

Secretary of Labor v. Wal-Mart Stores, Inc.  
OSHRC Docket No. 09-1013  
Respondent's Opening Brief

Exhibit E  
Transcript of June 1, 2010, Deposition of Vicky Heza

Filed on June 20, 2011

*SECRETARY OF LABOR VS.  
WAL-MART STORES, INC.*

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*VICKY HEZA  
June 1, 2010*

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UNITED STATES OF AMERICA  
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION  
-----x  
SECRETARY OF LABOR,

Complainant,

-against-

WAL-MART STORES, INC.,

Respondent.

OSHRC Docket No. 09-1013  
-----x

1050 Connecticut Avenue, NW  
Washington, DC

June 1, 2010  
1:35 p.m.

Videoconference Deposition of VICKY  
HEZA, taken before John L. Harmonson, Registered  
Professional Reporter and Notary Public in and  
for the District of Columbia.

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**A P P E A R A N C E S:**

**ON BEHALF OF COMPLAINANT SECRETARY OF LABOR:**

**U.S. DEPARTMENT OF LABOR  
OFFICE OF THE SOLICITOR**

201 Varick Street  
Room 983  
New York, New York 10014

**BY: DARREN COHEN, ESQUIRE  
(646) 264-3675**

**ON BEHALF OF RESPONDENT WAL-MART STORES, INC.:**

**GIBSON DUNN**

1050 Connecticut Avenue, NW  
Washington, DC 20036

**BY: BARUCH A. FELLNER, ESQUIRE  
-and-  
DANIEL RATHBUN, ESQUIRE  
(202) 955-8500**

**ON BEHALF OF CAL-OSHA AND THE WITNESS:**

**WILLIAM CREGER, ESQUIRE**

1515 Clay Street  
Room 1901  
Oakland, California 94612  
(510) 286-7348

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----- I N D E X -----

WITNESS	EXAMINATION BY	PAGE
VICKY HEZA	MR. FELLNER	5

----- E X H I B I T S -----

EXHIBITS	DESCRIPTION	FOR I.D.
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(NO EXHIBITS MARKED)

## P R O C E E D I N G S

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3 THE COURT REPORTER: We are going on  
4 the record for the video conferenced deposition of  
5 Vicky Heza, in the matter of Secretary of Labor v.  
6 Wal-Mart Stores, Inc., pending before the United  
7 States Occupational Safety and Health Review  
8 Commission, OSHRC Docket No. 09-1013. Today's  
9 date is June 1, 2010, and the time is 1:35 p.m.

10 My name is John Harmonson. I am a  
11 court reporter and notary public in and for the  
12 District of Columbia, appearing on behalf of Ellen  
13 Grauer Court Reporting of New York, New York, and  
14 will be reporting these proceedings from the  
15 offices of Gibson, Dunn & Crutcher in Washington,  
16 D.C.

17 At this time would counsel please  
18 identify themselves and state whom they represent.

19 MR. FELLNER: This is Baruch Fellner.  
20 I'm with Gibson, Dunn & Crutcher on behalf of  
21 Wal-Mart, the respondent in this matter. I'm  
22 joined by Dan Rathbun here in Washington, D.C.

23 MR. COHEN: And this is Darren Cohen in  
24 New York from the Office of the Solicitor,  
25 Department of Labor, representing the complainant,

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the Secretary of Labor.

MR. CREGER: William Creger. I'm an attorney with Cal-OSHA, the Los Angeles legal unit of the Division of Occupational Safety and Health.

THE WITNESS: And I am Vicky Heza with Cal-OSHA.

V I C K Y H E Z A ,  
after having been first duly sworn, was examined and did testify under oath as follows:

MR. FELLNER: Once again, let me apologize to everyone for both the delay and the technical difficulties that prevent this deposition from being taken in a video format. This is the first one in my career that is voice only. But I suspect we can get it done, and I hope we can get it done with dispatch.

Again, this is Baruch Fellner with Gibson, Dunn & Crutcher on behalf of Wal-Mart in this matter. It deals with a general duty clause citation involving an unruly crowd of shoppers on Blitz Day 2008, in Valley Stream, Long Island.

EXAMINATION

BY MR. FELLNER:

Q. Ms. Heza, I assume that you know the

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process and procedures of taking depositions, but at the risk of belaboring the point, first you know that you are and have been sworn in and therefore are under oath.

Let me ask you whether you've been through the drill before and have given a deposition.

A. I believe once.

Q. Just let me remind you, and that is if there is anything unclear about my questions, please let me know so that I can clarify the questions. I think it may be a little trickier since this is exclusively audio, but we'll give it a whirl.

Also, if you need a break at any point, please let me know and we can obviously take a brief recess.

As a preliminary matter, are you taking any medications that might affect your memory or your ability to give this deposition today?

A. I have been taking cough medicine, yes.

Q. And would that cough medicine, in your view, affect your ability to recall?

A. I don't think so.



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Q. Okay. And I hope you feel better if you've been taking the cough medicine.

A. Thank you.

Q. How did you prepare for this deposition?

MR. COHEN: Baruch, before you go further, I just want to for the record note again the Secretary's objection to the deposition and to the possible admission of the deposition at the hearing. I just want to have that on the record.

MR. FELLNER: Duly noted.

BY MR. FELLNER:

Q. Ms. Heza, how did you prepare for this deposition?

A. You know, to be honest, I did not have much time at all to prepare for this deposition. And so this is, to a large extent, off the top of my head.

Q. Did you have an opportunity to speak with anyone concerning this deposition?

A. Well, yeah, I spoke with the chief.

Q. And who is the --

MR. CREGER: She spoke with me.

MR. FELLNER: You being counsel?

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MR. CREGER: I am counsel, yes.

BY MR. FELLNER:

Q. Right. And the chief being Len Welsh?

A. Correct.

Q. Okay. And did you speak with anybody outside of California OSHA with respect to this deposition?

A. No.

Q. Did you review any materials in preparation for the deposition?

A. No.

Q. Let me just briefly get into your education and employment background, if I may. Would you describe for me your formal educational background, please.

A. I have a bachelor's in biology and a master's in toxicology.

Q. And when did you receive your bachelor's, please?

A. Oh, I don't know. It was in the '80s, I think.

Q. And your master's?

A. '90s. '95, maybe.

Q. Have you received any other formal

1 HEZA

2 training?

3 A. In what?

4 Q. Related to safety and health issues.

5 A. Well, in my career with Cal-OSHA I've  
6 attended training classes.

7 Q. All right. And what kind of classes,  
8 off the top of your head, can you recall  
9 attending?

10 A. Oh, policy and procedure. It was so  
11 long ago, I actually don't remember. I think  
12 industrial hygiene techniques.

13 Q. Okay. Do you have any other degrees  
14 other than the two that you mentioned?

15 A. No.

16 Q. Are you a Certified Safety  
17 Professional?

18 A. No.

19 Q. A CIH, Certified Industrial Hygienist?

20 A. No.

21 Q. Let me get in a little bit into your  
22 employment history. How long have you worked for  
23 California OSHA?

24 A. I think about 23 years.

25 Q. And what positions have you held?

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2 A. I have held industrial hygiene  
3 consultant; district manager of San Diego  
4 enforcement; regional manager of Cal-OSHA  
5 consultation; deputy chief enforcement; and I am  
6 now the program manager of Cal-OSHA consultation.

7 Q. Could you go back to those various  
8 positions and give me time frames and content of  
9 responsibility, please.

10 A. Industrial hygiene consultant would be  
11 '86 through '91, and I was conducting on-site  
12 surveys at the employer's request.

13 District manager in San Diego was '91  
14 to '94. Wait a minute. When was that? '91 to  
15 '93. And that was the district office, the  
16 enforcement office, so those duties included  
17 assignment of work, review of work product, and  
18 then personnel-related issues.

19 And then from ninety -- I'm missing  
20 some years here. But through 1999 I was regional  
21 manager for the consultation service, and that  
22 position entailed establishing strategic goals,  
23 working with the various offices in  
24 implementing those, keeping track of the  
25 consultation and service activities, conducting

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2 outreach and training.

