHA-NCBRT-00582).

The training addressed active shooters (*i.e.* individuals actively engaged in killing or attempting to kill people in a confined and populated area) and instructed “all employees can help

Incidents,” “Report Writing and Preliminary Investigation,” “Basics of CCTV,” and “Customer Service.” (Tr. 172-201).

prevent and prepare of potential active shooter situations.” (Ex. J-15 at OSHA-NCBRT-00616). The training noted active shooter incidents were unpredictable and happened quickly and provided that “[c]onsidering that most security officers are unarmed, confronting the shooter would not be effective.” (Ex. J-15 at OSHA-NCBRT-00617, OSHA-NCBRT-00625).

The training also highlighted the importance of logs and documenting suspicious behavior in a special logbook or database that the trainee “believe[d] may reveal a connection to foreign or domestic terrorism.” (Ex. J-16 at OSHA-NCBRT-00656). Suspicious behaviors were described as “behaviors that are outside of the baseline conditions of a facility.” (Ex. J-16 at OSHA-NCBRT-00656). The training also highlighted the importance of communication with other security staff during shift changes to exchange information. (Ex. J-16 at OSHA-NCBRT-00666).

PSC’s Conflict Resolution Training Module

PSC’s Conflict Resolution training advised trainees that “[b]ecause security officers are susceptible to physical attack during every interaction,” PSC security officers had to follow proper incident response and call for back-up as necessary. (Ex. J-6 at PSC_000448). It also noted that since malls had zero-tolerance policies in place, PSC security officers would likely “have multiple interactions where individuals become irate or on the verge of being out of control.” (Ex. J-6 at PSC_000460). The training instructed security officers to call for backup when “interactions with subjects who have previously posed difficulties” and in which “the subject will be ejected.” (Ex. J-6 at PSC_000449). It also identified the de-escalation techniques of persuasive or search talk (used to persuade or suggest actions or gain information during low levels of conflict), light control talk (authoritative tone used to give directions that must be complied with or to warn of consequences of failure to comply), and heavy control talk (forceful, commanding tone used to

deliver simple directions that demand immediate compliance). (Ex. J-6 at PSC_000457, PSC_000458, PSC_000459).

PSC security officers were trained to record any improper conduct in the daily activity log, and the Conflict Resolution training noted that “improper conduct interactions” occurred frequently and developed quickly. (Ex. J-6 at PSC_000471). PSC required that subjects with whom PSC security officers have had more than one interaction be ejected from the premises and fellow security officers alerted.³ (Ex. J-6 at PSC_000472).

*PSC’s Customer/Subject Interaction/Use of Force/
Officer Safety-Positioning Training Module*

The Customer/Subject Interaction/Use of Force/Officer Safety-Positioning training module addressed how a PSC security officer should handle resistance by any mall patron, whether armed or unarmed. (Ex. R-75). It outlined the five levels of the “use of force continuum.”⁴ (Ex. R-75 at 3). The training outlined communication by soft-talk (using respective terms like “Sir” and “Ma’am”) and control-talk (using assertive but professional language while explaining things like the consequences of trespassing). (Ex. R-75 at 13-14). If verbal commands failed and there was no safety threat, PSC security officers were directed not to use physical force but instead call the police. (Ex. R-75 at 15). If there was a threat to physical safety, such as one person assaulting another person, PSC security officers were trained in compliance maneuvers (low-level physical

³ In the Court’s reading of this PowerPoint slide, ejection takes place when security officers have had more than one interaction in a single day with the subject.

⁴ Level One: Officer presence (physical appearance and professional bearing); Level Two: Verbal commands (clear and deliberate); Level Three: Soft techniques (OC, come alongs, and wrist locks); Level Four: Hard techniques (strikes and take-downs); Level Five: Deadly force (firearms and strike to vital areas). (Ex. R-75 at 3).

force techniques designed to gain cooperation) or defense maneuvers in the event of a threat of bodily harm or death. (Ex. R-75 at 16-20).

The training also identified behaviors that indicated a patron was angry, such as clenched fists, a tight jaw, pronounced veins in the neck, and a red face. (Ex. R-75 at 29). PSC security officers were trained to avoid a face-to-face confrontation, anticipate aggressive behavior, and avoid putting themselves into physical danger. (Ex. R-75 at 2, 31, 32).

Active Shooter Training

PSC also required its security officers to review the DHS Active Shooter – How to Respond training (Ex. J-7), and it also provided its own training on active shooters (Exs. R-67, R-76). The DHS Active Shooter training largely focused on the active shooter who was a current or former employee, or the acquaintance of an employee. (Ex. J-7 at PSC_000484). According to the training, employees “typically do not just ‘snap,’ but display indicators of potentially violent behaviors,” including increased alcohol or drug use, depression, repeated violations of company policies, increased mood swings, explosive outbursts of rage without provocation, and an increase in unsolicited comments about firearms or other dangerous weapons. (Ex. J-7 at PSC_000484).

PSC’s Active Shooter training focused on the PSC security officer’s role in a firearm assault or active shooter situation, including notifying the police, evacuating tenants and guests, and stopping incoming traffic at the Mall’s entrances. (Ex. R-76 at 2-3). It also noted that active shooter situations would unfold quickly and explained the run, hide, and flight options available during an active shooter scenario. (Ex. R-76 at 2, 4). It warned security officers to “[b]e aware of indications of workplace violence and take remedial actions accordingly.” (Ex. R-67 at PSC_002929). Indications of a suspicious person included someone who appeared very nervous,

was carrying or trying to hide objects resembling a weapon, was carrying abnormally large bags, or was dressed inappropriately for the weather conditions. (Ex. R-67 at PSC_002930).

“Preventing Violence in the Workplace” Field Training

The Preventing Violence in the Workplace field training consisted of watching a National Institute of Safety and Health (NIOSH) and Center for Disease Control (CDC) video on workplace violence and reviewing a corresponding workplace violence information packet. (Ex. J-5). This field training was developed by PSC’s corporate office and was intended to be included in the training program for PSC security officers. (Tr. 1493-94).

PSC highlighted that workplace violence could occur at or outside the workplace. (Ex. J-5 at PSC_000219). The training outlined risk factors for homicide in the workplace, including contact with the public, working late night or early morning hours, guarding valuable property or possessions, and working in a community setting. (Ex. J-5 at PSC_000219). It identified three types of workplace violence, including violence by strangers and violence by customers. (Ex. J-5 at PSC_000219- PSC_000220). The training noted that “no one can predict human behavior; there is no specific profile of a potentially dangerous individual,” although it outlined the following indicators of potentially violent behavior used by the Federal Bureau of Investigations (FBI): direct or veiled threats of harm; intimidating, belligerent, harassing, bullying, or other inappropriate and aggressive behavior; numerous conflicts with supervisors and other employees; bringing a weapon into the workplace and brandishing it; statements showing a fascination with incidents of workplace violence; drug or alcohol abuse; extreme changes in behavior; commenting or planning to carry out a violent attack; and making threatening statements about another person. (Ex. J-5 at PSC_000221- PSC_000222). The training then detailed actions that should be taken when a co-

worker exhibited signs of workplace violence, including detailed documentation and notification of a supervisor. (Ex. J-5 at PSC_000223, PSC_000224).

Code of Conduct Enforcement Training

PSC's Code of Conduct Enforcement training provided PSC security officers with information on general Mall rules, guidelines for banning Mall patrons, and instructions for handling various scenarios, like criminal activity, public intoxication, skateboarding, improper use of escalators, and loitering. (Ex. J-4). The training stressed that a security officer's primary focus was customer service and maintaining a pleasant shopping experience. (Ex. J-4 at PSC_000199). It acknowledged that patrons might complain or question the security officer when asked to leave the Mall but stressed that the patron leaving was the goal. (Ex. J-4 at PSC_000199).

The training identified examples of specific activities that were prohibited, which included disruptive profanity, vulgar or threatening language, and firearms. (Ex. J-4 at PSC_000216). If patrons refused to leave the Mall, "they may be arrested and prosecuted for criminal trespass." (Ex. J-4 at PSC_000216). The training also instructed a PSC security officer to call law enforcement for criminal offenses or the subject "becomes disorderly or uncooperative." (Ex. J-4 at PSC_000198). The PSC security officer was trained to write an incident report in the event of "more serious or extenuating circumstances." (Ex. J-4 at PSC_000198). The security officer was also expected to prepare a corresponding entry in the Daily Activity Report. (Ex. J-4 at PSC_000198).

b. Hands-On Training

PSC security officers also learned how to handle an openly armed patron through on-the-job, or hands-on, training. (Tr. 228). Then-Security Officer [redacted] recalled his hands-on training for approaching armed patrons as following the requirements contained in the SOP

Manual. (Tr. 323). Then-ASD [redacted] recalled training officers to look at body language, demeanor, hand gestures, and behaviors before approaching an armed patron. (Tr. 920). He also encouraged his trainees to have another security officer present if he did not feel comfortable approaching an armed patron. (Tr. 920). One security officer recalled being told that PSC security officers were like herding dogs who funneled patrons with firearms safely out of the Mall. (Tr. 324).

