



United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR, :
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 Complainant, :
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 v. :
 :
 IMPERIAL SUGAR COMPANY, :
 IMPERIAL-SAVANNAH, L.P., :
 :
 Respondents. :
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OSHRC DOCKET NO. 08-1104

ORDER DENYING MOTION TO DISMISS

Under consideration are Respondents’ Motion to Dismiss Citation 2, Items 4 through 15, Complainant’s Response thereto, and Respondents’ Reply. Respondents allege that, pursuant to Federal Rules of Civil Procedure 12(b)(6) and 12(c), 29 C.F.R. § 658(a), and 29 C.F.R. § 1903.14(b), judgment on the pleadings in their favor is appropriate; specifically, Respondents claim that the allegations contained in the subject citation fail to state a claim upon which relief can be granted because they do not provide fair notice of the nature of the alleged violations and do not describe with particularity the nature of the alleged violations.¹ The subject citation items allege violations of

¹Respondents cite *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 U.S. 1955, 1964 (2007), for the proposition that a complaint must “give the defendant fair notice of what the ... claim is.” The issue before the Supreme Court in *Twombly*, an antitrust case, was whether the plaintiff had stated a claim for conspiracy under Section 1 of the Sherman Act by alleging parallel conduct without any additional factual allegation that, if later proved true, would establish the existence of a conspiracy. The Court said no, and, in reaching its conclusion, discussed what a plaintiff in an antitrust conspiracy complaint must allege in order to withstand a motion to dismiss; specifically, plaintiffs need not set forth detailed factual allegations but instead provide a “plausible suggestion of conspiracy.” *Id.* at 1971. The Court noted that the pleadings “mentioned no specific time, place, or person involved in the alleged conspiracies.” *Id.* at 1970, n.10. The amplification of facts is unnecessary in this case, where the citation and complaint meet the criteria mandated by the Act and Commission Rules.

housekeeping standards at 29 C.F.R. §§ 1910.22(a)(1) and (a)(2), in that Respondents permitted hazardous accumulations of combustible dust to exist in the cited work locations. The gravamen of this motion is Complainant's alleged failure to draft the citation with sufficient particularity. Respondents argue that the citation does not define what is a "hazardous accumulation" of sugar dust and that it is Complainant's burden to articulate the violative conditions with some reference to objective criteria. Complainant counters that the allegations do not lack particularity and that all pleading requirements have been met, pursuant to the Occupational Safety and Health Act ("the Act"), OSHA regulations and Commission rules.²

In an action brought under the Act, section 9(a) of the Act³ and Commission Rule 34(a)(2)⁴ set out what information must be provided to give fair notice of the Secretary's allegations. Commission precedent has established that the particularity requirement of section 9(a) does not require minute detail but, rather, fair notice of the nature of the alleged violation and the general location of the violation. The particularity requirement may be fulfilled, and additional information obtained, during the pleading, discovery and hearing stages of the litigation. In determining whether fair notice has been afforded, consideration may be given to factors external to the citation, such as the nature of the alleged violation, the circumstances of the inspection, and the employer's knowledge

²Complainant also avers that the Motion is untimely, as an answer has already been filed in this matter. A Rule 12(b)(6) motion must ordinarily be filed before a responsive pleading is served; however, absent prejudice to the nonmoving party, post-pleading and pre-pleading motions asserting dismissal for failure to state a claim may be treated as a Rule 12(c) motion. Complainant also counters what it believes to be Respondents' due process/constitutionality arguments regarding fair notice as to the requirements of the standard. However, Respondents' Reply makes it clear that the present motion solely addresses Complainant's burden to describe with particularity the nature of the violations.

³Section 9(a) of the Act provides that a citation must "describe with particularity the nature of the violation, including reference to the provision of the Act, standard, rule, regulation, or order alleged to have been violated." 29 U.S.C. § 658(a).

⁴ 29 C.F.R. § 2200.34(a)(2) states: "The complaint shall set forth all alleged violations and proposed penalties which are contested, stating with particularity: (i) The basis for jurisdiction; (ii) The time, location, place, and circumstances of each such alleged violation; and (iii) The considerations upon which the period for abatement and the proposed penalty of each such alleged violation are based."

of its own business.⁵ *See Meadows Indus., Inc.*, 7 BNA OSHC 1709, 1710 (No. 76-1463, 1979); *Gold Kist, Inc.*, 7 BNA OSHC 1855, 1861 (No. 76-2049, 1979); and *Del Monte Corp.*, 4 BNA OSHC 1201 (No. 11865, 1977). Further, where the citation tracks the standard's language, pleadings are drafted with sufficient particularity. *See L & L Painting Co., Inc.*, 22 BNA OSHC 1346 (No. 05-0050, 2008).

Having reviewed the pleadings before me, I find that the citation and complaint provided Respondents with fair notice of the nature of the violations and their locations; they also provided a proper basis for determining whether to contest the alleged violations. Respondents' assertion that the complaint must set out objective criteria that define the term "hazardous dust" is rejected. The citation and complaint also provided the basis for jurisdiction; the time, location, place and circumstances of each alleged violation; and the bases for the abatement periods and proposed penalties. Moreover, a review of the citations reveals that the language of the citation items tracks the language of the cited standards. Both the citation and complaint allege sufficient facts to constitute noncompliance with the cited standards, if true. Respondents' Motion to Dismiss Citation 2, Items 4 through 15, is DENIED.⁶

SO ORDERED this 18th day of March, 2009.

/s/ Covette Rooney

COVETTE ROONEY

U.S. OSHRC JUDGE

⁵Complainant's Response contains evidence of such external factors. *See* Response, Exh. A-B.

⁶Respondents' Reply requests that Complainant be required to provide a more definite statement. In view of my findings, this request is also DENIED.



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CERTIFICATE OF SERVICE

I certify that all parties have consented that all papers required to be served may be served and filed electronically. I further certify that a copy of the Order Denying the Motion to Dismiss was electronically served on March 18, 2009, on the following parties:

CHARLES H. MORGAN, ESQ.
charlie.morgan@alston.com
MATTHEW J. GILLIGAN, ESQ.
matt.gilligan@alston.com
ASHLEY D. BRIGHTWELL, ESQ.
ashley.brightwell@alston.com
JEREMY D. TUCKER, ESQ.
jeremy.tucker@alston.com
KAREN E. MOCK, ESQ.
Mock.karen@dol.gov
ANGELA F. DONALDSON, ESQ.
Donaldson.angela@dol.gov

/s/Arnita A. Acty
ARNITA A. ACTY
Legal Assistant