3 And then the next position as deputy  
4 chief of enforcement from '99 to 2009, it was  
5 working with the regional managers and the  
6 district managers as they conducted their  
7 enforcement activities. You know, outreach and  
8 education, again establishing strategic goals and  
9 performance goals and tracking that kind of  
10 information, and then personnel activities.

11 And then most recently as program  
12 manager for the consultation service it is  
13 overseeing the consultation program, ensure its  
14 consistency with federal requirements, working  
15 with the various managers and senior staff in, you  
16 know, working towards achieving our goals.

17 Q. That's a very impressive list,  
18 Ms. Heza.

19 And is it fair to say that your  
20 knowledge of California regulations and  
21 enforcement and consultation issues is thorough  
22 and comprehensive?

23 A. I -- I don't know if I would use those  
24 terms. You know, I'm reasonably knowledgeable  
25 about the Cal-OSHA consultation program.

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2 Q. With respect to enforcement issues, and  
3 you were deputy chief of enforcement for a period  
4 of ten years, I would assume that applies to  
5 enforcement issues as well as consultation issues,  
6 that you're reasonably knowledgeable insofar as  
7 enforcement issues?

8 A. Yes.

9 Q. Have you played any role with respect  
10 to developing Cal-OSHA's regulations?

11 A. No.

12 Q. Any advisory role with respect to any  
13 regulatory initiatives?

14 A. No.

15 Q. Have you at all been involved in or had  
16 responsibility for administering the IIPP program?

17 A. Administering the IIPP program? What  
18 does that mean?

19 Q. Well, if there is a better gerund to  
20 use than administering the IIPP program -- How  
21 about reviewing the IIPP program, being conversant  
22 with respect to the kinds of programs that  
23 employers would implement in response to the IIPP  
24 regulation?

25 A. I'm familiar with the IIPP

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2 requirements.

3 Q. And are you also familiar with how  
4 employers generally attempt to meet those  
5 requirements?

6 A. Am I familiar with how employers would  
7 generally attempt to meet those requirements?

8 Q. To comply with IIPP.

9 A. Yeah, I would say so.

10 Q. Same question with respect to special  
11 orders. And let me be a little bit more specific.  
12 Do you have any responsibility for issuing or  
13 monitoring the compliance with special orders?

14 A. I personally have not.

15 Q. Have you supervisory responsibility or  
16 have you had supervisory responsibility with  
17 respect to individuals who have issued or  
18 monitored compliance with special orders?

19 A. I did supervise managers whose offices,  
20 you know, would have issued special orders.

21 Q. Now, let's get into the operation of  
22 California's OSHA Act, an area in which I'm  
23 considerably less familiar than I am with the  
24 federal program. I assume, of course, you are  
25 totally familiar and conversant with the design

1 HEZA

2 and operation of California's Occupational Safety  
3 and Health Act.

4 A. I'm familiar.

5 Q. And let me ask you with respect to the  
6 design and operation of the federal Occupational  
7 Safety and Health Act. Are you at all conversant  
8 in that?

9 A. No. I'm familiar with it, but I'm not  
10 conversant in it.

11 Q. Got it. Who admit -- Let me ask it  
12 more directly and you'll allow me this leading  
13 question.

14 The California OSHA Act is administered  
15 by the Department of Industrial Relations; is that  
16 right?

17 A. Correct.

18 Q. The California OSHA Act is an approved  
19 state plan under Section 18 of the federal OSHA  
20 Act; is that correct?

21 A. We don't have final approval.

22 Q. Yeah, that's always been an anomaly.  
23 When is California going to finally  
24 have final approval? Do you have any idea?

25 A. You would have to ask the chief.



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2 Q. In order to gain and maintain whatever  
3 interim approval under the federal OSHA Act  
4 California OSHA must be -- I think the operative  
5 phrase is at least as effective as the federal  
6 program; is that correct?

7 A. Correct.

8 Q. Now, are you familiar at all with any  
9 policy or programmatic interactions between  
10 California OSHA personnel and federal OSHA  
11 personnel?

12 A. Could you maybe state that differently?  
13 I'm not quite sure what you're asking me.

14 Q. Well, obviously, there are  
15 opportunities for federal OSHA and its state plan  
16 counterparts to discuss policy issues,  
17 programmatic issues, citation issues, regulatory  
18 issues. Are you at all familiar with any of those  
19 interactions?

20 A. There are meetings that are held  
21 between Region 9 and Cal-OSHA to discuss a variety  
22 of issues, any one of which could include the ones  
23 that you mentioned.

24 And then there are meetings of all the  
25 state plans with federal OSHA on a maybe quarterly

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2 basis, three times a year, through OSHPD, which is  
3 a statewide -- sorry -- a nationwide organization,  
4 and there is a discussion about federal policy  
5 issues at those meetings as well.

6 Q. Now, would you for clarity purposes  
7 identify what Region 9 is?

8 A. Well, that is the federal OSHA region  
9 that -- within which California sits. Region 9 is  
10 California, Arizona, Nevada, Hawaii and Guam.

11 Q. And do you -- How often does California  
12 OSHA meet with Region 9?

13 A. Well, recently it's been probably --  
14 They've been trying to maintain the quarterly  
15 agenda, a quarterly meeting.

16 Q. And what are some of the subject  
17 matters, if I may ask, that you meet with Region 9  
18 on?

19 A. It's a review of our progress towards  
20 our strategic goals. Federal OSHA may, you know,  
21 introduce the meeting by talking about things that  
22 are going on in Washington or budget issues. But  
23 it's primarily a discussion from the Cal-OSHA  
24 program. It's a discussion on our progress  
25 towards our strategic goals.

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Q. And similarly, this every three or four times a year that state plans more formally meet under I think you said OSHPD, what are some of the issues that you meet on?

A. The agenda items will typically include budgetary discussions, updates on a new information system that is in the works, new regulations that the feds have promulgated or are working on.

And then the states, you know, will highlight something innovative going on. A couple of states will report on some innovative programs they have within their own states.

Q. When was your last meeting of OSHPD?

A. Well, I have not attended a meeting, I think, since the end of '08.

Q. Okay. Have you discussed any meetings that have transpired since '08?

A. No. The chief has attended, but we haven't spoken about them.

Q. Okay. Are you at all familiar with the recent initiatives that federal OSHA has made which kind of would copy California OSHA's IIPP program?

1 HEZA

2 A. Well, I understand they're holding some  
3 stakeholder meetings to discuss what they refer to  
4 as I2P2.

5 Q. Right. It's an unfortunate acronym,  
6 but I don't think California has ever done that  
7 before. It sounds too much like R2D2.

8 So you're familiar that they're having  
9 stakeholder meetings. Have there been any other  
10 discussions that you have participated in or that  
11 you have heard of between California and federal  
12 OSHA with regard to I2P2?

13 A. At a recent meeting, I spoke with one  
14 of the federal folks, just in general terms, about  
15 I2P2, and she told me that they would be holding  
16 some stakeholder meetings, and that was about the  
17 extent of it.

18 Q. There was no substantive discussion  
19 during the course of that meeting that dealt with  
20 what federal OSHA's objective may have been with  
21 respect to I2P2, or may be with respect to I2P2?

22 A. It wasn't a meeting. It was a coffee  
23 break, exchanging a couple of words.

24 Q. And other than that, you're not  
25 familiar with any of the substance behind federal

1 HEZA

2 OSHA's I2P2 exercise?

3 A. What do you mean?

4 Q. Are you -- Other than that brief coffee  
5 meeting, have there been any other opportunities  
6 or inquiries or discussions that you have had, or  
7 that you're familiar with that others may have had  
8 at California OSHA, with respect to federal OSHA's  
9 I2P2 initiative?

10 A. I can't speak to what other people in  
11 California OSHA have or have not spoken to or  
12 spoken with. I myself have not had any  
13 substantial -- substantive discussions, excuse me,  
14 substantive discussions with the federal folks  
15 about the proposal.

16 Q. And has anyone in California that may  
17 have had some more substantive discussions talked  
18 to you about those discussions?

