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October 28, 2015

Occupational Safety and Health Commission

**Re: Secretary of Labor v. Integra Health Management Inc.
OSHRC Docket No. 13-1124**

To Whom It May Concern:

Please find enclosed an amicus brief filed by the United Steelworkers with the Occupational Safety and Health Commission in the above referenced case. Please do not hesitate to contact me with any questions.

Sincerely,



Antonia Domingo
Assistant General Counsel

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR,
United States Department of Labor,

OSHRC Docket No. 131124

Complainant,

v.

INTEGRA HEALTH MANAGEMENT,
INC.

Respondent.

***AMICUS CURIAE BRIEF OF
UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING,
ENERGY, ALLIED-INDUSTRIAL AND SERVICE WORKERS
INTERNATIONAL UNION, AFL-CIO/CLC.***

Dated: October 28, 2015

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INTRODUCTION

On December 10, 2012 a client of Integra Health Management Inc. (“Integra”) stabbed his service coordinator to death. The client suffered from schizophrenia and had a history of violent crimes, including aggravated assault with a deadly weapon. *Sec’y of Labor v. Integra Health Management, Inc.*, 2015 WL 4474372 (No. 13-1124, 2015) Integra did not relay information regarding the client’s diagnosis or his history to the service coordinator, who had begun working for Integra approximately three months prior to her death. *Id.* at *4. The service coordinator visited the client three times before the December 12 visit, summarizing each encounter in a progress note. *Id.* at *3-8. After her first visit with the client, the service coordinator wrote, “SC [Service Coordinator] is not comfortable being inside alone with member [the client] and will either sit outside to complete assessment or ask another SC to accompany her.” *Id.* at *4-5. An Integra supervisor reviewed the service coordinator’s progress note but the company’s management did not take any action, such as running a background check on the client or arranging for another Integra employee to accompany the service coordinator on her home visits. *Id.* at fn. 4.

The Secretary of Labor cited Integra for violating section 5(a)(1) or the “general duty clause” of the OSH Act. The Administrative Law Judge (“ALJ”) upheld the citation, finding that the risk of “being physically assaulted during a face-to-face meeting by a member with a history of violent behavior” constituted a workplace hazard likely to cause death or serious physical harm, that Integra recognized this hazard, and that effective abatement measures are available. *Id.* at *69. The Occupational Safety and Health Review Commission (“OSHRC” or “the Commission”) will review the ALJ’s order. OSHRC has sought briefs from interested amici,

addressing whether, in a situation such as the *Integra* case, an employer's failure to protect its employees from the violent acts of third parties violates the general duty clause of the OSH Act.

United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied-Industrial and Service Workers International Union, AFL-CIO/CLC ("United Steelworkers" or "USW") accepts the Commission's invitation. USW represents approximately 50,000 healthcare employees and has a substantial interest in the safety of its members. Thus, USW is deeply concerned with the government's ability to hold employers accountable for violating workplace health and safety laws.

ARGUMENT

While Congress initially promulgated the OSH Act out of a concern for "traditional work-related hazards," it recognized that the government would not be able to anticipate every workplace health and safety issue suitable for regulation. *Ramsey Winch Inc. v. Henry*, 555 F.3d 1199, 1205 (10th Cir. 2009). Therefore, Congress included the general duty clause in the OSH Act, which requires 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). "This section of the Act has been described as a 'catchall provision' designed to redress hazardous conditions not covered by a specific standard." *Sec'y of Labor v. Wal-Mart Stores, Inc.*, 2011 WL 12678760, *29 (No. 09-1013, 2011) (citing *Reich v. Arcadian Corp.*, 110 F.3d 1192, 1196 (5th Cir. 1997)). This catchall provision does not impose strict liability on employers, but it does require them to exclude all "preventable forms and instances of hazardous conduct" from the workplace. *Nat'l Realty & Construction Co. v. OSHRC*, 489 F.2d 1257, 1267 (D.C. Cir. 1973).

