



United States of America  
**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**  
1924 Building - Room 2R90, 100 Alabama Street, S.W.  
Atlanta, Georgia 30303-3104

Secretary of Labor,

Complainant

v.

United States Postal Service,

Respondent,

and

National Association of Letter Carriers  
(NALC),

Authorized Employee Representative,

and

National Rural Letter Carriers' Association  
(NRLCA)

Authorized Employee Representative.

OSHRC Docket No.: **16-1713**

**ORDER DENYING RESPONDENT'S MOTION TO STRIKE OR TO  
DISMISS WITH RESPECT TO ENTERPRISE-WIDE LIABILITY**

Before the Court is the Motion to Strike or Dismiss of the Respondent, United States Postal Service (USPS). The USPS moves pursuant to Fed.R.Civ.P. 12(b)(6) or (f) to strike or dismiss the request for *an order of enterprise-wide abatement* from the First Amended Complaint of the Secretary. As grounds therefore, the USPS asserts enterprise-wide liability is inconsistent with the Occupational Safety Health Act of 1970, 29 U.S.C. § 651-678 (Act), and is "inappropriate in cases that require place and circumstance-specific findings of facts relating to whether a violation exists and is required to be abated, such as in (a) General Duty Clause cases; and (b) heat stress cases." (Motion, p. 3)

The Secretary opposes and sets forth in his Response that his Complaint survives the USPS's motion to dismiss, as the Complaint sets forth a plausible claim for relief, providing fair notice of his claim, which is all that is required pursuant to Fed.R.Civ.P. 12(b)(6). The Secretary also asserts dismissal is an extreme sanction disfavored by the Commission where a lack of

particularity is alleged. In addition, the Secretary contends the order for enterprise-wide abatement he seeks is to address “corporate practices, not individual heat stress conditions at specific locations.” (Response, pp. 3-6)

The USPS in its Reply asserts the Secretary’s response makes clear the Secretary is not seeking enterprise-wide abatement, but rather is seeking an order assuring future compliance with the General Duty Clause as to heat stress. This, the USPS argues, is precluded by section 10 of the Act. The crux of the USPS’s argument is that there can be no abatement when no citation has been issued. Nor, according to the USPS, is the Commission authorized to issue orders regarding conditions for which no citation exists. Also according to the USPS, the Secretary’s Complaint fails to meet the notice pleading requirement, as the request for relief seeks abatement of citations which have not been issued. Accordingly, the USPS contends the Secretary’s request for an order of enterprise-wide abatement should be stricken or dismissed (Reply, pp. 1-3).

Having reviewed and considered the arguments of both parties, for the reasons set forth herein, the Court **HEREBY DENIES** the USPS’s Motion.

#### **BACKGROUND**

This proceeding is before the Occupational Safety and Health Review Commission pursuant to § 10(c) the Act. At issue is a Citation for an alleged violation of the General Duty Clause found at § 5(a)(1) of the Act which requires an employer to furnish employment and a place of employment free from recognized hazards likely to cause death or serious physical harm to employees. The Citation alleges in relevant part:

OSH ACT of 1970 Section (5)(a)(1): 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 recognized hazards related to working outside during periods of high heat levels while delivering the U. S. mail:

...

As required, the Citation sets forth the Secretary’s purported feasible means of abatement for the alleged §5(a)(1) violation. The Citation was issued following an inspection by the Occupational Safety and Health Administration (OSHA) of the specific USPS facility identified in the Citation.

The USPS timely contested the Citation. Following the filing of the Complaint and Answer, this matter was assigned to the undersigned Judge for hearing pursuant to the

Commission's Conventional Proceedings. The parties requested Voluntary Settlement Proceedings and the matter was assigned to Judge Heather Joys to conduct those proceedings. The settlement proceedings concluded without a settlement being reached and the case was reassigned to the undersigned Judge for Conventional Proceedings.

On April 5, 2018, the Secretary filed an Unopposed Motion for Leave to Amend the Complaint. Although the Motion was unopposed, the USPS advised the Court during two conference calls that it reserved the right to move to strike or to dismiss the amendment. By Order issued April 9, 2018, the Court granted the Motion to Amend, and deemed the Secretary's First Amended Complaint filed as of April 5, 2018.