19 A. I'm not aware of anyone that has had  
20 those discussions. So the answer to your question  
21 is no.

22 Q. Okay. You mentioned a moment ago when  
23 you were describing your meetings or California's  
24 meetings with Region 9, and I think I took this  
25 down accurately, that part of those meetings go to

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things going on in Washington.

Have there been any discussions that you are aware of, either that you have participated in or that others have participated in and relayed to you, dealing with crowd management or crowd control-type issues?

A. I don't --

MR. COHEN: Objection to form.

THE WITNESS: I'm sorry, could you repeat what -- somebody --

MR. COHEN: I just made an objection to the form of the question.

Go ahead and answer.

BY MR. FELLNER:

Q. You can answer it.

A. Not to my recollection.

Q. And has there been any discussion that you are aware of with Region 9 with respect to the Wal-Mart case of 2008?

A. Not that I'm aware of.

Q. Same question with respect to the meetings that you have had with the state plans, the OSHPD more formal meetings. Has there been any discussion at those meetings with respect to

1 HEZA

2 crowd management or crowd control issues?

3 A. Well, as I said, it's been a while  
4 since I have attended one of those meetings, and  
5 that subject was not a topic of discussion at any  
6 of the meetings that I attended.

7 Q. And was that the subject of any  
8 meetings that were relayed back to you by any  
9 other attendee of California OSHA?

10 A. Not that I recall.

11 Q. And how many years would you have  
12 participated in your various different positions  
13 in meetings either with Region 9 or with the state  
14 plans under OSHPD?

15 A. With Region 9, I may have participated  
16 in meetings going back to 1998. With OSHPD, with  
17 a very limited window, maybe 2001 or '02  
18 through 2008.

19 Q. Thank you.

20 One of the areas, specific areas, that  
21 I wanted to get into now involves the IMIS system,  
22 the Integrated Management Information System.

23 Is it correct that both Cal-OSHA and  
24 federal OSHA citations are, as it were, cataloged  
25 in the IMIS system?

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2 A. That's the database that we use, and  
3 that's how we -- that's the federal database that  
4 we use to create citations, yeah.

5 Q. Let me ask you for purposes of  
6 clarification, to create citations or to retain  
7 the information with respect to issued citations?

8 A. Correct.

9 Q. And if some of my questions reflect  
10 some frustrations of penetrating the IMIS system,  
11 I apologize in advance.

12 Is there any interaction between the  
13 federal OSHA and California OSHA with respect to  
14 this cataloging process or retention process known  
15 as IMIS?

16 A. I'm not really sure I understand your  
17 question.

18 Q. Well, I mean do you do your own thing  
19 with regard to -- does California do its own thing  
20 with regard to entering data into IMIS, or is this  
21 something that you consult with federal OSHA on?

22 MR. COHEN: Objection to form.

23 BY MR. FELLNER:

24 Q. Go ahead, you can answer the question.

25 A. The California, the COSHOs and the



1 HEZA

2 clerical enter their own information.

3 Q. And they don't consult with federal  
4 OSHA with respect to how to go about entering that  
5 information?

6 A. No.

7 Q. Do the agencies look at each other for  
8 any kind of guidance or ideas insofar as entering  
9 this information is concerned, to your knowledge?

10 A. You know, I know in the past if we  
11 wanted to retrieve information, we could work with  
12 Washington to develop special reports, but I don't  
13 think that's really available anymore to the state  
14 plan.

15 I think the interaction between the  
16 state and the feds with regards to IMIS is more  
17 often when something is not functioning properly.

18 Q. Can you give me an example to your best  
19 recollection of that kind of an interaction when  
20 something is not functioning properly?

21 A. Well, you know, I don't know the  
22 technical terminology, but the systems, you know,  
23 a particular office, their system may go down or  
24 crash or whatever you want to call it, and we do  
25 fix that. You know, we use our own technical

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2 staff to fix that, but there may be some  
3 interaction with Washington.

4 And I really don't know that much about  
5 the state of IMIS today, so it's kind of difficult  
6 for me to answer, I think, your questions from my  
7 personal direct experience.

8 Q. If I were to search, for example, for  
9 citations that Cal-OSHA may have issued for  
10 certain kinds of hazards covered by specific  
11 standards, specific California OSHA standards, how  
12 would I go about doing that?

13 A. I believe that would require something  
14 called a micro-to-host report. It's a report  
15 that -- There are several ways. You can get  
16 reports out of local databases. You can also get  
17 reports out of what has been sent to Washington.

18 And, you know, to a certain extent you  
19 can establish your own sort criteria. So if you  
20 were looking to see, you know, a list of employers  
21 who had been issued A, B, C, D, there is a  
22 mechanism to do that.

23 I personally don't do it. We have  
24 staff up in headquarters who do that kind of  
25 thing.

1 HEZA

2 Q. Of course.

3 And that question was directed at  
4 citations under specific standards. If I were to  
5 search for citations, California OSHA citations  
6 issued under the IIPP or under special orders, is  
7 that a more difficult process?

8 A. Well, 3203, which is the Title 8 IIPP  
9 reference, you know, we could pull information  
10 out, limited information mind you, but we could  
11 pull information out on who had been issued 3203  
12 citations. A special order, to be perfectly  
13 honest, I have no idea.

14 Q. Let me ask you more granularly if I  
15 may. If I wanted to search for citations under  
16 the IIPP program -- I know what your answer is  
17 going to be for special orders. But under the  
18 IIPP program, for any citations that dealt with  
19 problems of crowd control or crowd management, is  
20 the IMIS system sufficient to capture that level  
21 of detail?

22 A. Perhaps in a very, very limited way.  
23 If an accident investigation had been conducted,  
24 sometimes you can search on keywords. But it's  
25 probably a multistep process.

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And again, I am really not the expert. I'm not the one to answer that question. I'm not that familiar with when you drill down that far into IMIS. I'm not familiar with how that would actually be retrievable. It would not be easy.

Q. If an accident did not occur, would that make it difficult or impossible to retrieve that information?

A. It would be difficult to retrieve that from IMIS.

Q. Are there any other ways of finding that level of detail about California OSHA citations?

A. With regards to crowd control?

Q. Yeah.

A. You know, I really -- I'm not the IMIS expert. I'm not a tech expert. Beyond what I've already provided, I cannot shed any further light on the subject.

Q. And I appreciate your allowing me to belabor this issue as much as I have. And frankly, if we had been more successful under IMIS, this deposition could have been avoided.

Let's talk a little bit about the

1 HEZA

2 structure of the California OSHA Act, if I may.  
3 And again, rather basically, the act gives, as I  
4 understand it, the Department of Industrial  
5 Relations the ability to issue regulations  
6 pertaining to workplace safety and health; is that  
7 correct?

8 A. There is a Cal-OSHA standards board.  
9 Where it fits within the Cal-OSHA Act I couldn't  
10 tell you. But there is a standards board that  
11 promulgates regulations.

12 Q. Now, with respect to specific  
13 regulations that pertain to individual industries,  
14 is it correct that the department, through the  
15 standards board, has issued those kinds of  
16 regulations, specific regulations that pertain to  
17 individual industries and general regulations that  
18 pertain to all industries? Is that correct?

19 A. There are vertical and horizontal  
20 standards.

21 Q. And the horizontal standards or general  
22 regulations, are they known as general industry  
23 safety orders? Is that right?

24 A. That's where they would reside in Title  
25 8, yes.

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Q. Okay. Do you know whether these general industry safety orders are similar to the kinds of regulations that federal OSHA issues under Section 5(a)(2) of its statute?

A. I wouldn't have -- You would have to speak to someone who's with the standards board. You would have to speak to an attorney. I can't answer that question. No, I can't answer that question.

Q. Okay. Let's turn more specifically to the IIPP program. I assume you're familiar with Section 3203 of the California Code.

A. Correct.

Q. And that Section 3203 requires California employers to develop what is referred to as an Injury and Illness Prevention Program; is that right?

A. Correct.

Q. Now, is it fair to say that each employer's IIPP program is unique or ought to be unique and tailored to its particular workplace and workplace hazards?