In other words, employers must eliminate "feasibly avoidable recognized hazard[s]." *Baroid Div. of NL Indus., Inc. v. OSHRC*, 660 F.2d 439, 446 (10th Cir. 1981), citing *Beatty Equipment Leasing v. Sec'y of Labor*, 577 F.2d 534 (9th Cir. 1978); *Champlin Petroleum Co. v. OSHRC*, 593 F.2d 637, 640 (5th Cir. 1979).

OSHA acknowledges that workplace violence is a recognized hazard.

Workplace violence is a clear example of a feasibly avoidable recognized hazard. In two interpretation letters, OSHA acknowledged as much:

In a workplace where the risk of violence and serious personal injury are significant enough to be 'recognized hazards,' the general duty clause would require the employer to take feasible steps to minimize those risks. Failure of an employer to implement feasible means of abatement of these hazards could result in the finding of an OSH violation. Letter from Richard E. Fairfax, Director of Enforcement Programs, OSHA to Morgan Melekos (Sept. 13, 2006), available at https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=25504, attached as Exhibit A; and Letter from Roger A. Clark, Director of Enforcement Programs, OSHA, to John R. Schuller (Dec. 10, 1992), available at https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=20951, attached as Exhibit B.

And while OSHA has not yet promulgated a standard specifically addressing workplace violence, the agency has issued 26 citations under the general duty clause in response to employers' failure to abate this particular recognized hazard. AFL-CIO, *DEATH ON THE JOB 37* (2015), available at <http://www.aflcio.org/content/download/154671/3868441/DOTJ2015Finalnobug.pdf>, attached as Exhibit C. Many of these citations involve situations similar to the instant case. See Press Release, OSHA, *Employees Injured by Violent Clients at Birmingham, Alabama Social Services Center*, USDL 15-1362-ATL (208) (OSHA) (July 13, 2015) (employees physically assaulted by adolescents known to exhibit violent tendencies), attached as Exhibit D; Press Release, OSHA, *US Labor Department's OSHA Fines Rescare Ohio for Inadequate Workplace Violence*

Safeguards at Residential Care Facility in Fairfield, Ohio, USDL 12-1922-CHI (OSHA) (October 3, 2012) (employees of nursing home facility exposed to physical assaults during routine interactions with residents), attached as Exhibit E; Press Release, OSHA, US Labor Department's OSHA Fines Lakeview Specialty Hospital for Inadequate Workplace Violence Safeguards at Waterford, Wis., Center, USDL 12-819-CHI (OSHA) (May 1, 2012) (employee severely injured by client at health care and treatment facility), attached as Exhibit F; Press Release, OSHA, US Labor Department's OSHA Cites North Suffolk Mental Health Association in Massachusetts for Inadequate Workplace Violence Safeguards, USDL 11-1111-BOS (July 28, 2011) (employee fatally injured by client at residential group home while performing regularly assigned duties), attached as Exhibit G; Press Release, OSHA, US Labor Department's OSHA Cites the Renaissance Project in Ellenville, NY, for Inadequate Workplace Violence Safeguards Following Worker's Death, USDL 11-468-NEW (April 7, 2011) (client kills employee of addiction treatment facility), attached as Exhibit H; Press Release, OSHA, US Department of Labor's OSHA Cites the Acadia Hospital in Bangor, Maine, for Inadequate Workplace Violence Safeguards, USDL 11-115, BOS (January 28, 2011) (employees of psychiatric hospital assaulted by violent patients), attached as Exhibit I; Press Release, OSHA, US Labor Department's OSHA Cites Danbury, Conn., Hospital for Inadequate Workplace Violence Safeguards, USDL 10-970-BOS (July 16, 2010) (employees of hospital's psychiatric ward assaulted by violent patients), attached as Exhibit J.

And in *Ramsey Winch Inc.*, 555 F.3d at 1205 (internal citations omitted) the 10th Circuit recognized OSHA's increased focus on workplace violence:

In recent years . . . OSHA has recognized workplace violence as a serious safety and health issue. To that end, OSHA has issued voluntary guidelines and recommendations for employers seeking to reduce the risk of workplace violence in at-risk industries.