6. PSC's Incident Documentation

PSC required its security officers to document incidents and suspicious persons through daily activity reports, shift pass-downs, incident reports, and a Be-on-the-Lookout (BOLO) Book. (Tr. 373-84).

a. *Daily Activity Log*

Daily activity logs were prepared by PSC for Brookfield Properties to document all interactions with Mall patrons. (Tr. 373-74, 861-62). The entries ranged from restroom checks to approaching an openly armed patron to enforce the Mall's Code of Conduct. (Tr. 242, 376; Ex. R-28, R-22). The security officer on dispatch duty was responsible for creating the daily activity log entry on a program called Maximus.⁵ (Tr. 374). The daily activity logs contained, inter alia, the date and time of the incident, the primary officer at the scene, the location of the incident, the officer on dispatch duty, and a description, which included general information about the interaction. (Tr. 968; Ex. R-28). Security officers were not required to include a physical

⁵ Maximus was implemented in April 2021, and it was owned by Brookfield Properties. (Tr. 1134). Prior to April 2021, daily activity logs were recorded in a program called Webdar. (Tr. 1134). Webdar logs were stored on an outside server and, due to a code error, could not be searched. (Tr. 1137-38). As a result, the Webdar logs could not be produced to the Secretary during discovery. (Tr. 1137-38).

description or other identifying information of the Mall patron in the daily activity logs. (Tr. 377, 968; Ex. R-28).

b. *Pass Down Log*

PSC security officers conveyed anything of note occurring during their shift to the next shift via a pass down log. (Tr. 383-84). The pass down log included things like weather conditions, ongoing maintenance issues, or information conveyed to PSC by Brookfield. (Tr. 385, 1162). The PSC security officers were required to read the pass down log at the beginning of their shifts. (Tr. 384, 1163). An interaction with a Mall patron would generally not be included in the pass down log. (Tr. 384).

c. *Incident Report*

Incident reports detailed major occurrences—such as an auto accident, injury, or criminal activity—that required the attention of Brookfield Properties or the PSC corporate office. (Tr. 866, 981). Incident reports were created in Maximus and served as a record for upper-level corporate management. (Tr. 866). Management would use incident reports to gather and chart various trends, including crime trends, that would inform mitigation strategy. (Tr. 1130). Interactions with armed patrons would not be documented in an incident report unless the patron was formally banned from the Mall or police were called. (Tr. 867, 981).

d. *BOLO Book*

The BOLO (Be-on-the-Look-Out) Book was a physical database of Mall patrons with whom PSC security officers had encountered issues. (Tr. 386). It also included documentation of missing persons and shoplifters. (Tr. 153, 386). PSC did not require Mall patrons who had been verbally banned to be included in the BOLO Book. (Tr. 901). And, there were no specific requirements for who was required to be included in the BOLO Book. (Tr. 154, 983). An entry in

the BOLO Book usually included a physical description of the person and sometimes a still photograph pulled from the CCTV if available. (Tr. 153, 387).

7. PSC Security Officers' Interactions with Bergquist⁶

Jacob Bergquist was the customer who shot Security Officer Acker and several other Mall customers on October 25, 2021. (Tr. 674-75). PSC security officers had encounters with Bergquist on several occasions prior to the shooting. (Tr. 601, 898). Those encounters are described as follows. Many of the details were recalled by PSC security officers after the shooting, as individuals connected the shooting event to prior customer interactions from their pre-shooting memories. (Tr. 232, 1169).

a. *Interaction No. 1*

Sometime between June 2020 and January 2021, then-Security Supervisor [redacted] observed Bergquist openly carrying a pistol and two extra magazines on the back of his belt. (Tr. 1172). [redacted] called dispatch and then approached Bergquist to discuss the Mall's firearm ban policy. (Tr. 1173). Bergquist in response asserted his Second Amendment rights and claimed he was a former felon working with the Boise police department "to see how [] people would respond to a former felon carrying a firearm." (Tr. 1173). Despite this claim and mention of Second Amendment rights, Bergquist ultimately complied with the directive to leave the Mall. (Tr. 1377).

⁶ The Secretary contends that Bergquist violated the Mall's firearms policy "no less than 10 times." (Sec'y Post-Trial Brief at 15). Those encounters purportedly occurred in June 2020 or January 2021; early 2021; several "cat and mouse" interactions before April 2021; between April 2021 and June 26, 2021; twice prior to June 26, 2021; on June 26, 2021; on or about October 18, 2021; and on October 25, 2021. However, the testimony regarding some of those alleged encounters was vague, highly speculative, and unreliable. For example, [redacted] could hardly remember two of his purported encounters with someone who *might have been* Bergquist. (Tr. 1235). After reviewing the testimony and evidence in the record, the Court identified five reasonably verifiable encounters with Bergquist prior to the shooting and considered only those encounters as relevant in making its decision.

[redacted] later learned that Bergquist's claim of working with the police department was untrue. (Tr. 1177).

[redacted] described Bergquist's demeanor during this interaction as "straightforward." (Tr. 1179). Bergquist was calm during the interaction and did not raise his voice or swear at [redacted]. (Tr. 1180). Bergquist did not threaten [redacted] or anyone else. (Tr. 1212). Bergquist did not unholster his weapon or make any gestures toward it. (Tr. 1212). Bergquist did not push or shove [redacted], nor did he take an aggressive body posture. (Tr. 1213). The interaction and Mall policy violation was resolved without issue.

b. *Interaction No. 2*

Sometime between January and March 2021, then-ASD [redacted] approached Bergquist,⁷ who was wearing all black and carrying a handgun in a holster along with multiple magazines, to advise him of the Mall policy banning firearms. (Tr. 232-36). Bergquist did not argue with [redacted], but instead claimed he was working with the Boise police department to test the Mall's security response. (Tr. 233). Bergquist also made a comment about being a convicted felon. (Tr. 233). Bergquist was not angry or agitated during the interaction, and [redacted] described Bergquist's demeanor as "relaxed." (Tr. 237). Bergquist did not swear at [redacted], and [redacted] did not feel threatened. (Tr. 237). [redacted] testified that Bergquist did not give any "vibe" indicating hostile intent. (Tr. 237). Bergquist never reached for his weapon. (Tr. 258). He simply complied and left the Mall. (Tr. 249).

There was no documentation of [redacted]' interaction with Bergquist, although [redacted] recalled documenting the interaction in Webdar. (Tr. 242). He did not prepare an incident report

⁷ ASD [redacted] testified that he "vaguely" recognized Bergquist when he saw Bergquist's photograph on the news after the shooting on October 25, 2021. (Tr. 231). [redacted] thought, in hindsight, that it was Bergquist with whom [redacted] interacted in early 2021. (Tr. 231).

because he did not believe the interaction merited one. (Tr. 242). He recalled passing down information about the interaction to the next shift. (Tr. 235). [redacted] did so because the interaction was “weird” due to Bergquist wearing all black, carrying multiple magazines, and saying he was a convicted felon. (Tr. 235). [redacted] also called the Boise police department to inquire about the veracity of Bergquist’s story. (Tr. 234). The Boise police department told [redacted] that Bergquist’s claim was not true and that such a program did not exist. (Tr. 235).

[redacted] never directly interacted with Bergquist again. (Tr. 237). [redacted] recalled seeing Bergquist (or someone who looked like Bergquist) carrying a firearm on the CCTV on other occasions. (Tr. 237-38). However, [redacted] testified that “we’d try and go catch him but never could find him again after that.” (Tr. 237). [redacted] believed the individual, who in hindsight he thinks might have been Bergquist, was playing a “cat and mouse game” with security officers, meaning he would be seen carrying a firearm on the CCTV but evade being confronted by a security officer by entering an anchor store (like Macys) where PSC had no jurisdiction.⁸ (Tr. 241).

c. Interaction No. 3

Bergquist again entered the Mall openly carrying a firearm in the Spring of 2021.⁹ Then-Supervisor [redacted] noticed Bergquist and approached to inform him of the Mall’s firearms ban. (Tr. 869). [redacted] recalled Bergquist “brushed [[redacted]] off” and did not engage in a conversation but complied with the directive to leave the Mall. (Tr. 869). [redacted] testified that he did not notice anything that seemed “off” or out of the ordinary about Bergquist. (Tr. 869).

⁸ Many anchor stores prohibited PSC security officers from operating inside because they maintained their own security program. (Tr. 243-44, 366).

⁹ [redacted] recalled that he was a supervisor during his first interaction with Bergquist, which predated [redacted]’s June 2021 interaction with Bergquist. (Tr. 872). [redacted] was a supervisor until he was promoted to ASD in August 2021. (Tr. 19) Accordingly, the Court finds [redacted] likely interacted with Bergquist for the first time in the Spring of 2021.

d. *Interaction No. 4*

On June 26, 2021, then-ASD [redacted] and then-SD [redacted] received a report that there was an individual openly carrying a firearm at the Mall. (Tr. 1187). [redacted] testified that he and [redacted] decided to approach Bergquist together because the suspected PSC “had dealt with him [before].”¹⁰ (Tr. 1187). [redacted] went ahead to make initial contact with Bergquist while [redacted] gathered the proper paperwork to ban Bergquist from the Mall. (Tr. 1187). [redacted] wanted to ban Bergquist from the Mall because he was “tired of explaining” the rules to Bergquist.¹¹ (Tr. 1187).