A. Yeah. The IIPP should be reflective of the site, or, you know, there might be some like

## HEZA

1  
2 kind of corporate overarching policy but very  
3 unique hazards identified, or if there are unique  
4 situations at a site, then the IIPP should reflect  
5 that.

6 Q. And further, that the IIPP program  
7 should describe ways to both identify and abate  
8 those specific hazards? Do I have that correct?

9 A. That is one of the elements of the  
10 IIPP.

11 Q. And speaking of the elements, I would  
12 like you to confirm I think what is on the face of  
13 the IIPP program. There are about eight key  
14 elements; is that correct?

15 A. I believe so.

16 Q. And let me tick them off and see  
17 whether or not I've got them right.

18 It is management responsibility;  
19 compliance; communication; hazard assessment;  
20 accident exposure investigation; hazard  
21 correction; training and instruction; and record  
22 keeping.

23 A. Yes.

24 Q. Let's walk through the establishment of  
25 an IIPP. What is an employer supposed to do first

1 HEZA

2 when he's trying to construct his own IIPP?

3 A. Well, you know, an employer can  
4 probably approach it from various directions, but  
5 there does have to be -- you know, a hazard  
6 analysis has to be conducted.

7 And then from that, the development of  
8 ways to correct the hazards, to communicate it,  
9 communicate the hazards to employees and train.  
10 And then ultimately assigning responsibility for  
11 the program.

12 Q. Now, with respect to the hazard  
13 analysis, are there a number of different ways  
14 that an employer can use to discover particular  
15 hazards and then to analyze them?

16 A. I would imagine so.

17 Q. Does anything come to mind?

18 A. An employer can use their injury and  
19 illness records. They can bring their insurance  
20 carrier in, their loss prevention specialist.  
21 They can hire a consultant.

22 Q. So with respect to what the employer  
23 has at hand, the first thing that you mentioned  
24 was to examine the injury/illness records that an  
25 employer has, and that would be one of the good



1 HEZA

2 places to start. Do I have that correctly?

3 A. Well, it would certainly show the  
4 employer if there are any trends or anything in  
5 particular that should be looked at more  
6 thoroughly.

7 Q. Now, what kind of follow-up is required  
8 once the IIPP is established?

9 A. If new hazards are introduced into the  
10 workplace, those have to be included in the  
11 program in terms of attempts to correct and  
12 training.

13 If employees are assigned to a  
14 different or a unique or new job, they have to  
15 have training that is consistent with the hazards  
16 associated with that new position. That would be  
17 required in follow-up.

18 Q. So, for example, if I were involved in  
19 retail and I had experiences with respect to an  
20 unruly crowd that created some injuries in my  
21 workplace, would you think that it would be  
22 required under the IIPP program to do a hazard  
23 analysis insofar as the impact of an unruly crowd  
24 on my workplace is concerned?

25 MR. COHEN: Objection to the form.

1 HEZA

2 Calls for speculation.

3 BY MR. FELLNER:

4 Q. You can answer the question.

5 A. Yes. Well, I really can't answer the  
6 question. I don't know.

7 Q. Let's probe that a little -- I'm sorry,  
8 you were continuing?

9 A. No.

10 Q. Let's probe that a little more if I  
11 may. You indicated a moment ago that a good place  
12 to start is to check your accidents and illness  
13 records, injury record. That remains correct,  
14 right?

15 A. That was one of the alternatives that I  
16 listed, yeah.

17 Q. And if an employer, a retail employer,  
18 were to check his injury records and to find that  
19 employees had tripped or fallen or had been pushed  
20 or shoved and that this qualified as reportable  
21 injuries in the context of crowds entering the  
22 particular workplace, would that not be important  
23 for the employer to evaluate for purposes of an  
24 IIPP program?

25 A. Conceivably.

1 HEZA

2 Q. Conceivably. Why would it conceivably  
3 not be important to evaluate that?

4 A. Well, you know, it would depend upon I  
5 think the details and the facts. It's difficult  
6 for me to answer, you know, a hypothetical or  
7 speculative question with certainty. That's why I  
8 would say that, you know, the employer has to take  
9 a look at their history; and if they see  
10 something, if there is a flag, then that very well  
11 could be the basis for further evaluation.

12 Q. All right. Now, Cal-OSHA has model  
13 IIPP programs on its website; is that correct?

14 A. That is correct.

15 Q. And these models are available for  
16 high-hazard and also for nonhigh-hazard employers?

17 A. I think so, although intermittent,  
18 perhaps.

19 Q. What do you mean by "intermittent"?

20 A. Seasonal.

21 Q. I see. Could you be a little bit more  
22 specific about what you mean by seasonal?

23 A. I would suggest you look on the  
24 website. That would probably tell you better than  
25 I could.

1 HEZA

2 Q. Well, let me be a little bit more  
3 precise. For example, is this what you had in  
4 mind when the temperatures go way up in  
5 California, that there may be some seasonal IIPP  
6 programs for purposes of heat-related disorders?  
7 Is that what you had in mind?

8 A. My recollection is that the seasonal or  
9 intermittent program was -- was written or  
10 produced by our then Chief Howard, and I seem to  
11 think it was for like the agricultural industry,  
12 although I really don't remember. It was a long  
13 time ago.

14 Q. Okay. Are there models specifically  
15 available to address workplace hazards like  
16 workplace violence?

17 A. I believe there are such models on the  
18 website, yes.

19 Q. What is the purpose of putting these  
20 models on the website?

21 A. Employers can use them as boilerplates  
22 to develop their own site-specific programs.

23 Q. And are they, as it were,  
24 authoritative?

25 A. I don't know what that means.

1 HEZA

2 Q. Do they --

3 A. I don't know what you mean by that.

4 Q. Let me rephrase it.

5 Do they reflect kind of safe harbors  
6 that if an employer follows one of these -- one of  
7 these website programs, that they will not be  
8 subject to IIPP citations?

9 A. You know, an employer can have a  
10 program and can still be issued citations, if that  
11 answers your questions.

12 Q. Let me probe that. That wasn't exactly  
13 my question, but let me take that one step  
14 further.

15 What are the circumstances in which an  
16 employer can have a program and still receive  
17 citations?

18 A. They don't follow it.

19 Q. I see. Can you give me an example of  
20 any particular case that you're familiar with  
21 where an employer had a program but didn't follow  
22 it?

23 A. No, not off the top of my head.

24 Q. Does Cal-OSHA offer any assistance,  
25 direct or indirect assistance, for employers

1 HEZA

2 looking to develop individualized IIPPs?

3 A. The consultation program will offer  
4 some assistance if asked.

5 Q. And I know that you've been involved --  
6 I'm sorry, go ahead.

7 A. It's ultimately the employer's  
8 responsibility to develop the program.

9 Q. And you've been extensively involved in  
10 the consultation program and are presently  
11 involved. Have you ever been asked by an employer  
12 with respect to setting up an IIPP program  
13 concerning workplace violence-type issues?

14 A. No.

15 Q. Have you ever been asked with respect  
16 to any crowd-related issues that might be involved  
17 in IIPP?

18 A. No.

19 Q. The model IIPP program for high-hazard  
20 employers has an extensive list of training  
21 subjects; is that correct?

22 A. I don't recall.

23 Q. Do you have a binder in front of you,  
24 Ms. Heza?

25 A. No. Oh -- I don't have a binder in

1 HEZA

2 front of me, no.

3 MR. RATHBUN: There's not a binder in  
4 the conference room directed to you with tabs in  
5 it?

6 THE WITNESS: There is a binder that  
7 says "Daniel Rathbun" on it.

8 MR. RATHBUN: Okay. That's yours. I'm  
9 sorry that someone didn't give that to you  
10 directly.

11 BY MR. FELLNER:

12 Q. If I may ask you, to refresh your  
13 recollection, to turn to Tab 5 in that binder,  
14 please.

15 MR. COHEN: I assume I have the same  
16 binder?

17 MR. FELLNER: Yes, you do, Darren.

18 THE WITNESS: Okay.

19 BY MR. FELLNER:

20 Q. And specifically to page 6 in that --  
21 under that tab.

22 A. Okay.

23 Q. Let me ask you to look at that. I  
24 don't have to introduce a public record,  
25 obviously, into -- as an exhibit.