OSHA updated its guidelines this year, recommending the implementation of violence prevention programs and safety training for employees of hospitals and residential treatment facilities and for workers, such as the Service Coordinator, who make home visits. OSHA, GUIDELINES FOR PREVENTING WORKPLACE VIOLATIONS FOR HEALTH CARE AND SOCIAL SERVICE WORKERS (2015), available at <https://www.osha.gov/Publications/osh3148.pdf>, attached as Exhibit K.

Workplace violence is a serious and prevalent employee safety issue.

OSHA's increasing recognition of workplace violence addresses a serious and widespread problem. Workplace violence is the second-leading cause of workplace fatalities in the United States. DEATH ON THE JOB, *supra*, at 8. In 2013, 773 victims died from workplace violence. *Id.* at 8. Workplace violence remains grossly underreported; still, a Department of Justice report estimates that about 1.7 million incidents of workplace violence occur annually. U.S. DEPARTMENT OF JUSTICE, WORKPLACE VIOLENCE: ISSUES IN RESPONSE 12, available at <http://www.fbi.gov/stats-services/publications/workplace-violence>, attached as Exhibit L. Employee victims of workplace violence lose \$55 million in wages each year, while employers spend \$4.2 billion annually in workplace violence related expenses. Mark Haynes, *Workplace Violence: Why Every State Must Adopt a Comprehensive Workplace Violence Prevention Law*, CORNELL HR REVIEW (2013), available at <http://www.cornellhrreview.org/workplace-violence-why-every-state-must-adopt-a-comprehensive-workplace-violence-prevention-law/>, attached as Exhibit M. Exposure to violence at work can have indirect effects as well, such as anxiety, increased absenteeism, and poor work quality. Theresa Gorman et al., *Controlling Health Hazards to Hospital Workers*, 23 NEW SOLUTIONS: J. ENV'T & OCC'L HEALTH POL'Y 1, 132 (2013), attached as Exhibit N.

Several states with OSHA-approved State Plans have already acted to address workplace violence. For example, California, Connecticut, Illinois, New Jersey, and Washington have all recognized workplace violence as a hazard. These states have implemented standards to protect employees from violence on the job. Additionally, New York has implemented a law to protect public employees from workplace violence. DEATH ON THE JOB, *supra*, at 37-38.

Acknowledging employers' responsibility to address workplace violence under the general duty clause does not conflict with OSHA's existing practice.

As mentioned above, OSHA has already responded to a number of workplace violence incidents by issuing citations under the general duty clause. And although there have been few cases addressing the general duty clause and workplace violence, upholding the ALJ's determination in *Integra* does not conflict with OSHA's existing practice.

Both the Secretary of Labor and *Integra* discussed the application of *Megawest Financial Inc.*, 1995 WL 383233 (No. 93-2879, 1995) to the instant case. . *Integra* at *65. In *Megawest*, the employees staffed an office located inside an apartment complex. The complex had a high crime rate and the residents subjected the employees to threats and physical attacks. While the ALJ found that the violent incidents constituted a foreseeable workplace hazard, she concluded that the apartment management industry did not recognize the hazard and vacated the citation. *Megawest* at *12, 17.

As recognized by the ALJ in the *Integra* case, the ALJ's decision in *Megawest* is not binding on OSHRC. *Integra* at fn. 97. See also *SeaWorld of Florida, LLC*, 24 BNA OSHC 1303 (No. 10-1705, 2012), *aff'd*, 748 F.3d 1202, 1210 (D.C. Cir. 2014) ("*Megawest* is an unreviewed ALJ decision with no precedential value for the Commission"). *Megawest* is also distinguishable. *Integra* employees, and other healthcare workers who are subjected to physical violence from

clients, do not manage apartment complexes; they provide social services to individuals with mental health issues and violent histories. The possibility of workplace violence is a recognized hazard in the healthcare field. *See Gorman, supra*, at 131.