[redacted] advised Bergquist of the Mall’s firearms ban policy, and Bergquist again asserted his Second Amendment right to carry the firearm. (Tr. 960). Bergquist also said he was going to contact the City of Boise to have the Mall’s “private property rights” revoked. (Tr. 961). Bergquist was turning to walk away from [redacted] as [redacted] approached them. (Tr. 1187). [redacted] requested Bergquist’s identification for purposes of imposing a Mall ban. (Tr. 1187). Bergquist swore at [redacted], called [redacted] a “rent-a-cop,” and said [redacted] had no authority to ask for identification. (Tr. 1188). Then, Bergquist walked away and left the Mall. (Tr. 1189).

¹⁰ [redacted] believed he may have had as many as four total encounters with Bergquist but could not recall the dates. (Tr. 1212). He also admitted that his recollection of the second and third encounters was vague. (Tr. 1235). Accordingly, the Court will assign less weight to his recollection regarding Bergquist’s behavior and demeanor during his second and third interactions and does not include those interactions in the number of Bergquist encounters before the shooting.

¹¹ [redacted] recalled this interaction a bit differently. (Tr. 950-56). [redacted] testified that he and [redacted] were on patrol when they noticed Bergquist carrying a firearm and two magazines. (Tr. 956). However, [redacted] did not recall many details about Bergquist’s demeanor or behaviors. (Tr. 962-63, 966). And, he admitted he was going through post-traumatic stress, resulting in difficulty recollecting what happened. (Tr. 991). Accordingly, the Court will generally rely on [redacted]’s testimony regarding this interaction.

[redacted] (who was a supervisor at the time) was working dispatch during this encounter, and he watched the interaction through the CCTV. (Tr. 873). He documented the encounter in a daily activity report as follows:

Male patron asked to leave his firearm in his vehicle. Became verbally hostile with [the security officers] upon asking. This is not the first time for individual to be acting this way. Police to be called asap upon net [sic] seeing of individual.

(Ex. R-28 at 13). [redacted] assisted [redacted] in creating the daily activity report entry and specifically directed [redacted] to describe Bergquist as “hostile.” (Tr. 1223). [redacted] wanted to use the word “hostile” to convey that Bergquist was upset during the encounter, not that Bergquist’s actions suggested he could, in [redacted]’s opinion, become physically aggressive. (Tr. 1223). [redacted] testified, however, that the encounter between Bergquist, [redacted], and [redacted] was “just a regular interaction” because it was common for Mall patrons to gesture with their hands and be argumentative with officers. (Tr. 874, 927-28). Similarly, [redacted] and [redacted] both testified that while Bergquist appeared frustrated and angry, he was not threatening in any way, and neither officer was concerned for his personal safety. (Tr. 995, 1223-24, 1227). Bergquist did not point or unholster his weapon or clench his fists in anger. (Tr. 1221). And, he never took an aggressive body posture. (Tr. 1221-22).

After his encounter with Bergquist, [redacted] called the Boise police, who sent a patrol car to the Mall. (Tr. 1192). [redacted] and [redacted] showed the Boise police camera footage of the interaction. (Tr. 1192). Although the police responded to [redacted]’s phone call in this instance, [redacted] did not recall the police providing any type of advice or instructions on what to do if Bergquist returned. (Tr. 1193).

[redacted] later told some PSC security officers about the interaction. (Tr. 1200-01). He instructed them to avoid approaching Bergquist again, and instead to alert [redacted] or [redacted]

so that they could approach Bergquist and implement a formal ban. (Tr. 1227). [redacted]'s instruction to avoid approaching Bergquist was not due to any safety concern or danger, but rather due to the intent to properly serve Bergquist with a formal Mall ban. (Tr. 1200-01, 1227). [redacted] testified that he did not believe, based on his interactions with Bergquist, that Bergquist would become violent. (Tr. 1230). For instance, Bergquist did not reach for his weapon, clench his fists, or exhibit other indicators that a person may become violent. (Tr. 1232). He also did not take an aggressive body posture during this interaction. (Tr. 1221-22).

e. *Interaction No. 5*

On October 15, 2021, then-Security Officer [redacted] and then-AD [redacted] were tracking another unrelated activity at the Mall when [redacted] saw Bergquist walking in the mall while openly carrying a pistol. (Tr. 358). [redacted] approached Bergquist without calling dispatch to advise him of the Mall's firearms ban. (Tr. 343, 357-58). Bergquist became argumentative and asserted his Second Amendment rights, but he did not use profanity or ever gesture toward his weapon. (Tr. 346, 449). He complained to [redacted] that he did not have a car, so he could not store his gun in the car and then return to the Mall. (Tr. 346).

[redacted], in an effort to de-escalate the situation, told Bergquist he could instead conceal his weapon. (Tr. 342-48). Bergquist complied, and, as he concealed his firearm, [redacted] noticed Bergquist was in fact carrying two firearms and what appeared to be a suppressor (also called a silencer), as well as multiple magazines. (Tr. 344-45). [redacted] joined [redacted] and Bergquist toward the end of their interaction and further reminded Bergquist he had to leave the Mall. (Tr. 890). [redacted] did not recognize Bergquist from Bergquist's interaction with [redacted] and [redacted], which [redacted] had observed from the CCTV. (Tr. 894).

The amount of weaponry that Bergquist carried concerned [redacted], so he and [redacted] followed Bergquist as he walked through the Mall. (Tr. 354). Then-Supervisor Acker—who was working dispatch—followed Bergquist on the CCTV. (Tr. 464). While Bergquist was shopping in a store, [redacted] realized that Bergquist might be the same individual who had, in the recent past, given other security officers issues.¹² (Tr. 359). [redacted] and [redacted] decided to continue following Bergquist throughout the Mall and advised other security officers on duty, including the security officer patrolling the parking lot, of the situation. (Tr. 358-59, 367). Bergquist eventually left the Mall without any further incident. (Tr. 367).

Acker logged the interaction with Bergquist into Maximus as a daily activity report. (Ex. R-28 at 14; Tr. 463-64). No incident report was prepared. (Tr. 369). [redacted] did not give any further specific instructions to the other security officers regarding Bergquist. (Tr. 904). [redacted] did not feel threatened by Bergquist, nor did he believe Bergquist was “probing” the Mall. (Tr. 451, 453). In [redacted]’s opinion, Bergquist did not demonstrate bullying, harassing, intimidating, or belligerent behavior during this incident. (Tr. 928-29).

8. Date of the Shooting

On October 25, 2021, Bergquist returned to the Mall openly carrying a firearm. (Tr. 662). He walked around the Mall, purchased food, and ate it in the food court. (Tr. 607-08). He then continued walking around the Mall. (Tr. 662). Then-Supervisor Acker was patrolling the Mall and saw Bergquist with his firearm. (Tr. 906). She radioed [redacted], who was working dispatch, giving a brief description of Bergquist. (Tr. 906). [redacted] visually confirmed the presence of the firearm on the CCTV but did not recognize Bergquist from his previous interaction. (Tr. 908). Acker told [redacted] she was going to approach Bergquist and advise him of the Mall’s firearms

¹² This account was based on [redacted]’s testimony. [redacted] testified that he did not recognize Bergquist until after Bergquist had already left the Mall. (Tr. 897).

ban. (Tr. 19). [redacted] then watched on the CCTV as Acker approached Bergquist, the two had a discussion, and Bergquist started to walk away. (Tr. 908; Ex. J-19(r)). Then, Bergquist suddenly and surprisingly turned back toward Acker, drew his firearm, and shot and killed Acker. (Ex. J-19(r); Tr. 19). Bergquist then ran into the nearby department store and shot several other people, killing one Mall patron and wounding several others. (Tr. 113; 674-75). Bergquist ultimately shot and killed himself. (Tr. 79).

9. OSHA Investigation and Citation

OSHA was notified about the shooting and promptly initiated its investigation the next day, on October 26, 2021. (Tr. 579). The CSHO conducted interviews with PSC security officers and reviewed PSC's OSHA 300 logs, the daily activity reports, video footage of the shooting, and PSC's operating procedures and training materials. (Tr. 579-80). On April 25, 2022, OSHA issued a Citation and Notification of Penalty. (Citation). With leave of the Court, the Citation was amended on June 21, 2023. (Order Granting Motion to Amend). The Amended Citation and Notification of Penalty (Ex. J-1, Amended Citation) asserted a single serious violation of 29 U.S.C. § 654(a)(1), also referred to as the general duty clause, with a proposed penalty of \$14,502. The Amended Citation also identified four methods of proposed abatement. (Amended Citation at 1-2).

Discussion

Complainant alleged a serious violation of the Act in Citation 1, Item 1 as follows:

The employer did not furnish employment and a place of employment which were free from recognized hazards that were causing or likely to cause death or serious physical harm to employees in that employees were exposed to workplace violence hazards while enforcing a shopping mall's "Code of Conduct" provision that prohibited firearms on the premises.

On October 25, 2021, and times prior thereto, security officers on patrol at the mall were exposed to the hazard of physical assault, including potential homicide due to gun violence,

when enforcing the mall's firearms prohibition by approaching and engaging with an armed repeat offender of the firearms prohibition who had a history of argumentatively resisting the firearms prohibition and carrying multiple firearms, a suppressor, and magazines.

(Amended Citation at 1).