1 HEZA

2 But this is the workplace injury and  
3 illness prevention model program. And does the  
4 list of training subjects at page 6 refresh your  
5 recollection?

6 A. That there is a list of training  
7 subjects?

8 Q. Yes. And that it describes the kind of  
9 possible hazards that we were talking about  
10 before.

11 A. It certainly lists particular subjects,  
12 yes.

13 Q. And it lists an extensive -- It's a  
14 relatively extensive list of training subjects?  
15 Are you familiar with this? Have you seen this  
16 list before?

17 A. I'm sure I saw it years ago. I haven't  
18 really looked at it in a very, very long time.

19 Q. Take a look at page 7, what is referred  
20 to as the Hazard Assessment Checklist, and  
21 successive pages. Is it fair to describe this  
22 Hazard Assessment Checklist as relatively  
23 exhaustive and detailed?

24 A. It's lengthy.

25 Q. Do you know whether these two items



1 HEZA

2 that I've just called to your attention, whether  
3 they are exhaustive of the kinds of possible  
4 hazards that an employer is exposed to?

5 A. I don't know that I would use the word  
6 "exhaustive." I think a person who can best  
7 answer that question or the folks that can best  
8 answer that question are the ones who wrote this.  
9 It's intended to give the employer, you know,  
10 guidance certainly at the time that it was  
11 written.

12 Q. And what inference can you draw if  
13 there is a particular hazard that's not on this  
14 list?

15 A. I mean, usually we have disclaimers  
16 that these lists are not meant to be all-inclusive  
17 and that there could be other hazards that -- you  
18 know, in addition to what's on this list. These  
19 documents are intended as guidance. They're not,  
20 you know, intended to be the final say in what the  
21 employer has to develop.

22 Q. Are they updated with any degree of  
23 frequency?

24 A. I don't think this one has been in a  
25 while.

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2 Q. Do you know of your own knowledge as to  
3 whether there is anything in these documents that  
4 I've pointed you to that deals with crowd  
5 management or crowd control?

6 A. I don't recall if there is or there  
7 isn't something that deals with crowd management  
8 or crowd control.

9 Q. Or that deals with hazards being struck  
10 or pushed or shoved or tripped or injured by a  
11 crowd? Same answer?

12 A. Yes. Specific to crowds, I don't  
13 know that -- I don't recall if there is something  
14 in here that's specific to crowds.

15 Q. Now, in designing its IIPP, does an  
16 employer only need to identify and abate specific  
17 hazards identified in specific California  
18 regulations?

19 A. Well, that would certainly be the place  
20 to start. But if there is a hazard that is unique  
21 to a facility that is not covered under a  
22 regulation, then the employer should also try to  
23 address that as well.

24 Q. And how about hazards whose sources are  
25 general industry safety orders, might they also be

1 HEZA

2 a place to start with?

3 A. Yes.

4 Q. And employers may very well have to go  
5 beyond those orders themselves if, as you've  
6 indicated, there are unique hazards that an  
7 employer and only that employer would know in his  
8 workplace?

9 A. Correct.

10 Q. Now, Section 3203 says that employers  
11 must conduct hazard inspections and provide hazard  
12 training whenever new substances, processes,  
13 procedures or equipment are introduced in the  
14 workplace that represent a new occupational safety  
15 and health hazard or whenever the employer is made  
16 aware of a new or previously unrecognized hazard.

17 You're familiar with that obligation?

18 A. Uh-huh. Yes.

19 Q. So is it fair to say that that language  
20 would require employers to look beyond the hazard  
21 specifically identified in specific regulations or  
22 safety orders?

23 A. Well, if it's reasonable for -- If it's  
24 reasonable for the employer, you know, to  
25 acknowledge that there could be something beyond

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Title 8, which, of course, is just a minimum that employers have to comply with, then yeah, a reasonable employer should probably look into whatever the issue may be.

Q. In your extensive experience that you've had with so many different hats on, have you seen employer IIPP programs that in fact have looked beyond specific regulations and special orders and have anticipated hazards that weren't covered in either?

A. You know, I don't have a clear recollection of looking at a specific program, so I guess I can't really answer that question in the affirmative.

Q. Is there anything that would assist you in answering that question?

A. I don't know. Maybe you could restate it.

Q. Well, we've established the proposition, Ms. Heza, and you've testified that upon occasion employers may have to look beyond both the special orders that have been issued as well as the specific regulatory requirements of Cal-OSHA.

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And my question is: Do you have any examples that come to mind where employers have established IIPPs that deal with hazards beyond either special orders and/or specific regulations?

A. A specific employer does not come to mind.

Q. How about a specific example without a specific employer?

A. I'm sorry, but the light bulb is not going off.

Q. Let me ask you this: In your 23 years of experience in various different jobs, have you ever seen an IIPP program that dealt with crowd management or crowd control issues?

A. Not that I recall.

Q. Have you ever discussed crowd management, crowd control issues as being part of an IIPP program with anyone who may have seen such a program?

A. I don't have any specific recollection of that.

Q. We talked before about one of the ways that an employer can trigger the IIPP process, and that was by initially taking a look at his injury

1 HEZA

2 reports. Is it fair to say that those injury  
3 reports may very well identify unsafe workplace  
4 conditions that are associated with those  
5 industries -- with those injuries? I didn't mean  
6 industries.

7 A. Yes.

8 Q. And through identifying those unsafe  
9 workplace conditions, that such injuries -- injury  
10 reports would develop a recognition on the part of  
11 the employer that he ought to be doing something  
12 with respect to those workplace hazards?

13 A. Correct.

14 Q. Now, are you at all familiar with the  
15 general duty clause under the federal program?

16 A. Not -- You know, just from a very  
17 layman's perspective.

18 Q. Well, let me ask you from your layman's  
19 perspective whether or not the kind of recognition  
20 that the analysis of such injuries would trigger,  
21 whether that's a recognition that is similar to a  
22 recognized hazard under the general duty clause.

23 A. You know, I can't speak to the general  
24 duty clause. It's outside of my, you know,  
25 experience, my scope of expertise. So I really

1 HEZA

2 can't speak to the general duty clause.

3 Q. Have you ever heard Section 3203  
4 compared to the general duty clause?

5 A. More in the negative. But  
6 historically, it would not necessarily be general  
7 duty clause equivalent. I haven't really heard  
8 any comparison recently that I can recall.

9 Q. And when you've heard it in the  
10 negative, in those discussions what distinguishes  
11 3203 from the general duty clause?

12 A. When 3203 was first promulgated from a  
13 policy standpoint, it was not -- it was not to be  
14 used as like a 5(a)(1) equivalent. And over time  
15 that has changed.

16 But if you're going to ask more  
17 questions about that, you really need to speak to  
18 the policy folks who were making those decisions  
19 at the time.

20 Q. Understood. But are you aware of it  
21 changing over time? You had indicated that over  
22 time that particular policy has changed.

23 A. Not -- You know, not in writing. The  
24 P&T hasn't changed at all. But 3203 has been  
25 applied, I think, certainly in workplace violence.

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Before we had our heat illness standard, it was applied for that. So it was --

Q. What was the second example? I'm sorry to interrupt you. Workplace violence was the first example. Heat only; is that what you said?

A. No. Before we had our heat illness prevention standard --

Q. Ah, heat illness.

A. -- I believe we used 3203 to issue citations for employers to address those hazards.

Q. So there has been some history but not across the board in California for the use of 3203 where specific regulations are not issued and where certain broad-based hazards are recognized?

A. Could you say that again, ask me that again?

Q. Sure. There has been precedent for 3203 to be used and to be cited for certain hazards that are not covered by specific regulations; is that correct?

A. Well, as I said, I believe that we've used it in the past for workplace violence. And I believe in maybe 2005 we may have issued some with respect to heat illness. But I can't say that



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with 100 percent certainty. I really don't remember exactly what we issued back then.

