

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

Secretary of Labor,)	
)	
Complainant,)	
)	
v.)	OSHRC Docket No. 11-2132
)	
North Suffolk Mental Health Association,)	
)	
Respondent.)	
)	

ORDER DENYING RESPONDENT’S MOTION TO DISMISS

I. FACTS

Respondent is a large provider of mental health services through group homes, outpatient clinics, and home visits. (Opposition to Motion to Dismiss at p. 2). On July 19, 2011, the U.S. Occupational Safety and Health Administration (OSHA) issued to Respondent a one-item serious citation under the general duty clause, section 5(a)(1) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651, *et seq.* (Act), for exposing employees to the hazard of physical assault.¹ The citation proposed a penalty of \$7,000 for this violation. The citation alleged, in relevant part, as follows:

a) Location – 110 Ocean Avenue, Revere, MA:
On or about January 20, 2011, a senior counselor working at the group home was brutally attacked and fatally injured during performance of regularly assigned duties. Employees are exposed to the hazard of physical assault....The employer failed to develop and implement adequate measures to protect employees from physical assault in the workplace.

The citation set out a number of feasible means of abatement, one of which was to “[c]reate a stand alone written Workplace Violence Prevention Program for all the service programs.” On August 4, 2011, Respondent submitted its notice of contest. On November 28,

2011, the Secretary filed her complaint, amending the citation's language. The complaint amended the above paragraph to read as follows:

a) On or about January 20, 2011, a senior counselor working at a group home located at 110 Ocean Avenue, Revere, MA was attacked and fatally injured during performance of regularly assigned duties. Employees are exposed to the hazard of physical assault in workplaces including, but not limited to, group homes, when they interact with clients who pose a potential danger of physical assault in light of factors such as a history of violence, active alcohol and/or substance abuse, and/or failure to adhere to treatment. The employer failed to develop and implement adequate measures to materially reduce the likelihood of physical assault on employees working in such workplaces.

The complaint listed various feasible means of abatement, the first of which was to create a "stand-alone written Workplace Violence Prevention Program" for all service programs.²

On January 31, 2012, Respondent filed its Motion to Dismiss the complaint (Motion) for the Secretary's alleged failure to plead any violation of the Act with specificity. Respondent asserts that the complaint must identify the workplace involved, where in the workplace the violation occurred, and what conduct or failure to act constitutes a violation.³ Respondent seeks the dismissal of workplaces that are unidentified in the complaint. It concedes that the underlying citation clearly identifies the workplace at 110 Ocean Avenue in Revere, Massachusetts as the inspection site. (Motion at p. 5). Respondent notes that the complaint amends the citation to include "workplaces including, but not limited to, group homes" that Respondent asserts are unidentified. Respondent argues that the complaint lacks facts sufficient to provide it with fair notice of the alleged violation. (Motion at pp. 5-6).

Respondent states that the "Complaint must be dismissed with respect to unidentified

¹ The citation identifies the inspection dates as "1/21/2011 – 07/13/2011."

² The Secretary stated that the "reason for the amendment is to clarify and further particularize and explain the alleged violation." (Complaint at p. 4).

³ Commission Rule 34(a)(2) states, in part: "The complaint shall set forth all alleged violations and proposed

workplaces to the extent the allegations are based upon secret or otherwise unlawful inspections.” (Motion at p. 6). It also states that it “conditionally permitted OSHA to conduct an inspection regarding [the subject] incident and regarding [the cited] location.”⁴ Respondent argues that “no Citation can be issued based upon conditions allegedly observed” during any OSHA inspections of Respondent’s workplaces other than the inspection site. It further argues that “if OSHA actually conducted an on site inspection of the conditions at the [inspection site] workplace, such an inspection was conducted without Respondent’s knowledge or consent and no Citation can be issued based upon conditions allegedly observed during any such inspection.” (Motion at p. 7). Respondent states that any claim based upon violations that occurred more than 180 days prior to the issuance of the citation must be dismissed. *See* 29 U.S.C. § 658(c).

Finally, Respondent asserts that the complaint must be dismissed because the Secretary did not provide it with “sufficient notice of the hazard” alleged at the inspection site, in that the Secretary failed to specify precisely where at the inspection site workplace the alleged hazard exists or to sufficiently describe the conditions that allegedly created a recognized hazard. (Motion at pp. 8-11).

Respondent requests that “the portions of the Complaint and Citations including the proposed penalties, and the proposed abatement demands associated with those claims of the Complaint, each be dismissed in their entirety and that all fees and costs be assessed against the Complainant as enumerated in its Motion to Dismiss. (Motion at pp. 12-14).

On February 28, 2012, Complainant filed her Opposition to Respondent’s Motion

penalties which are contested, stating with particularity: ... (ii) The time, location, place, and circumstances of each such alleged violation;...”

⁴ Respondent states that it “notified OSHA that a client had allegedly killed one of its employees at one of its workplaces located at 110 Ocean Avenue.” (Motion at p. 6). The incident occurred on January 20, 2011, and the

(Opposition). Complainant asserts that the Motion fails to show that the complaint is legally deficient in any way and that the Motion identified no cause to dismiss the complaint. The Secretary argues that the “allegations of the Complaint are made with more than sufficient particularity, and the issues that Respondent raises are strongly disputed and should be decided at the hearing in this matter, rather than at this early stage.” (Opposition at p. 1).