Identification of the Hazard

As a threshold matter, the Court notes that the Secretary's cited hazardous condition has been unclear in this case. The Amended Citation generally identified the hazard as "workplace violence hazards while enforcing a shopping mall's Code of Conduct provision that prohibited firearms on the premises." (Amended Citation at 1). But the Amended Citation also specifically describes the violative condition as PSC security officers "approaching and engaging with an armed repeat offender of the firearms prohibition who had a history of argumentatively resisting the firearms prohibition and carrying multiple firearms, a suppressor, and magazines." (Amended Citation at 1).

Further, at the beginning of trial, the Secretary narrowed the definition of the cited hazard, stating that "[t]he hazardous condition that the PSC security officers faced in this case was . . . approaching an armed patron *like Jacob Bergquist* who had shown many warning signs of violence over an extended period of time." (Tr. 109) (emphasis added). This was reiterated by the Secretary on the seventh day of trial, when counsel argued that "OSHA's position in this case is that [PSC] should not allow their security officers to approach armed individuals like Bergquist." (Tr. 1484). Counsel also said: "specifically in this case[,] the hazard is allowing security officers to continue to engage with someone who had behaved like Bergquist, despite his repeated violations of the firearms policy, his argumentative behavior, [and] his bizarre comments to security officers." (Tr. 1480-81). Then, in the very first sentence of her Post-Trial Brief, the Secretary described the hazardous condition as PSC requiring its security officers "to repeatedly confront *Jacob Bergquist*,

a heavily armed, agitated, and argumentative serial violator of Boise Towne Square Mall's firearms policy with a known history of exhibiting warning signs for violence.” (Sec’y Post-Trial Br. 6).

Although the Amended Citation identifies workplace violence as the cited hazard, the Secretary’s presentation of evidence and post-trial arguments were singularly focused on the hazard posed by PSC security officers confronting Jacob Bergquist, or someone like him. Accordingly, the Court concludes that the cited hazard in this case is Jacob Bergquist, the individual. The Court will, however, alternatively analyze the more general hazard of workplace violence throughout this decision. *See Henkels & McCoy, Inc.*, No. 18-1864, 2022 WL 3012701, at *2 (OSHRC, Jul. 21, 2022), *appeal docketed*, No. 22-13133 (11th Cir. Sept. 9, 2022) (finding the judge erred in redefining the cited hazard).

Jurisdiction & Direct Nexus¹³

The general duty clause provides that “[e]ach employer . . . shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.” 29 U.S.C. § 654(a)(1). The Secretary maintained that there was a direct nexus between the cited hazard and the work being performed by PSC security officers while enforcing the Mall’s Code of Conduct, thus bringing the cited hazard within the scope of the OSH Act. PSC argued that the unpredictable violent acts of a third-party mall customer committing a mass public shooting was a hazard beyond

¹³ The parties stipulated that the Commission has jurisdiction over this proceeding pursuant to section 10(c) of the Act and that, at all times relevant to this proceeding, PSC was an employer engaged in a business and industry affecting interstate commerce within the meaning of sections 3(3) and 3(5) of the Act, 29 U.S.C. §§ 652(3) & (5). (Tr. 26). *See Slingsluff v. OSHRC*, 425 F.3d 861 (10th Cir. 2005).

the scope of the OSH Act generally and the general duty clause specifically. PSC further argued that OSHA failed to meet its burden of proof.

This case involves violence in the workplace, which has been litigated for decades, both within the context of OSHA regulation and civil employer liability. *See, e.g., Drammeh v. Uber Techs., Inc.*, No. 22-36038, 2024 WL 4003548, at *3 (9th Cir. Aug. 30, 2024) (civil case involving rideshare driver who was murdered by a rider). Yet, OSHA has not promulgated standards to address workplace violence, resulting in such cases being cited under the catch-all general duty clause. *See, e.g., Integra Health Mgmt., Inc.*, No. 13-1124, 2019 WL 1142920, at *26 (OSHR, Mar. 4, 2019) (*Integra*) (MacDougall and Sullivan, concurring); *UHS of Westwood Pembroke, Inc., et al*, No. 17-0737, 2022 WL 774272, at *1 (OSHR, Mar. 3, 2022), *aff'd*, No. 22-1845, 2023 WL 3243988 (3d Cir. May 4, 2023); *SeaWorld of Fla., LLC v. Perez*, 748 F.3d 1202, 1205 (D.C. Cir. 2014); *Wal-Mart Stores, Inc.*, No. 09-1013, 2011 WL 12678760, at *1 (OSHR, Apr. 5, 2011) (vacated after settlement).

In *Integra*, the Commission established a framework for evaluating whether workplace violence hazards could form the basis of a general duty clause violation. *See Integra*, 2019 WL 1142920, at *6. OSHA cited *Integra* for exposing its employees “to the hazard of being physically assaulted by members with a history of violent behavior.” *Id.* at *4. The Commission concluded that in cases of workplace violence cited under the general duty clause, the Secretary must establish a “direct nexus” between the work being performed by the employer’s employees and the alleged risk of workplace violence. *Id.* at *6. The Commission found that under the particular circumstances of that case—in which *Integra* required its service coordinators to meet face-to-face with individuals diagnosed with mental illness and who had criminal backgrounds, as well as histories of violence and volatility—the hazard arose from the employment itself. *Id.* In other

words, the danger or risk of workplace violence arose from the nature of the employment and the population served: “a specific group of people with particular mental health conditions and criminal and/or violent backgrounds that create an enhanced potential for aggression and hostility.” *Id.* at *7; *see also Science Applications Int’l Corp., d/b/a SAIC*, No. 14-1668, 2020 WL 1941193, at *3 (OSHRC, Apr. 16, 2020) (*SAIC*) (applying the direct nexus framework).

Here, PSC security officers were tasked with enforcing the Mall’s Code of Conduct, providing general customer service to Mall patrons, patrolling both inside and outside the Mall, monitoring cameras, and answering telephone calls. In short, PSC security officers’ duties included regularly interacting with members of the general public, like Jacob Bergquist, visiting the Mall. Notably, the Commission commented that interactions with the general public may not satisfy the direct nexus test:

The danger or risk of workplace violence arises from the nature of both the “employment” and “place of employment” of Integra’s service coordinators. This renders the service coordinator position distinct from that of a generic service employee (such as a cable television or appliance technician); the latter interacts with the general population, while service coordinators assist a specific group of people with particular mental health conditions and criminal and/or violent backgrounds that create an enhanced potential for aggression and hostility.

Id. at *7. However, the Commission did not offer further guidance as to when interactions with the general population may fall outside the scope of the OSH Act.¹⁴

Thus, applying the Commission’s existing framework to the facts as presented here, the Court finds there was a “direct nexus” between the work being performed by PSC security officers and the alleged risk of workplace violence while enforcing the Mall’s Code of Conduct against

¹⁴ Commissioner Sullivan in his concurring opinion advocated for requiring the Secretary to prove foreseeability to prevail on a workplace violence citation. *Integra*, 2020 WL 1142920, at *15. However, the majority opinion did not require foreseeability in its direct nexus analysis, and the Commission has not adopted foreseeability as an element of the Secretary’s burden of proof. Thus, the Court cannot reject a finding of a direct nexus on that basis. *Cf. Drammeh*, 2024 WL 4003548, at *3 (employer had notice of criminal activity sufficient to give rise to a duty of care in civil case).

Jacob Bergquist or a member of the public like him. Enforcing the Code of Conduct was a core function of PSC security officers and one of the very reasons for PSC's security services. *See SAIC*, 2020 WL 1941193, at *3 (finding that the hazard of drowning was "an obvious risk of swimming, and swimming . . . was a required work activity for SAIC's employees" and was rooted in the very reason for SAIC's services). Approaching armed patrons like Bergquist to enforce the Code of Conduct required PSC security officers to periodically interact with customers openly carrying a firearm. This interaction arose directly out of PSC security officers' employment and job duties. Testimony elicited at trial supports a finding that confronting someone about any Code of Conduct violation created the potential for aggression and hostility. Thus, under the framework established by the Commission, the Court finds the Secretary established a direct nexus between the work being performed by PSC security officers and the hazard as alleged by the Secretary.

Legal Standard

To prove a violation of the general duty clause, the Secretary must establish, by a preponderance of the evidence, that: "(1) a condition or activity in the workplace presented a hazard; (2) the employer or its industry recognized the hazard; (3) the hazard was causing or likely to cause death or serious physical harm; and (4) a feasible and effective means existed to eliminate or materially reduce the hazard." *UHS of Westwood Pembroke, Inc.*, 2022 WL 774272, at *2. The Secretary must also establish that "the employer knew or, with the exercise of reasonable diligence, could have known of the hazardous condition." *Id.*

Existence of a Hazard

"A safety hazard at the worksite is a condition that creates or contributes to an increased risk that an event causing death or serious bodily harm to employees will occur." *Baroid Div. of NL Indus., Inc. v. OSAHRC and Marshall*, 660 F.2d 439, 444 (10th Cir. 1981). "In a general duty

clause case, the hazard must be defined in a way that apprises the employer of its obligations, and identifies conditions and practices over which the employer can reasonably be expected to exercise control.” *Mid S. Waffles, Inc., D/b/a Waffle House #1283*, No. 13-1022, 2019 WL 990226, at *2 (OSHRC, Feb. 15, 2019). A hazard has also been defined to mean “a condition or practice in the workplace which introduces an element of danger into the work environment.” *Foseco, Inc.*, No. 81-944, 1982 WL 22452, at *13 (OSHRCALJ, July 28, 1982) (citing *Empire-Detroit Steel Div., Detroit Steel Corp. v. OSHRC*, 579 F.2d 378 (6th Cir. 1978)). Not every condition affecting the employment relationship is a hazard under section 5(a)(1). *See, e.g., Am. Cyanamid Co.*, No. 79-5762, 1981 WL 18872, at *3 (OSHRC, Apr. 27, 1981), *aff’d*, 741 F.2d 444 (D.C. Cir. 1984) (holding that an employer’s policy was not a hazard because the employer “neither controls nor creates” factors “which operate primarily outside the workplace”).