Q. And do you know of any instance in which 3203 has been used in the context of crowd-related issues?

A. No, I do not know of any instances.

Q. And specifically crowd-related issues in the context of the retail industry?

A. Same answer.

Q. And are you aware of any employer that has recognized in his or her IIPP program any crowd-related issues and has taken any hazard assessment and training and abatement measures in response to that?

A. Not specifically.

Q. And more granularly with respect to the hazards of being struck, pushed, shoved, tripped or injured by a crowd, same questions. Have you seen any citations for IIPP or special orders in the context of those particular workplace conditions?

A. Not that I recall.

Q. And have you seen any IIPP programs or initiatives undertaken by employers responding to

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those kinds of workplace conditions?

A. Not that I am aware of. I have not seen such IIPPs.

Q. Have such IIPPs been drawn to your attention by anyone else?

A. No.

Q. So as far as you're concerned, the words "crowd management" or "crowd control" have never been discussed as a hazard in your presence in 23 years with California OSHA; is that correct?

MR. COHEN: Objection to form.

MR. FELLNER: I have no idea why.

BY MR. FELLNER:

Q. But go ahead and answer the question.

MR. COHEN: It's vague and compound.

MR. FELLNER: That's fine.

BY MR. FELLNER:

Q. Answer the question, please.

A. Not that I am aware of.

Q. Isn't that something that you would be aware of had it occurred?

A. I don't recall. You know, like you said, I've been there for 23 years. You have lots of informal conversations. But I do not recall,

1 HEZA

2 you know, having discussions about specific  
3 employers and specific programs dealing with  
4 crowds.

5 Q. Dealing with crowd management or crowd  
6 control?

7 A. Correct.

8 Q. A couple more technical questions with  
9 regard to IIPP if I may. Are IIPP citations  
10 freestanding, or do they typically rely upon  
11 general industry safety order provisions or other  
12 regulations?

13 A. I'm afraid I don't understand your  
14 question.

15 Q. Well, is an IIPP -- Can 3203 be cited  
16 by itself, or is it in tandem with a specific  
17 regulation that is being violated?

18 A. It can be cited by itself.

19 Q. And what are the circumstances for  
20 which it would be cited by itself?

21 A. The employer failed to meet one of the  
22 elements.

23 Q. Of the IIPP itself?

24 A. Or to implement one of the elements.

25 Q. Okay. You've never seen it -- and I

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know I'm asking the same question in a slightly different way.

You've never seen it cited by itself or discussed it being cited by itself with respect to workplace security issues, have you?

A. I'm sorry, I don't understand your question.

Q. All right. The question -- We've tacked at in a somewhat different fashion before, but I'm asking you whether or not you have seen the IIPP provision 3203 cited by itself with respect to the absence of a program dealing with workplace crowd management issues.

A. Well, you said workplace violence before.

Q. I said workplace security. But I --

A. You -- we --

Q. Go ahead.

A. I seem to recall that we have issued, you know, workplace violence citations, I believe under 3203. You know, it's a fairly long time ago, and I don't, you know, recall -- Actually, I take it back. I do recall one case.

There was an incident that occurred and

1 HEZA

2 we issued I'm pretty sure it was a 3203 citing,  
3 you know, failing to control potential Type 2  
4 workplace violence.

5 Q. Can you remind me what Type 2 is?

6 A. Type 2 is where a -- whether it be a  
7 customer, a client or some other person, you know,  
8 comes into a workplace or is at a workplace and  
9 commits a violent act against an employee of that  
10 workplace.

11 Q. And this was cited under 3203?

12 A. I think.

13 Q. And in the area of workplace  
14 violence -- Let's stay with that area for a  
15 moment. This is an area in which Cal-OSHA has, as  
16 it were, recognized that there are hazards related  
17 to various different types of workplace violence;  
18 is that accurate?

19 A. Correct.

20 Q. And that employers are expected to  
21 incorporate workplace violence measures in their  
22 IIPPs?

23 A. If appropriate.

24 Q. And that indeed you've got a model  
25 workplace violence IIPP on your web page, don't

1 HEZA

2 you?

3 A. I think so.

4 Q. And as you've alluded to, there are  
5 three types, basic types of workplace violence, is  
6 that right, that's referred to on your web page?

7 A. Correct.

8 Q. Those three types are fatal assaults  
9 upon employees at late night retail  
10 establishments. That's Type 1. Is that accurate?

11 A. That's what the web site says. That's  
12 what the program says.

13 Q. And Type 2 would be assaults by the  
14 recipients of a company's products or services  
15 upon the company's employees; is that right?

16 A. Correct.

17 Q. And then Type 3 is assaults upon  
18 employees by others with employment-related ties  
19 to the workplace?

20 A. Correct.

21 Q. Are you at all familiar with any of the  
22 federal initiatives on workplace violence?

23 A. No, I'm not.

24 Q. What is -- And I'm asking for your  
25 expertise, your 23 years expertise in the safety

1 HEZA

2 and health field. Could you tell me whether, in  
3 your view, an unruly crowd might be considered to  
4 be a type of workplace violence?

5 A. Can I tell you in my experience why an  
6 unruly crowd might be involved in workplace  
7 violence?

8 Q. Uh-huh.

9 A. Is that your question?

10 Q. That's the question. In other words,  
11 given what you know about workplace violence  
12 issues that have been included in 3203, and any  
13 discussions that you may have had with respect to  
14 what makes workplace violence cognizable under  
15 California OSHA, do you think that a stampeding or  
16 an unruly crowd attempting to enter a store might  
17 be encompassed in workplace violence theories?

18 A. Well, without having a great deal of  
19 facts at my disposal, I would have to say that is  
20 possible.

21 Q. And I'm asking you to engage,  
22 obviously, in hypotheticals. What would make that  
23 possible, in your view?

24 A. I don't really want to answer  
25 hypothetical questions.

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Q. Let me give you some more specific facts and see whether or not I can get you to engage in responding to this more factually-based hypothetical question.

Let's assume, Ms. Heza, that customers entering a store would push, shove, trample specific employees as they try to obtain goods and services in that store. Is that the kind of conduct, in your view, that would be encompassed by workplace --

MR. CREGER: There's a problem here, I'm afraid. There is a statute, 5304.5, which precludes employees of the Division from providing expert testimony. And these hypotheticals really are an attempt to elicit what I view as opinion testimony from this individual.

BY MR. FELLNER:

Q. Well, let's go back and talk about the workplace violence IIPP that you do recall, Ms. Heza. Do you recall the specifics of that IIPP?

A. Of the IIPP? No, I don't recall the specifics of the IIPP.

Q. Do you recall the specifics of the



1 HEZA

2 particular hazardous workplace violence areas that  
3 were dealt with in that IIPP?

4 A. I recall the specifics about the  
5 incident.

6 Q. Can you describe that for me, please?

7 A. An employee of a -- I think it was a  
8 mental health institution was attacked by a  
9 patient.

10 Q. And this attack by the patient, was  
11 this a kind of intentional action by the patient?

12 A. Well, I think the employee was killed  
13 and -- the employee died rather, more  
14 appropriately. And I don't recall what legal  
15 aspect there was to it. But we did issue I'm  
16 pretty sure it was a 3203 with regards to that.

17 Q. And do you believe that that particular  
18 workplace violence citation that was issued  
19 depended upon intentionality on the part of the  
20 patient?

21 A. I can't answer that.

22 Q. All right. And with respect to the  
23 conduct of the employer in that particular case,  
24 what was California OSHA's view as to what the  
25 employer did wrong in that case?

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A. I believe it was specific to alarm systems.

Q. And could you be a little bit more specific than that, if you recall?

A. That the worker was in the room alone with the patient and did not have a mechanism to raise alarms when the patient became violent.

Q. So let me take that one step further. As I understand that particular case, it was the interaction between a patient and worker and the absence of a specific control to prevent the violent conduct which led to that particular citation, right?