On March 20, 2012, Respondent filed its Reply to the Opposition (Reply). In its Reply, Respondent states its alarm that the Secretary’s position as espoused in her Opposition is that “the Complaint puts Respondent on notice that its entire operation is at issue.” (Reply at p. 2). Respondent states that the hazard of workplace violence alleged by the Secretary in her Opposition is “posed everywhere to all employees, at all times, by any client who “poses” an “ill-defined potential danger of physical assault based upon a non-exclusive list of factors.” (*Id.*). Respondent observes that the Secretary states in her Opposition that the complaint covers not only the inspection site, but other similar facilities, including group homes, outpatient clinics, clients’ homes, and during transportation of clients. (Reply at p. 4). Respondent asserts that the cases cited by the Secretary offer no support “for the notion that a Complaint this lacking in detail as to the location and nature of the hazard” meets the requirements of the Act. (Reply at pp. 6-8). Respondent further asserts that, in failing to plead with the specificity the Act requires, the Secretary is seeking to shift her burden of proof to Respondent. (Reply at pp. 10-11).

On April 3, 2012, the Secretary filed her Surreply. She contends that Respondent has received “more than adequate notice of the scope and nature of the citation, but appears unwilling to accept the answers it has received.” She also contends that Respondent either “ignores or misunderstands” the legal standard adopted by the Commission as to her pleading

victim’s body was found in a neighboring town. (Opposition at pp. 1, 6).

burden at this stage of the proceedings. (Surreply at p. 1). The Secretary notes that the Commission has held that “Section 9(a) of the Act does not require that a citation state the elements of a cause of action.” (Surreply at p. 2). She further notes that workplace violence is a highly recognized hazard, especially in the health care field in which Respondent is engaged, that her evidence will relate to a number of incidents of violence or threatened violence at locations operated by Respondent, and that these incidents will show that the cited hazard in mental health care settings is not dependent on, or limited to, one or more specific locations. The Secretary concludes that the complaint “more than adequately asserts what the hazard is – a hazard of which the Respondent is well aware.” (Surreply at p. 4).

II. DISCUSSION

As both parties note, section 9(a) of the Act states in relevant part that “[e]ach citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provision of the Act, standard, rule, regulation, or order alleged to have been violated.” The Commission has held that the “purpose of the particularity requirement is to put the cited employer on notice as to the nature of the violation.” *Gannett Corp.*, 4 BNA OSHC 1383, 1384 (No. 6352, 1976). Whether fair notice has been provided does not depend only on the citation’s language but may also be determined from other factors, such as the circumstances surrounding the inspection or the employer’s familiarity with his own business. *Id. Accord, Meadows Indus., Inc.*, 7 BNA OSHC 1710, 1711 (No. 76-1463, 1709). The Commission has also held that section 9(a) does not require a citation to state the elements of a cause of action; and, even a citation that facially lacks sufficient particularity need not be declared void as a matter of law if the purposes of the particularity requirement may be met during the pleading,

discovery, hearing and decisional phases of the litigation.⁵ *Del Monte Corp.*, 4 BNA OSHC 2035, 2037 (No. 11-865, 1977). The preferable course is for the judge presiding over the case to compile a complete record and then determine whether the employer was prejudiced by any lack of particularity in the citation. *Meadows Indus.*, 7 BNA OSHC at 1711.

Based on the foregoing, the Court finds that the Secretary's citation and complaint have put Respondent on notice as to the nature of the violation as required by section 9(a) of the Act.⁶ Both the citation and the complaint identify the worksite where the alleged violative conduct occurred. Further, both the citation and the complaint set out, among the proposed abatement means, the creation of a workplace violence prevention program for all service programs. This language put Respondent on notice from the inception of this matter that the Secretary would be seeking abatement in facilities and/or programs other than just the specifically-cited facility. As to Respondent's claim that any unidentified workplaces must be dismissed at this point in the proceedings, this assertion is rejected.⁷ The Secretary indicates that she has knowledge of other instances of violence or threatened violence at facilities of Respondent, and she may obtain evidence of those and other such instances during the course of discovery. The Secretary may utilize the evidence she obtains of other instances of workplace violence to show, for example, Respondent's knowledge of the cited hazard.

In view of the Commission precedent set out above and the circumstances of this case, Respondent's Motion to Dismiss is denied. The Motion is denied without prejudice, and

⁵ See Rules and Regulations, Occupational Safety and Health Review Commission, 57 Fed. Reg. 41,676 (September 11, 1992) ("Commission has eliminated fact pleading and instituted notice pleading at the complaint and answer stage.").

⁶ This is particularly true in light of the circumstances of the inspection and the nature of Respondent's business.

⁷ Respondent's suggestion that there may have been "secret or otherwise unlawful" inspections is rejected. There is nothing to indicate any such inspections occurred. Respondent's further suggestion, that the inspection at the subject site somehow went beyond the permission it gave to OSHA to inspect the site, is also rejected. As the inspection

Respondent may renew its Motion later in the proceedings if it believes there is a basis for doing so. Respondent may, for example, raise the issues of fair notice and due process at the hearing and in its post-hearing filings. In the meantime, however, Respondent shall file its answer. The Commission has stated that its rules require the respondent to answer the complaint that the Secretary has filed, not allegations or representations outside it. *American Can Co.*, 10 BNA OSHC 1305, 1313 (Nos. 76-5162, 77, 773 & 78-4478, 1982). The Commission has also stated that if an employer can reasonably be required to frame an answer, it shall do so. *Id.* The Court concludes that Respondent can reasonably be required to frame an answer in this matter.

III. ORDER

WHEREFORE IT IS ORDERED that Respondent's Motion to Dismiss is DENIED, without prejudice.

IT IS FURTHER ORDERED that Respondent shall file its answer within twenty (20) days of the date of this Order.

SO ORDERED.

/s/
The Honorable Dennis L. Phillips
U.S. OSHRC Judge

Date: April 18, 2012
Washington, D.C.

was consensual, the Court concludes the inspection met the requirements of section 8(a) of the Act.