The Court is cognizant of the fact that Congress did not intend the general duty clause to impose strict liability; rather, “the duty was to be an achievable one.” *Nat’l Realty & Constr. Co., Inc. v. OSHRC*, 489 F.2d 1257, 1265–66 (D.C. Cir. 1973). The general duty clause only requires the elimination of preventable hazards. *Pelron Corp.*, No. 82-388, 1986 WL 53616, at *3 (OSHRC, Jun. 2, 1986). And, “violence in many cases is inherently unpredictable, as it is the result of an individual’s affirmative, volitional, and deliberate choice. *Integra*, 2020 WL 1142920, at *16. (Sullivan, concurring); *see also Ramsey Winch Inc. v. Henry*, 555 F.3d 1199, 1206 (10th Cir. 2009) (declining to recognize firearms stored in locked vehicles on company property as hazard under the OSH Act).

Here, as discussed previously, the hazard cited by OSHA was Jacob Bergquist himself. However, the Court finds that an individual or specific incident cannot be the condition forming the basis of an OSHA citation. *See Litton Sys., Inc.*, 1981 WL 18925, at *2 (“[I]t is the hazard, not

a specific incident that resulted in injury, which is relevant in determining the existence of a hazard.”); *see also Brennan v. OSHRC (Vy Lactos Lab ’ys)*, 494 F.2d 460, 463 (8th Cir. 1974) (holding that a potential and unforeseeable event could not form the basis of a violation). Moreover, the hazard posed by Jacob Bergquist is not legally cognizable because Jacob Bergquist, or someone like him, is idiosyncratic in nature and akin to a “demented, suicidal employee.” *Nat’l Realty*, 489 F.2d at 1266. Dr. Palarea, a behavioral threat assessment expert, noted that Bergquist’s behavior on October 25, 2021 was unforeseeable because it “was a spontaneous, impulsive, and emotionally based decision to commit violence.” (Ex. R-15 at 10). In other words, Dr. Palarea concluded that Bergquist’s behavior was particular to him as an individual. The Court agrees. *See Roadsafef Traffic Sys., Inc.*, No. 18-0758, 2021 WL 5994023, at *2 (OSHRC, Dec. 10, 2021) (holding the existence of a hazard is established “if the hazardous incident can occur under other than a freakish or utterly implausible concurrence of circumstances”); *see also Pa. Power & Light Co. v. OSHRC*, 737 F.2d 350, 354 (3d Cir.1984) (recognizing that an employer’s “duty does not extend to the abatement of dangers created by unforeseeable or unpreventable employee misconduct”). The Secretary identified Bergquist himself as the cited hazardous condition, which this Court finds is improper under Commission case law.

Moreover, citing an employer for the hazard posed by a mass shooter is, under the circumstances presented in this case, beyond the scope of OSHA’s delegated authority. *See Nat’l Fed’n of Indep. Bus. v. Dep’t of Lab.*, 595 U.S. 109, 119 (2022) (*NFIB*) (holding OSHA’s COVID-19 mandate exceeded its statutory authority). In *NFIB*, the Supreme Court reviewed the propriety of OSHA’s COVID-19 vaccination mandate. It opined:

Although COVID–19 is a risk that occurs in many workplaces, it is not an *occupational* hazard in most. COVID–19 can and does spread at home, in schools, during sporting events, and everywhere else that people gather. That kind of universal risk is no different from the day-to-day dangers that all face from crime,

air pollution, or any number of communicable diseases. Permitting OSHA to regulate the hazards of daily life—simply because most Americans have jobs and face those same risks while on the clock—would significantly expand OSHA’s regulatory authority without clear congressional authorization.

Id. at 118. That rationale applies to the circumstances here. The potential threat of a mass shooting incident is, unfortunately, present in many public places where large groups gather, such as churches, concert venues, schools, *etc.* In other words, a mass shooter presents a universal risk in places where people gather and is not just limited to workplaces. Permitting OSHA to cite an employer for failing to predict a mass casualty event under the circumstances presented here appears to this Court to be an overreach of OSHA’s regulatory authority granted to it by Congress. Accordingly, the Secretary failed to properly identify a citable hazard considering Bergquist is the individual focus of the Citation.

However, the Court will, in the alternative, consider whether the Secretary established the more general hazard of workplace violence. Under existing Commission precedent, the evidence here supports a finding that approaching a Mall patron to enforce the firearms ban constituted a hazard. Then-ASD Harris testified that was always an inherent risk confronting an individual with a weapon, whether it was a firearm, a walking staff, or a knife. (Tr. 132, 137). Then-Security Officer [redacted] testified that he never personally felt safe approaching armed Mall patrons. (Tr. 432). Then-ASD [redacted] said that there was “always a risk” when approaching armed patrons because “I don’t know anybody’s intentions.” (Tr. 860). He further opined that “dealing with anybody with a firearm is dangerous for anybody, no matter who it is.” (Tr. 909). Then-Security Officer Murphy said, “any agitated person with a firearm is going to make me a little concerned for my safety,” and, beyond firearms, he noted that sometimes security officers were at risk of being punched, knifed, hit with blunt instruments, or shoved. (Tr. 409).

PSC itself had a policy on how to approach armed patrons and when to call for backup or the police. (Ex. J-3 at 58-59). It also trained its employees on how to approach Mall patrons, whether armed or unarmed. (Ex. R-75). This training was given in the event a Mall patron got so upset at being confronted that violence occurred. (Tr. 1533). And, although most Mall patrons were compliant when told about the firearms ban, some became upset or argumentative with the security officer, increasing the security officer's risk of possibly being physically assaulted. (Tr. 138, 140, 231).

Expert reports and testimony also support the existence of a workplace violence hazard. Mr. Levenberg, an expert in mall security, noted that there was the potential for violence when “dealing with” any armed individual. (Ex. R-19 at 14). He testified that someone carrying a firearm was in possession of “a deadly weapon and you don’t always know how they’re going to react.” (Tr. 1306). Likewise, PSC’s expert—Dr. Palarea—conceded that “[t]he presence of firearms elevates risk at the scene due to its potential lethality.” (Ex. R-15 at 12). He also conceded that being approached by a security officer could trigger violent behavior, and the presence of a firearm escalated the risk of harm. (Tr. 1763).

The Court is bound by the evidence in the record and the precedent set by the Commission, which has found workplace violence to be a cognizable hazard. *Integra*, 2019 WL 1142920 at *6. Although an armed-patron-turned-murderer’s motives may be idiosyncratic and beyond PSC’s control, PSC can control how and when its employees make contact with armed patrons to avoid workplace violence. *See SeaWorld*, 748 F.3d at 1210 (rejecting the employer’s argument that the hazard posed by killer whales was idiosyncratic and implausible because the employer “controls its employees’ access to and contact with its killer whales”). Experts in both the government and mall industry have training materials on violence in workplaces like shopping malls. PSC itself

had workplace violence training and acknowledged that security officers were “susceptible to attack” when approaching Mall patrons. (Ex. J-6 at PSC_000448). In short, violence at the hands of strangers was considered plausible by PSC and industry experts alike. Whether PSC implemented appropriate measures to materially reduce that hazard, or should have done more, is the Secretary’s burden to prove when advancing proposed abatement measures, discussed later in this decision. But, for purposes of establishing the existence of a general workplace violence hazard, the Secretary met her burden.

Recognition of the Hazard

The Secretary can establish hazard recognition either “by proof that a hazard is recognized as such by the employer or by general understanding in the employer’s industry.” *Integra*, 2019 WL 1142920, at *7. An employer’s work rules and safety precautions, in conjunction with other evidence, may establish that the employer recognized the hazard. *Id.* at *8 (work rules); *Waldon Health Care Ctr.*, No. 89-3097, 1993 WL 119662, at *13 (OSHRC, Apr. 2, 1993) (safety precautions). Hazard recognition may also be established through the knowledge of supervisory personnel. *See Integra*, 2019 WL 1142920, at *8 (“[T]he record here establishes both that Integra had work rules addressing the hazard of workplace violence and that the company, through its supervisory personnel, otherwise recognized this hazard.”).

Here, the Court already concluded that OSHA improperly cited the hazard as an individual homicidal person, and that hazard cannot—by law—be recognized. *See Litton Sys, Inc.*, 1981 WL 18925, at *2 (“[I]t is the hazard, not a specific incident that resulted in injury, which is relevant in determining the existence of a hazard.”). In fact, recognizing Bergquist, the individual, as a hazard would permit OSHA to significantly overreach its authority because such a hazard is far too speculative in nature. For example, in *Ramsey Winch Inc. v. Henry*, the Tenth Circuit rejected

OSHA's theory that firearms stored in locked vehicles on company property were a "recognized hazard" because it "simply too speculative and unsupported to construe as the clear and manifest purpose of Congress [when it enacted the OSH Act]." 555 F.3d 1199, 1206-07 (10th Cir. 2009). Here, the Secretary has offered no support for the conclusion that Congress intended the OSH Act to reach employers who failed to identify a specific mass shooter (Bergquist) and prevent his individual violent acts. The Amended Citation identifying Bergquist as the recognized hazard is overly broad and legally deficient. *A.H. Sturgill Roofing, Inc.*, No. 13-0224, 2019 WL 1099857, at *15 (OSHRC, Feb. 28, 2019) (MacDougall, concurring) ("Where the hazard at issue is a moving target with unclear parameters, how can the employer possibly prevent it?").