Amendments to the Complaint pertinent to the Motion currently before the Court include Paragraphs VIII and IX of the Secretary's First Amended Complaint. Paragraph VIII was amended to allege violations of § 5(a)(1) for heat stress exposure at four other USPS facilities and to allege that the USPS has not implemented a comprehensive program to address the hazard. Paragraph IX was amended to add the following:

RELIEF REQUESTED

Under 29 U.S.C. § 659(c), the Commission is authorized to "issue an order . . . affirming, modifying, or vacating the Secretary's citation or proposed penalty or directing other appropriate relief. . ." Based on this statutory grant of authority, Complainant respectfully requests that the Commission:

- (1) affirm the Citation and Notification of Penalty, and the proposed penalties, in the matter at issue in this docket; and
- (2) to the extent that Respondent has failed to comply with Section 5(a)(1) at any other facility with respect to exposing its employees to the recognized hazard of heat stress, direct other appropriate relief available under Section 10(c) of the Act, including: (A) entering ***an order of enterprise-wide abatement*** against Respondent compelling its compliance with Section 5(a)(1) of the Act at all of Respondent's facilities; and (B) based on the evidence provided at trial, such additional relief as appropriate under Section 10(c) of the Act.

WHEREFORE PREMISES CONSIDERED, Complainant requests the Commission issue an order pursuant to Section 10(c) of the Act, 29 U. S. C. § 659(c) as specified above.

(Secretary's First Amended Complaint, p. 4)(emphasis added).

On April 25, 2018, the USPS filed its Answer to the First Amended Complaint. As to the allegations in Paragraph VIII, the USPS admits it operates post offices and other facilities throughout the United States and some of its employees sort and deliver mail to residences and businesses. It also admits that there are five cases involving alleged heat exposure injury to seven

letter carriers in OSHRC Docket Nos. 16-1713, 16-1813, 16-1872, 17-0023 and 17-0279. And regarding the third paragraph of Paragraph VIII of the Complaint, the USPS denies the allegations “except that any reports of heat stress related illnesses and OSHA inspections speak for themselves.” (Answer to First Amended Complaint, p. 2).

With respect to Paragraph IX of the First Amended Complaint, the USPS asserts:

The remainder of the First Amended Complaint sets forth a prayer for relief, to which no response is required; to the extent a response may be required, the allegations are denied, and it is further denied that the Secretary is entitled to the relief requested or to any other relief.

(Answer to First Amended Complaint, p. 3). USPS also sets forth Affirmative Defenses in its Answer to the First Amended Complaint. The Affirmative Defenses in Paragraphs VI and VII, set forth below are relevant to the pending Motion:

VI. To the extent enterprise-wide liability and abatement may be authorized by the Occupational Safety and Health Act, it is inappropriate in heat stress cases arising under the General Duty Clause due to the numerous factual variables involved in such cases including the determination of whether a “hazard” exists.

VII. The General Duty Clause is unconstitutionally vague, in violation of the fair notice requirement of the Due Process Clause of the Fifth Amendment to the U. S. Constitution.

(Answer to First Amended Complaint, p. 3)

This and the other four cases referenced herein are scheduled to be heard by the Court in October 2018.

### **DISCUSSION**

Motions to Dismiss, like Motions for Summary Judgment, are rarely granted by the Commission. Only where the evidence is incontrovertible and an amendment will not cure the defect will a dismissal be appropriate. *Texland Drilling Corp.*, 9 BNA OSHC 1023, (No.76-5307, 1980); *Diamond Eng’g Co.*, 2 BNA OSHC 1585 (No. 4217, 1975). Well established Commission policy is to decide cases based on their merits, rather than on procedural flaws. Dismissal of a pleading is an extreme sanction that is not appropriate unless the record reveals that Respondent was prejudiced by the lack of particularity. *See Berg Lumber Co.*, 13 BNA OSHC 1822, 1824 (No. 87-0397, 1988); *Meadows Industries, Inc.*, 7 BNA OSHC 1709, 1710-11(No. 76-1463, 1979).

The essence of the USPS's Motion is a lack of particularity in the Secretary's Amended Complaint. As a result, the USPS seeks dismissal of the Secretary's requested relief for enterprise-wide abatement, which it contends is impermissible under the Act where it is to address citations which have not been issued, and is inappropriate in cases that require place and circumstance-specific findings of facts relating to the existence of a violation and required abatement (Motion, p. 3).

The USPS relies on two unreviewed ALJ determinations which address these issues. The first, *Delta Elevator Service Corp.*, 24 BNA OSHC 1968 (No. 12-1446, 2013)(ALJ), found "the evidence insufficient to support a determination that Delta violated the cited standard at sites other than the subject worksite." *Id.*, at 1976. The second, *Central Transport, LLC*, OSHRC Docket Nos. 14-1452, 14-1612, 14-1934) denied respondent's motion to strike the Secretary's claim for enterprise-wide abatement.