Further, the Secretary may also establish that the hazard is recognized through actual knowledge of the employer, rather than industry recognition. As the *Integra* ALJ noted, “the record establishes that Integra recognized the hazard of being physically assaulted by members with a history of violent behavior during a face-to-face interaction.” *Integra* at *70 (citing *Waldon Healthcare Ctr.*, 16 BNA OSHC 1052, 1061 (No. 89-3097, 1993); *Brennan v. OSHRC*, 494 F.2d 460, 464 (8th Cir. 1974)). Integra told its employees to use “universal precautions” and to “[a]ssume everybody you deal with could have the potential for harm.” *Integra* at *71. Clearly, the company recognized that potential violent interactions with clients was far from “freakish [or] utterly implausible.” *Waldon Healthcare Ctr.*, 16 BNA OSHC at 1060) (“ . . . [T]he existence of a hazard is established if the hazardous incident can occur under other than a freakish or utterly implausible concurrence of circumstances”). Prior to the December 10, 2012 fatality, several Service Coordinators had expressed concern about their clients’ violent or aggressive behavior in weekly calls to Integra management and in progress report notes. *Integra* at *72. The record establishes that management read these progress notes, specifically the note in which the Service Coordinator stated she was “not comfortable being inside alone with [the client].” *Integra* at *4, 71-72. Further, the client had a publicly available and documented history of violent criminal behavior. Even if Integra did not have *actual* knowledge of the client’s potential danger, the company surely possessed *constructive* knowledge of his violent tendencies. *See Burford’s Tree, Inc.*, 22 BNA OSHC 1948, 1950 (No. 07-1899, 2010) (“To establish a violation of the 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”).

Actual and constructive knowledge aside, the *Megawest* ALJ also worried that preventing violence in the complex was beyond the employer’s control. Megawest already screened residents and was in compliance with recommended preventative measures, issued by the National Institute for Occupational Safety and Health. *Megawest* at *17. In contrast, Integra does not run background checks, conduct risk assessments, provide employees with adequate safety training, or utilize a “buddy system” for required face-to-face visits with clients. Further, Integra assigns high caseloads, which makes it impractical for service coordinators to request a buddy. *Integra* at *68-69, fn. 105.

Finally, the *Megawest* ALJ stated that, “[e]mployers have less control over employees than they do over conditions because employees have a will, an intention, and an intellect that drives their behavior, and they are not always amenable to control . . . The employer has even less control over the behavior of third parties not in its employ.” *Megawest* at *14. While it is true that employers cannot control the potentially violent behavior of clients or residents, they *can* implement preventative hazard control measures, such as conducting violence risk assessments, providing adequate training, increasing communication between staff and supervisors, and managing caseloads. *See Gorman, supra*, at 133; *Hayes, supra*, 4-5.

Further, the ALJ in the *Integra* case is not the only Administrative Law Judge to uphold a citation based on an employer’s failure to address the violent acts of a third party. In *Wal-Mart, supra*, a Wal-Mart employee was crushed to death by a crowd attempting to enter the store on Black Friday. The ALJ agreed with the Secretary that Wal-Mart did not implement effective

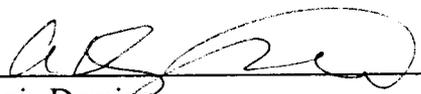
crowd management techniques. In finding that the implementation of effective crowd management was a feasible method of addressing the hazard, the ALJ stated that, “the Secretary must establish by a preponderance of the evidence that an abatement method will significantly reduce the hazard; the hazard need not be completely eliminated.” *Id.* at *35 (citing *Pratt & Whitney Aircraft*, 8 BNA OSHC 1329 (No. 13591, 1980)).

While Wal-Mart could not exercise complete control over an unruly crowd, it could feasibly implement measures to mitigate the possible harm. Similarly, Integra and other healthcare and service providers can implement prevention controls to protect their employees from potentially violent clients.

CONCLUSION

Workplace violence is a significant issue affecting Integra employees and workers in similar industries. Employers can adopt feasible and effective preventative measures to reduce this recognized hazard. Therefore, the Commission should uphold the ALJ’s finding that Integra’s failure to implement precautionary measures violated the general duty clause of the OSH Act.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that on this 28th day of October, a true copy of this Brief of Amicus Curiae was served by first class mail and electronically upon the following:

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