There is no support in the record that PSC's safety program (the SOP or trainings) recognized Jacob Bergquist as a hazardous condition at the Mall. *See Am. Dental Ass'n v. Martin*, 984 F.2d 823, 828 (7th Cir. 1993) (OSHA lacks the authority to impose strict liability on employers for hazards occurring despite the employer's due care in hiring, training, supervision, discipline, and retention). The record demonstrates that Jacob Bergquist did not ever display threatening or violent behavior such that supervisory employees recognized him as a safety threat to security officers. In fact, PSC security supervisors thought Bergquist was more of a nuisance and wished to ban him to avoid wasting time repeatedly advising him of the Mall's firearms policy.

Likewise, the Secretary failed to establish industry recognition of Jacob Bergquist, or someone like him, as a hazard. Bergquist is an alleged hazard so particularized that—under these circumstances—he would not be known to the mall security industry. And, although the Secretary presented evidence that some aspects of "an individual like Bergquist" might be known to the mall security industry as a concern, there is no evidentiary source identifying someone displaying Bergquist's previous characteristics or behavior as a recognized hazard for gun violence. For

example, the Secretary introduced into evidence an FBI publication titled “Making Prevention a Reality: Identifying, Assessing, and Managing the Threat of Targeted Attacks,” (Ex. C-25), arguing that governmental authorities have identified certain behaviors that enhance the risk of threat posed by an individual. These risk factors include a history of violence, a history of mental health issues or substance abuse, possession of firearms, a history of stalking, harassing, or menacing behavior, a history of non-compliance, negative family dynamics, and instability. (Ex. C-25 at 29-32). Notably, these risk factors do not capture “an individual like Bergquist,” who disagreed with security officers based on his perceived constitutional rights without displaying harassing, threatening, or menacing behavior. Moreover, Bergquist was an individual who carried firearms in a jurisdiction where open carry was common and legal, and not recognized by local police as a cause for concern.

Similarly, “an individual like Bergquist” did not display the observable physical behaviors identified by the Cybersecurity and Infrastructure Security Agency’s (CISA) document for recognizing the warning signs of violence, with the exception of disagreeing with security officers about his Second Amendment right to carry a firearm.¹⁵ (Ex. C-27 at OSHA003168). And, as noted by every PSC security officer who testified at trial, many other Mall patrons frequently argued about their Second Amendment rights when approached about the Mall’s firearms ban policy. It cannot stand to reason that every person who asserts Second Amendment rights should have been recognized as posing the hazard to potentially commit a mass shooting. Accordingly, the Secretary has not met her burden of proof that Bergquist, or someone like him, was a recognized hazard.

¹⁵ Behaviors identified by CISA included: argumentative or uncooperative behaviors; clenched jaw and/or balled fists; pacing or restlessness; trembling or shaking; violating others’ personal space; making specific threats to inflict harm to themselves or others; and displaying or making threats to use a weapon. (Ex. C-27 at OSHA003168).

The Court will next examine whether, in the alternative, the Secretary proved that workplace violence more generally was a recognized hazard. PSC had numerous policies and procedures aimed at avoiding workplace violence. For instance, PSC had a written policy specific to interacting with armed patrons, and it prohibited approach if the patron was exhibiting suspicious behavior or appeared to be intoxicated. (Ex. J-3 at 59). If an armed patron became confrontational or refused to comply with a security officer's directive, the security officer was required to disengage and call the police. (Ex. J-3 at 59). PSC's policies also addressed repeat offenders of the Code of Conduct in that security officers could ban them if those Code of Conduct violations were documented and "future compliance unlikely." (Ex. J-3 at 65).

PSC required its security officers to undergo comprehensive trainings on potential violence. PSC's workplace violence training instructed security officers to interpret "direct or veiled threats of harm" and "unreasonable bullying, harassment, intimidation, or belligerence" as workplace violence indicators. (Ex. J-5 at PSC_000218). It also identified bringing or brandishing weapons as indicators of a potential for violent behavior.

PSC security officers were trained on how to approach and handle resistance by a Mall patron, including the use of soft-talk and control-talk and calling for back-up as necessary. PSC's training materials acknowledged that PSC security officers were more susceptible to physical attack during interactions with Mall patrons, and the training materials included signals that a patron was becoming agitated, like clenched fists, tight jaw, pronounced veins in the neck, and a red face. PSC security supervisors also acknowledged the potential for violence when enforcing the firearms ban, and most only allowed supervisors or seasoned officers to approach armed patrons.

The evidence in this case demonstrates PSC’s policies and training materials, along with its supervisory employees, recognized the more general hazard of workplace violence associated with approaching an armed patron to advise him of the firearms ban. Accordingly, and alternatively, the Secretary established employer recognition of the hazard of general workplace violence.

The Hazard Was Likely To or Actually Caused Death or Serious Physical Harm

Section 5(a)(1) requires the employer to abate only those recognized hazards “that are causing or are likely to cause death or serious physical harm to his employees.” This inquiry does not turn on the likelihood of an accident or injury but instead focuses on whether, if the accident occurred, whether the results likely to be death or serious harm. *Waldon*, 1993 WL 119662, at *11. Being shot could unquestioningly cause serious harm, and, in this case, resulted in the death of an employee. *See Peacock Eng’g, Inc.*, No. 11-2780, 2017 WL 3864205 at *5 (OSHRC, Apr. 27, 2017) (employee injury evidenced actual exposure); *see Schaad Detective Agency, Inc.*, No. 16-1628, 2018 WL 11270674, at *32 (OSHR CALJ, Nov. 13, 2018) (holding that the “severity of the harm is undisputed and undeniable: being shot in the torso could lead to an employee’s death”). This is true regardless of whether the cited hazard was Bergquist (or someone like him) or workplace violence more generally. Accordingly, the Secretary met her burden of establishing that the alleged violation was properly characterized as Serious.

Employee Exposure to the Hazard

“Implicit in the above elements [of proof for general duty clause violations] is the necessity for establishing employee exposure to the cited hazardous condition.” *Peacock Eng’g, Inc.*, 2017 WL 3864205, at *5 (citation omitted). “The Secretary establishes exposure either by showing actual exposure or that access to the hazard was reasonably predictable.” *Id.* (citation omitted).

Here, PSC security officers routinely approached Mall patrons, including armed patrons, to enforce the Mall's Code of Conduct. This exposed PSC security officers an inherent risk of workplace violence that was known to PSC. And, one PSC security officer was actually exposed to this risk and died as a result. Employee exposure to the cited hazard of Bergquist individually, or alternatively, general workplace violence, was established.

Feasible Means of Abatement

The Court previously found the Secretary's cited hazard of Bergquist, an individual homicidal shooter, is not legally cognizable. Accordingly, under that analysis, the Court does not reach issue of whether the Secretary's proposed methods of abatement would eliminate or materially reduce the cited hazard.¹⁶ The Court will, nevertheless, evaluate in the alternative whether the Secretary's proposed methods of abatement were already being implemented by Respondent, and if not, would they eliminate or materially reduce the more general hazard of workplace violence when security officers enforced the Mall firearms ban policy.

To prevail on this element, "the Secretary must specify the particular steps a cited employer should have taken to avoid citation and demonstrate the feasibility and likely utility of those measures." *BHC Nw. Psychiatric Hosp., LLC v. Sec'y of Lab.*, 951 F.3d 558, 564 (D.C. Cir. 2020). "Abatement is feasible when it is economically and technologically capable of being done." *SeaWorld*, 748 F.3d at 1215. The Secretary must also prove the measure would be effective in materially reducing the incidence of the hazard. *Beverly Enters., Inc.*, No. 91-3144, 2000 WL 34012177, at *34 (OSHRC, Oct. 27, 2000) (consolidated).

¹⁶ And, even if the Court were to consider the consider the proposed methods of abatement as to the hazard posed by Bergquist, individually, it would similarly conclude that Respondent was already implementing Complainant's proposed abatement methods, where feasible.

Where a hazard cannot be abated with a single measure, it is permissible for OSHA to require the employer to engage in a “process approach” to abatement. *See Pepperidge Farm, Inc.*, No. 89-265, 1997 WL 212599, at *3 (OSHRC, Apr. 26, 1997) (finding that “the appropriate response to the hazard. . . was a process that included actions selected from a menu of alternatives”). When multiple forms of abatement are alleged as part of a process, proof of the feasibility of any individual abatement proposal is sufficient to affirm a violation of the general duty clause. *See UHS of Westwood Pembroke, Inc.*, 2022 WL 774272 at *8.