The *Delta* case was in a much different posture at the time the Judge addressed the enterprise-wide abatement issue than the instant case. Here, discovery has not been initiated, no hearings have been held and no evidence has been presented on the issue. And, it is yet to be seen whether the Secretary will present evidence sufficient to support the claimed violation and the enterprise-wide abatement relief sought. As the litigation of this matter is still in its infancy stage, the Judge's decision in *Delta* does not further the USPS's argument.

In *Central Transport*, the Judge found the Commission has jurisdiction to hear and decide the Secretary's claim for enterprise-wide abatement (Central Transport Order, p. 17). In reaching this conclusion, the Judge was persuaded by the early stage in the proceeding, before discovery and hearings had been held. The Judge also was persuaded that the respondent's claims did not warrant the extreme sanction of striking the Secretary's claim for an order or enterprise-wide abatement (Central Transport Order, pp. 17, 18). The Judge further found the request for an order of enterprise-wide abatement in the complaint at issue there satisfied the pleading requirements of Commission Rule 34 by providing notice that its compliance with the cited standard was at issue (Central Transport Order, p. 20).

Here, as in *Central Transport, supra* and *Delta, supra*, the Secretary argues the "other appropriate relief" clause in section 10(c) of the Act provides authority to the Commission to grant the enterprise-wide abatement relief requested. The Court need not decide at this time whether the Commission has the authority to grant the requested relief and if so, whether such relief should

be granted. The only issue which must be decided by the Court at this time is whether the Secretary's First Amended Complaint complies with the Commission's notice pleading requirements. The Court finds that it does.

Commission Rule 34(a)(2), provides:

- (a)(2) 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.

29 C.F.R. § 2200.34(a)(2).

The Commission has adopted notice pleading which encompasses a fair notice test for citations, which is satisfied with notification of the nature of the violation and the standard allegedly violated. A citation will be dismissed only where it fails to include this information. In determining whether a citation contains a sufficiently particular description of the alleged violation, the Commission considers the totality of the circumstances. *Todd Shipyard Corp.*, 5 BNA OSHC 1012 (No. 8500, 1977); *Gannett Rochester New Corp.*, 4 BNA OSHC 1383, (No. 6352, 1976).

Here, the Amended Complaint provides notice to the USPS that its compliance with § 5(a)(1) of the Act is at issue regarding whether it (1) provided employment and a place of employment which were free from recognized hazards; (2) that were causing or likely to cause death or serious physical harm to employees; (3) and that the employees were exposed to recognized hazards related to working outside during periods of high heat levels while delivering the U. S. mail. The Court finds that the Citation alleging a violation of § 5(a)(1) meets the Commission's fair notice test.

The Court also finds that the Secretary's relief request for an order for enterprise-wide abatement meets the fair notice test. The Secretary's request for enterprise-wide abatement relates specifically to the alleged §5(a)(1) citation, which the Court finds is sufficiently particular in description. The Secretary asserts that the relief requested is to address "corporate practices, not individual heat stress conditions at specific locations." (Response, pp. 3-6) And as such defines the parameters of the Secretary's claim for relief thereby providing more particular

information to the USPS as to the relief sought. Further, more particular information regarding the Citation and complaint allegations may be obtained during discovery and the hearing. The Commission has stated:

Even if we were to find that the citation was not sufficiently particular, dismissal of the complaint would not be proper. Lack of particularity in a citation may be cured at the hearing. Whether a citation gives an employer fair notice of the nature of the alleged violation does not depend solely on the language of the citation but may be determined from factors external to the citation, such as the circumstances surrounding the inspection or the employer's familiarity with his own business. Furthermore, available discovery procedures enable a respondent to obtain sufficient additional information about the alleged violations to remedy any lack of particularity in the citation and complaint.

*Meadows Industries, Inc.*, 7 BNA OSHC at 1710-11(citations omitted). See *Brock v. Dow Chemical*, 801 F.2d at 930-31, 934; *Berg Lumber*, 13 BNA OSHC at 1824.

Any perceived procedural flaws in the Secretary's Amended Complaint do not warrant the extreme sanction of dismissal or striking from the Amended Complaint the Secretary's request for enterprise-wide abatement relief. The record at this time does not substantiate any prejudice to the USPS resulting from any lack of particularity.

The Court finds the Secretary's Amended Complaint complies with the notice pleading requirement. Only after a full evidentiary hearing will the Court be able to determine whether the totality of the circumstances will show an order for enterprise-wide abatement is appropriate or warranted.

### **ORDER**

It is therefore ORDERED that USPS's Motion to Strike or to Dismiss is **HEREBY DENIED**.

SO ORDERED.

Date: June 6, 2018

/s/  
**Judge Sharon D. Calhoun**  
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