A. What I recall is what I've shared with you.

Q. Okay. Let me go back to another area, and perhaps you might give me a little bit more background on this. We've talked about IIPP. With respect to special orders, I assume you're familiar with Section 332 of the California Code that gives the Director of Industrial Relations the ability to issue special orders; is that right?

A. Yes.

1 HEZA

2 Q. And as I understand it, a special order  
3 is warranted whether it's an unsafe condition or a  
4 device or a place of employment that poses a  
5 threat to the health or safety of an employee that  
6 cannot be made safe under existing standards or  
7 orders of the Standards Board, right?

8 A. That, I believe, is what the labor code  
9 says.

10 Q. Now, what's the relationship between  
11 special orders and the general industry safety  
12 orders we spoke about earlier?

13 A. I don't know.

14 Q. Is it fair to say that special orders  
15 are issued in the absence of specific regulatory  
16 requirements that are covered under general  
17 industry safety orders? Is that accurate?

18 A. Well, I think that's what the labor  
19 code says, which cannot be made safe under  
20 existing standards or orders.

21 Q. Okay. Now, are you familiar with  
22 Cal-OSHA's policy and procedural manual provisions  
23 pertaining to special orders?

24 A. Somewhat.

25 Q. My recollection is that Cal-OSHA's

1 HEZA

2 policy is to consider the issuance of a special  
3 order to correct an unsafe condition which can't  
4 be made safe under an existing Title 8 safety  
5 order. I think that's straight out of the  
6 provision.

7 Am I refreshing your recollection  
8 adequately?

9 A. Uh-huh.

10 Q. To your knowledge, what are the  
11 pertinent considerations that Cal-OSHA would use  
12 in considering the issuance of a special order?

13 A. You know, I have not been -- I don't  
14 recall that I've been directly involved in the,  
15 you know, development of a special order. I don't  
16 have much, if any, experience in special orders.

17 Q. Given even your limited experience, is  
18 it safe to say that special orders only pertain to  
19 individual employers?

20 A. Yes.

21 Q. Might an individual employer be  
22 required to address a hazard identified in a  
23 special order through an IIPP?

24 A. I don't know.

25 Q. If an individual employer recognized a

1 HEZA

2 previously unrecognized hazard through an IIPP,  
3 how would this relate to the issuance of a special  
4 order?

5 A. You know, I would have to defer to our  
6 legal staff for that. I can't answer those  
7 questions.

8 Q. Okay. Have you ever heard of  
9 Section 332 compared to OSHA's general duty  
10 clause -- federal OSHA's general duty clause?

11 A. I'm sorry, could you repeat that?

12 Q. Have you ever heard of Section 332, the  
13 special order section, compared to federal OSHA's  
14 general duty clause?

15 A. I'm trying to think. I don't recall  
16 that I heard that in an official capacity, that  
17 comparison.

18 Q. How about in an unofficial capacity?

19 A. Probably. Probably.

20 Q. Do you recall any specific context in  
21 which that comparison has been made unofficially?

22 A. No, no. No, no. Again, this is just  
23 kind of general conversations.

24 Q. Do you recall who those conversations  
25 may have been with?

1 HEZA

2 A. They may have -- I'm sure they were  
3 Cal-OSHA staff, but I couldn't tell you who they  
4 were.

5 Q. Is it possible that any of those  
6 conversations may have been with Len Welsh?

7 A. They may have been.

8 Q. In your experience, has Cal-OSHA ever  
9 issued a special order pertaining to crowd control  
10 or crowd management?

11 A. Not that I'm aware of.

12 Q. And how about in the retail industry,  
13 have you -- retail crowd control or crowd  
14 management, has that ever been issued?

15 A. Not that I'm aware of.

16 Q. Is it safe to say that Cal-OSHA has the  
17 authority to issue a special order if it thought  
18 an employer faced hazards relating to crowd  
19 control or crowd management?

20 A. Well, after, you know, consulting with  
21 our legal staff before I would make a decision  
22 like that. But conceivably we would pursue that  
23 line if we thought that was appropriate.

24 Q. I seem to recall a case not involving  
25 an unruly crowd but, pardon my comparison, an

1 HEZA

2 unruly killer whale in San Diego in which  
3 California OSHA either considered issuing a  
4 special order citation then retracted it or did  
5 something similar to that.

6 Are you familiar at all with that  
7 particular investigation?

8 A. Not in any detail. I know which one  
9 you're talking about, yes.

10 Q. Do you recall what the upshot of that  
11 particular investigation was?

12 A. I never reviewed the case file. I  
13 think the chief dealt with that one directly.

14 Q. And do you recall what the ultimate  
15 outcome was?

16 A. I believe the -- I don't know what was  
17 issued. I honestly do not remember what was  
18 issued. And the investigative summary was  
19 modified.

20 Q. But California OSHA certainly  
21 investigated that particular matter; is that  
22 correct?

23 A. Correct.

24 Q. And is it also correct to say that  
25 there are no specific California regulations

1 HEZA

2 dealing with killer whales?

3 A. Not to my knowledge.

4 Q. Is there a penalty associated with the  
5 issuance of a special order?

6 A. I don't think so.

7 Q. The employer has to just post a notice  
8 of abatement and perform the abatement; isn't that  
9 right?

10 A. I would have to review the P&T. I  
11 don't have a lot of experience with special  
12 orders.

13 Q. Okay. Have you ever had any --  
14 Regardless of whether you've had experience in  
15 issuing special orders, have you had any  
16 conversations with respect to the legal  
17 underpinnings of special orders?

18 A. No, not that I recall.

19 Q. In your view, would you -- In light of  
20 the fact there is no specific regulation that a  
21 special order is attached to, in your view would  
22 it be unfair to levy a penalty under such  
23 circumstances?

24 A. Look, you're asking me questions that  
25 are beyond my experience, beyond my knowledge. I



1 HEZA

2 think these are legal issues, and I can't answer  
3 those questions.

4 Q. Do you have any personal experience or  
5 knowledge of retail crowd management issues?

6 A. Do I have any personal experience?

7 Q. Uh-huh.

8 A. No. No.

9 Q. Are you -- Have you ever discussed with  
10 anyone retail crowd management issues?

11 A. No.

12 Q. Have you ever been to a Black Friday  
13 sale?

14 A. No.

15 Q. Have any of your relatives or  
16 acquaintances?

17 A. How on earth would I know that?

18 Q. Well, that they have talked to you  
19 about?

20 A. No.

21 Q. Have you ever read any specific  
22 incidents involving crowd management -- read about  
23 any specific instances involving crowd management  
24 issues in retail stores?

25 A. Just whatever videos were on the news

1 HEZA

2 clips.

3 Q. And do you recall any of those specific  
4 videos on the news clips? Have you ever seen any?  
5 Do you recall any of them specifically?

6 A. I recall seeing one. I couldn't tell  
7 you when it was. I couldn't tell you where it  
8 was. I couldn't tell you who the retailer was.  
9 But it was a video of customers rushing into a  
10 store when the doors were unlocked.

11 Q. And did you say that was relatively  
12 recently or in the dim past?

13 A. A couple of years ago probably.

14 Q. What reaction did you have to that  
15 specific video when you saw it as a safety and  
16 health professional?

17 MR. COHEN: Objection. This is outside  
18 the scope.

19 MR. CREGER: I don't know what  
20 relevance this could possibly be.

21 MR. FELLNER: I'm going to ask her to  
22 respond to the question, whether she had any  
23 specific safety and health concerns when she saw  
24 the video.

25 MR. CREGER: That's a different

1 HEZA

2 question.

3 BY MR. FELLNER:

4 Q. Answer that question.

5 A. Whether or not I --

6 MR. COHEN: Object to being outside the  
7 scope of the subpoena.

8 BY MR. FELLNER:

9 Q. Whether she had any specific safety and  
10 health concerns, please, with respect to that  
11 video when you saw it.

12 A. I thought it was lucky that nobody got  
13 hurt.

14 Q. Did you have any concerns with respect  
15 to employee safety when you saw it?

16 A. That was just a general -- you know, a  
17 general reaction.

18 Q. Did you bring any concern to your  
19 colleagues at Cal-OSHA that would suggest that  
20 this ought to be investigated?