Where, as here, “an employer has existing safety procedures, the burden is on the Secretary to show that those procedures are inadequate.” *SeaWorld*, 748 F.3d at 1215. “The Secretary may do so by demonstrating that there was a more effective feasible means by which the employer could have freed its workplace of the hazard.” *Roadsafe*, 2021 WL 5994023, at *6. “Alternatively, the Secretary may demonstrate that an employer’s existing safety procedures were inadequate by showing that the employer failed to properly communicate those procedures to its employees, failed to take steps to discover noncompliance with those procedures, or failed to effectively enforce those procedures in the event of noncompliance.” *Id.*

Here, the Secretary claimed there were more effective feasible means to address the hazard of workplace violence when approaching an armed patron like Bergquist about the Mall’s firearms ban. She identified, “[a]mong other methods,” four abatement measures:

1. Develop and implement an effective workplace violence program.
2. Implement an effective system to identify, track, and communicate issues about high-risk people, persons of interest, and repeat offenders of the mall’s firearms prohibition.
3. Develop, train security officers on, and enforce a strict no-approach policy for high-risk situations, such as when a threatening or repeat offender is observed on mall property carrying a firearm.

4. Conduct re-training on workplace violence with security officers, supervisors, and directors that includes internal and external risk factors for violence in the retail and security industries.

(Amended Citation 1-2).

Develop and Implement an Effective Workplace Violence Program

The Secretary's first method of abatement argues that PSC should implement guidance published in an ASIS International Standard titled "Workplace Violence and Active Assailant Prevention, Intervention, and Response" (ASIS Standard). (Amended Citation 1; Ex. J-10). The abatement would include "developing a workplace violence prevention and intervention program where the risk of violence is identified, there is prompt reporting of concerning behaviors, recording of these behaviors, and investigations by the employer about the person(s) of concern." (Amended Citation at 1). The Secretary maintained that if PSC had a proper workplace policy in place and a threat management team, it would have materially reduced the workplace violence hazard posed by Bergquist (or another armed patron like him).

"To assess the efficacy of a proposed abatement measure, we first consider the adequacy of the employer's existing safety procedures." *SAIC*, 2020 WL 1941193, at *8. PSC had in place workplace violence policies and training. PSC had a formal policy on approaching armed Mall patrons and required security officers to request police intervention if a Mall patron resisted security officers' directives. Security officers were trained to contact the dispatch officer before approaching an armed patron and to observe the individual for signs of aggravation or intoxication before approaching. And, PSC security officers were trained on how to identify when a person was becoming angry or violent.

The Secretary pointed to Bergquist as an example that PSC's policies were inadequate because PSC did not implement a no-approach ban despite Bergquist repeatedly violating of the

firearms ban, bringing multiple magazines to the Mall, and verbally disagreeing with the Mall policy. However, Dr. Palarea,¹⁷ an expert in behavioral threat assessment, noted that these factors were not indicative of violence risk. (Tr. 1693; Ex. R-15 at 12). He opined that being argumentative and carrying one or multiple firearms required other behavior escalation to indicate a violence risk. (Ex. R-15 at 12). Similarly, repeatedly violating the Code of Conduct was—by itself—not a risk factor for violence. (Ex. R-15 at 12). Dr. Palarea noted that repeated violations were “indicative of obstinance and disregard for rules,” which was “not uncommon in the Second Amendment culture” due to individuals’ strong beliefs about their right to bear arms. (Ex. R-15 at 12-13). He opined that an armed subject would have to “communicate threats of violence, become physically aggressive with the PSC officer, [or] brandish the firearm” to be a violence risk. (Ex. R-15 at 13).

Here, PSC security officers were aware of Bergquist, and then-ASD [redacted] intended to ban Bergquist from the Mall because he was a repeat offender of the firearms ban. Although the Secretary argues PSC should have identified Bergquist as a high-risk threat, the record shows that Bergquist did not exhibit behaviors indicating that he would become violent. PSC security officers regularly dealt with Mall patrons who were argumentative or hostile about a variety of Mall Code of Conduct issues unrelated to the firearms ban. Bergquist, although he disagreed with the policy, never threatened anyone or reached for his weapon when confronted. He never attempted to fight or physically resist a PSC security officer. He never even displayed behaviors like clenching his fists or holding an aggressive posture. None of the security officers testified that they felt threatened by Bergquist during their direct interactions with him. And, although PSC security

¹⁷ The Court gives great weight to Dr. Palarea’s testimony. Unlike Mr. Levenberg, who specialized in mall security, Dr. Palarea’s expertise is in behaviors that demonstrate a likelihood that the individual will become violent. In turn, this informs the Court as to what behaviors can warn a PSC security officer approaching Mall patrons for Code of Conduct violations.

officers found it notable that Bergquist carried two firearms on one occasion, there was no evidence in this record to indicate that being a propensity to commit a violent criminal act.

The Secretary's position relies heavily on the hindsight of those involved after the shooting occurred. But, PSC and its security officers had no way to know Bergquist's mental health status, his behavior in the community at large, or any changes to his behavior or psychological state during any of their encounters leading up to the shooting on October 25, 2021. They only knew how he acted at the Mall, and his actions were not seen as threatening or violent. The inability to predict Bergquist's homicidal actions were not due to the inadequacy of PSC's workplace violence policies and procedures. Rather, PSC failed to predict Bergquist's actions because he gave no obvious indication of future violence that a mall security guard could have recognized. (Ex. R-15 at 13). The Secretary failed to meet her burden of proving that PSC's existing workplace violence training program for its employees was inadequate.

The next abatement advanced by the Secretary was the creation of a threat management team. Under the ASIS Standard, a threat management team included "human resources, security, and legal personnel," and it described a threat management team's objective as determining the "general urgency of a situation" and engaging in extensive fact-gathering. (Ex. J-10 at OSHA003415, OSHA003418). Fact-gathering included interviewing a subject's current or former supervisors, talking to the subject's human resources representative, accessing personnel files, computers and communications devices, performing a background check, and accessing relevant network files. (Ex. J-10 at OSHA003418- OSHA003419).

Mr. Levenberg testified that a threat management team was feasible because it could be staffed by PSC's existing roster of security officers and corporate management personnel. (Ex. R-19 at 19). However, PSC was not the employer of, nor could it exercise authority over, the Mall's

other stakeholders, such as Brookfield Properties employees, store owners, and restaurants. PSC was merely the security guard service in the Mall, with significant limitations. Dr. Palera concluded that a threat management team could not be implemented by PSC because security officers “[were] not equipped nor empowered to conduct the full spectrum of threat management strategies.” (Ex. R-16 at 8). Instead, PSC security officers were limited to “cautioning the subject about the subject’s concerning behavior, asking the subject to leave the mall, and banning the subject from mall property.” (Ex. R-16 at 8). Anything beyond that would be referred to local law enforcement to be handled at their discretion. Even the Mall property manager could override a PSC security officer’s decision to ban a customer. The Court concludes that OSHA’s proposed mandate for PSC to create a threat management team was simply not feasible based on evidence presented in this case.

PSC lacked the investigative powers, i.e., the technological ability, envisioned by the ASIS Standard. Mall security officers had no legal authority to demand that a subject provide identification. There is no evidence in the record that PSC could obtain search warrants to access various sources concerning the subject. There is no evidence in the record to suggest that security officers would know the mental health history of a subject visiting the Mall. There is no evidence in the record that security officers could talk to a subject’s supervisor, family, or friends to evaluate the subject’s behavior. There is no evidence in the record that security officers could access Mall patrons’ personnel files, computers, or communications devices. Without names or other information, security officers could not perform any type of customer background check. PSC security officers’ authority was extremely narrow in scope and designed to support a comfortable shopping experience for Mall visitors to the best of their ability. The creation of a threat

management team was not feasible and would not materially reduce the risk of workplace violence from a homicidal mall customer.

Implement an Effective System to Identify, Track and Communicate Issues About High-Risk People, Persons of Interest, and Repeat Offenders of the Mall's Firearms Prohibition

The next abatement advanced by the Secretary centered on a record-keeping system that she claimed would “identify, track, expose trends, communicate, and effectively manage high-risk persons.” (Amended Citation 1). PSC had in place a system for tracking various incidents at the Mall, including interactions with Mall patrons and any criminal activity or incidents requiring police intervention. PSC security officers reported notable events to the next shift in the form of pass-down logs. And, PSC tracked certain offenders, like shoplifters, in a BOLO book, which included the offender’s name and photograph. The Secretary contended PSC’s system was inadequate because the entries failed to include detailed descriptions of the violators, rendering it impossible to track them. The Secretary pointed to the entries related to Bergquist as an example, arguing that although Bergquist returned to the Mall on several occasions, there was only one entry that could definitely be attributed to him. And, that entry—the Secretary argued—described Bergquist only as a “Male patron,” (Ex. R-28 at 13), which would not assist another security officer in identifying him in the future.

The Court agrees that PSC could have attempted to include more information when available or obtainable, such as physical descriptions, tattoos, clothing, and a CCTV still photograph, about certain patrons who were repeat offenders or were otherwise found to pose a possible safety threat. However, the Secretary has not shown that enhanced record-keeping would have materially reduced the cited hazard, particularly as it applied to Bergquist or his decision to commit a mass shooting on October 25, 2021. First, there was no evidence that Bergquist would have necessarily been included in any enhanced database as envisioned by the Secretary. Bergquist

was never seen as a safety threat by any security officer with whom he interacted. The fact that Bergquist disagreed with the Mall policy, and asserted Second Amendment rights was apparently not particularly noteworthy in the state of Idaho, according to virtually every witness that testified at trial. He always complied with security officer directives. He did not demonstrate behaviors that would indicate to security officers (or a behavioral threat assessment expert) that he posed a risk of violence. Then-AD [redacted] even admitted that he only wanted to ban Bergquist because Bergquist's repeated firearms violations were a nuisance. In short, Bergquist's behavior did not demonstrate any clear escalation toward such abhorrent violence based on witness testimony and the evidentiary record in this case.

Second, even if Bergquist was included in an enhanced database, the Secretary failed to prove that record-keeping would translate into recognition of Bergquist such that a security officer would know not to approach him. Such an enhanced database could not predict that a repeat offender of the Mall's Code of Conduct would one day decide to commit a mass shooting inside the Mall. None of the officers knew Bergquist's name, and security officers failed to recognize Bergquist even though they had personally talked to him before. The Secretary has not provided any convincing evidence to overcome this issue. Mr. Levenberg, who opined that enhanced record-keeping might mitigate future potentially dangerous situations, but did not address details of recognition methodology. It is highly speculative and unreliable to conclude that an enhanced recordkeeping system based on more physical descriptions or CCTV photographs would have materially reduced or eliminated the alleged hazard. This abatement method rests entirely on the benefit of hindsight after the shooting occurred. Additional details in Respondent's activity logs and records would not have necessarily identified Bergquist as a threat, nor anticipated he would commit a mass shooting. Similarly, the Court fails to see how such enhanced record keeping could

predict a violent response from any patron approached about the Mall firearm policy. *See SeaWorld*, 748 F.3d at 1216 (the general duty clause applies “only when a reasonably prudent employer in the industry would have known that the proposed method of abatement was required”). The Secretary’s second proposed abatement method fails.

*Develop, Train Security Officers On, and Enforce a Strict
No-Approach Policy for High-Risk Situations*

The Secretary’s third proposed method of abatement was the adoption of a strict no-approach policy for certain high-risk situations, such as when a threatening or repeat offender was observed on Mall property openly carrying a firearm. (Amended Citation 1). At trial, the Secretary clarified that the abatement did not mean that PSC security officers could never approach an armed patron; rather, it meant that PSC would not allow its security officers “to approach armed individuals like Bergquist who had engaged in . . . behaviors that suggested he posed a significant violence risk.” (Tr. 1484). This abatement also required the development of a relationship with Boise police so that “an immediate and direct notification can be made when repeat offenders or higher-risk persons are observed inside the mall.” (Amended Citation at 1-2). The record fails to establish that this was feasible and would have materially reduced PSC security officers’ exposure to workplace violence, including a homicidal Mall customer.

The evidence in this case is that prior to the shooting, Bergquist did not exhibit behaviors of a significant risk of violence. As a result, he would not have been identified as a “high risk” person to whom the Secretary’s proposed no-approach policy would apply. Moreover, there is no way to know how many Mall customers repeatedly came to the Mall with a firearm concealed in their clothing, thus repeatedly violating the Mall’s firearms ban policy. The facts of this case focus solely on Bergquist’s behavior, Mall customers openly carrying firearms, with no evidence whatsoever about the number or frequency of customers entering the Mall with concealed firearms.

The no-approach abatement method also assumes that PSC would always be able to readily identify repeat offenders of the policy. Further, there is no evidence in the record that if PSC security officers chose to not approach Bergquist on the day of the mass shooting, that the shooting would not have still occurred. And if so, could still have resulted in the shooting of one or more Mall security officers as unfortunate victims. Accordingly, the Secretary failed to present sufficient evidence to prove that the no-approach policy for recognized repeat offenders of the firearm ban policy would have resulted in a material reduction or elimination of a workplace violence hazard. The Secretary has presented no evidence that the no-approach policy would reduce the risk of a “spontaneous, impulsive, and emotionally based decision to commit violence,” (Ex. R-15 at 13), particularly the kind of homicidal violence committed by a Mall customer in this case.

Likewise, creating a heightened relationship with the Boise police department is not within PSC’s control, and there is no evidence that such efforts would materially reduce or eliminate the risk of gun violence posed by Bergquist or other Mall patrons. PSC security officers could—and did—call the Boise police when they encountered dangerous, emergency medical, or suspected criminal situations. However, the Boise police chief testified in this case that the police department did not, and would not, respond to a call from PSC about an individual walking around the Mall openly carrying a firearm alone, because open carry was legal in Boise, Idaho. Further, the Boise police chief testified that even an individual wearing all black and carrying multiple firearms and magazines would not necessarily elevate the situation in a way that would garner a police response. (Tr. 722). These behaviors were not against the law in Boise. (Tr. 728).

The police department would, however, respond to calls about Mall patrons engaging in suspected criminal activity, with or without the involvement of an openly carried firearm. (Tr. 736-

37). The police department would also respond to a call about a repeat offender if the Mall properly implemented a written ban notice or a customer refused to leave the property because these were treated as a trespassing issue. (Tr. 728, 732).

The Court concludes that PSC's policy for contacting the Boise police was adequate and consistent with Boise police's stated practices and policies. The Secretary has failed to prove that attempting to create a closer relationship with the Boise police would have resulted in the police department responding to a call about Bergquist, or any other Mall customer, openly carrying a firearm into the Mall. In fact, this is directly contrary to the testimony provided by the Boise Chief of Police at trial. Bergquist apparently did not exhibit behavior that would have necessitated a police response in his previous encounters with PSC security officers. He appeared to be a firearms enthusiast, which apparently was not considered unusual, suspicious, or criminal in Boise, Idaho. (Tr. 1698). Although Bergquist clearly did not agree with the Mall's policy, he never previously became violent or threatening, according to PSC security officers. He always left the Mall and followed security officers' directives. He was not in violation of any ban, so he was not trespassing. And, the one occasion when the police decided to respond to a phone call about Bergquist resulted in no further action or investigation. The police offered no advice on what to do if Bergquist returned, nor did they express concern over his reported behavior. (Tr. 1193). In short, there is no support in the record that a request by PSC for an enhanced relationship with the Boise police department was feasible and would have materially reduced the risk posed by Bergquist (or another Mall patron like him) who decided to commit a mass public shooting.

Conduct Re-Training on Workplace Violence

The final abatement method identified by the Secretary was to "conduct re-training on workplace violence with security officers, supervisors and directors that includes internal and

external risk factors for violence in the retail and security industries.” (Amended Citation 2). This included ensuring that “officers, supervisors, and directors have the appropriate awareness to detect and respond to situations and behaviors that may be indicative of potential violence.” (Amended Citation 2). Here, PSC presented evidence that it already conducted workplace violence training, which included conflict resolution, use of force, active shooter, and anti-terrorism training. PSC also conducted regular re-trainings. And, as noted previously, the Secretary did not establish that PSC’s workplace violence policies and training were inadequate. There was no evidence in this case that additional re-training would have eliminated or materially reduced the the hazard of Bergquist, or any other Mall customer, committing a mass public shooting/homicide inside the Mall. The Secretary’s final proposed method of abatement for the cited hazard is rejected.

Knowledge of the Hazardous Condition

“[I]n addition to establishing the four elements of a general duty clause violation, the Secretary must prove that the employer knew or, with the exercise of reasonable diligence, could have known of the hazardous condition.” *Peacock Eng’g*, 2017 WL 3864205, at *2. The key factor here is whether PSC was aware of the conditions constituting a violation, not whether it understood the conditions violated the OSH Act. *Phoenix Roofing, Inc.*, No. 90-2148, 1995 WL 82313, at * 3 (OSHRC, Feb. 24, 1995).

Respondent contends PSC lacked any knowledge that the cited hazard, Bergquist, posed a safety hazard to its officers. The Court agrees. For reasons previously articulated in this decision, Bergquist did not behave in a way that would signal to PSC that he would become violent and commit a mass shooting at the Mall. Even his actions on the actual day of the shooting gave no indication that he was about to become violent. In fact, Bergquist’s behavior was unremarkable up

until the moment he turned around and shot Acker. Bergquist's previous interactions with PSC security officers indicated no escalation toward violence. PSC had no knowledge of the cited condition.

Alternatively, to the extent the Secretary claims the cited hazard was general workplace violence from approaching any armed customer to explain the firearms ban, the Court similarly concludes the Secretary failed to prove employer knowledge. The record clearly establishes that PSC trained its employees on various aspects of workplace violence and safety protocols. PSC communicated to its security officers that they should disengage from an interaction with a patron if the security officer felt his safety was at risk. PSC had a policy expressly setting forth procedures for approaching armed patrons. PSC management recognized the existence of the workplace violence hazard, and some required security officers to notify a supervisor when an armed patron was seen at the Mall. However, the record does not support a finding that PSC knew that approaching an armed patron to discuss the Mall's firearms ban policy could result in a customer deciding to engage in a homicidal, mass shooting event like this one. Accordingly, the Secretary failed to establish employer knowledge of the cited condition.

CONCLUSION AND ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, the Court finds that Complainant failed to establish, by a preponderance of the evidence, the necessary elements of proof for a Section 5(a)(1) General Duty Clause violation. Accordingly, Citation 1, Item 1 is VACATED.

/s/ Brian A. Duncan

Judge Brian A. Duncan

U.S. Occupational Safety and Health Review Commission

Date: December 26, 2024
Denver, Colorado