21 A. No.

22 Q. Are you aware of any California OSHA  
23 office that has investigated a retail store for  
24 any conduct like you viewed on this video?

25 A. Not that I'm aware of.

1 HEZA

2 Q. Let me ask you to turn to Tab 9 in the  
3 binder that you've got. Let me ask you to take a  
4 look at that news report concerning a specific  
5 free concert at a Wal-Mart in Bakersfield.

6 A. Uh-huh.

7 Q. Is this by any -- Well, take a look at  
8 it.

9 A. Okay.

10 Q. Does this at all refresh your  
11 recollection as to whether this was the incident  
12 you may have seen on the video?

13 A. I don't think so.

14 Q. Okay. Are you independently familiar  
15 with this particular incident? Do you recall it  
16 occurring?

17 A. No.

18 Q. Are you aware of whether Cal-OSHA  
19 investigated this particular incident?

20 A. I -- I don't know.

21 Q. Are you aware of any citations that  
22 Cal-OSHA may have issued with respect to this  
23 particular incident?

24 A. Not that I can recall.

25 Q. Now, this incident occurred in 2007,

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did it not, when you were deputy enforcement head?

A. Uh-huh. Yes.

Q. Would this have been the kind of incident or investigation that would have come to your attention?

A. If someone had been injured or filed a complaint, perhaps.

Q. Given the uniqueness of the incident, it would not necessarily have come to your attention?

A. Correct.

MR. CREGER: Let me interject here. Can we take a break?

MR. FELLNER: Sure. As a matter of fact, yeah, why don't we take a break.

(A recess was then taken.)

BY MR. FELLNER:

Q. The last topic that I want to deal with you involves employee exposure. As I understand the theory under California OSHA's policy and procedures manual, when it comes to exposure, employee exposure to workplace hazards, you have what's referred to as the zone of danger theory.

Are you familiar with that, Ms. Heza?

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A. I've heard the term.

Q. And does the size of that -- the geographic size of that zone of danger, does it depend upon the nature of the hazard?

A. Probably.

Q. Now, there's various different ways of establishing employee exposure, are there not, either directly through what the compliance officer sees or through appropriate interview statements; is that right?

A. Correct.

Q. With respect to the kinds of hazards that we've been talking about today involving crowd management and crowd control, do you see issues involving difficulties of establishing employee exposure in that kind of a context?

A. In what kind of a context?

Q. In the context of the hazard that we've been describing or the facts that we've been talking about, namely what you saw in the video of a crowd entering into a workplace. Would you think there may be some difficulties with respect to establishing the zone of danger for employees?

A. Well, the zone of danger is not a

1 HEZA

2 finite term. You know, an investigation would  
3 follow certain procedural steps. You know, I  
4 really can't speculate on some -- you know, on  
5 some kind of general hypothetical proposition.

6 Q. But if you saw a crowd generally  
7 entering a store without knowing where employees  
8 are or would be, as you put it, it would be  
9 speculative to come up with a zone of danger for  
10 employees, wouldn't it?

11 A. It's so fact-specific. I mean, you  
12 know, I can't answer that question.

13 Q. Right. To put it a little bit more  
14 specifically, any customer that is injured in the  
15 context of crowds entering a store, Cal-OSHA would  
16 have no jurisdiction over that; is that correct?

17 A. Correct.

18 Q. Are you familiar at all with any  
19 substitutes for establishing the kinds of  
20 fact-specific zone of danger employee exposure  
21 that we talked about?

22 Are there any surrogates that can be  
23 used, or is it a requirement under California OSHA  
24 that specific employees be exposed to a zone of  
25 danger in order to make out a case?

1 HEZA

2 A. I didn't understand that question at  
3 all.

4 Q. Let me just ask you the second half of  
5 the question. Is it a requirement under  
6 California OSHA's policy that to establish a zone  
7 of danger, there has to be evidence in the file  
8 that employees specifically are exposed to that  
9 zone of danger?

10 A. There would have to be evidence in the  
11 file that demonstrates employees were exposed to a  
12 hazard.

13 Q. Okay.

14 A. Or hazardous conditions.

15 Q. You described before that one of your  
16 responsibilities was to establish goals and  
17 objectives. I think my recollection is accurate  
18 in this respect. Is that correct?

19 A. Yes.

20 Q. Now, that was in connection with which  
21 position that you held?

22 A. Several.

23 Q. Could you remind me, please?

24 A. My current position, as deputy chief,  
25 and regional manager of consultation.



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Q. And? You said "several."

A. Yes. I said my current position, deputy chief, and regional manager.

Q. Oh, I'm sorry. I'm sorry.

And could you describe for me whether or not those goals and objectives included substantive areas in which California OSHA ought to be more active in an enforcement capacity?

A. We traditionally have targeted high-hazard employment such as construction. Also as part of our goals and objectives, trying to reach underserved workforce such as those that don't necessarily speak English in a variety of industries.

Q. And in any of those several capacities where you were considering goals and objectives, were issues involving crowd management ever discussed?

A. I don't believe so.

Q. Was the retail industry ever discussed?

A. I don't recall having done so.

Q. In the context of your present consultation position as well as any other consultation work that you've done in 23 years,

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have you ever consulted on crowd management or crowd control issues?

A. I don't believe so.

Q. Are you aware of any employer, retail or otherwise, that has asked for California's expertise with respect to such issues?

A. Not that I recall.

Q. Let me return for a moment to workplace violence if I may, Ms. Heza. Given your experience, do you believe -- and given your earlier response to the one video that you recall that your view was, if I recall your testimony correctly, that it was lucky that no one was hurt in that video, do you believe that there is an aspect of workplace violence to what you saw in that video?

A. Well, there may have been based upon the definition of Type 2, but it would be very, again, you know, fact-specific, unique to that situation.

Q. But --

A. That might very well be something that we would look at.

Q. Under the workplace violence rubric?

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A. Yeah. We might do an evaluation to see if it's an appropriate fit.

MR. FELLNER: I have no further questions.

MR. COHEN: I have no questions for you, Ms. Heza. I don't want to take any more of your time.

THE WITNESS: Thank you so much.

MR. CREGER: Thank you. I guess we can go.

MR. FELLNER: Absolutely.

And thank you very much. I hope you feel better from your cold.

(Whereupon, the deposition was concluded at 3:22 p.m.)

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A C K N O W L E D G M E N T

STATE OF )  
 ) ss.:  
COUNTY OF )

I, VICKY HEZA, hereby  
certify that I have read the transcript of my  
testimony taken under oath in my deposition;  
that the transcript is a true, complete and  
correct record of my testimony, and that the  
answers on the record as given by me are true  
and correct.

\_\_\_\_\_

VICKY HEZA

Signed and subscribed to before  
me, this            day of            ,  
20\_\_.

\_\_\_\_\_

Notary Public, State of \_\_\_\_\_

## C E R T I F I C A T E

1  
2  
3 I, the undersigned Registered  
4 Professional Reporter and Notary Public, do hereby  
5 certify that VICKY HEZA, after having been first  
6 duly sworn by me to testify to the truth, did  
7 testify as set forth in the foregoing pages, that  
8 the testimony was reported by me in stenotype and  
9 transcribed under my personal direction and  
10 supervision, and is a true and correct transcript.

11 I further certify that I am not of  
12 counsel, not related to counsel or the parties  
13 hereto, and not in any way interested in the  
14 outcome of this matter.

15 SUBSCRIBED AND SWORN TO under my hand  
16 and seal this 4th day of June, 2010.

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18 My commission expires October 14, 2010.

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22 \_\_\_\_\_  
23 JOHN L. HARMONSON, RPR  
24 Notary Public in and for  
25 the District of Columbia

\*\*\*ERRATA\*\*\*

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NAME OF CASE: SECRETARY OF LABOR vs. WAL-MART  
DATE OF DEPOSITION: JUNE 1, 2010  
NAME OF WITNESS: VICKY HEZA

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Subscribed and sworn before me

this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_.

\_\_\_\_\_

(Notary Public)

My Commission Expires:

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