

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY & HEALTH REVIEW COMMISSION

SECRETARY OF LABOR,	:	
Complainant,	:	
	:	OSHRC
	:	Docket Nos. 95-0893, 95-0895,
	:	95-0897 & 95-0901
	:	
v.	:	
	:	
MACY'S EAST, INC.	:	
ABRAHAM & STRAUS, INC.	:	
STERN'S DEPARTMENT STORES, INC.	:	
Respondents.	:	

ORDER

These nine cases comprise a number of citations which, for the most part, relate to the means-of-egress standards for ensuring employee safety from fire or other emergencies. They were assigned to the undersigned in July 1995. Before embarking upon protracted discovery, counsel for respondents made it clear that the one dominant issue affecting all three department stores was the Secretary's application of the obstruction-free requirements of § 1910.37(K)(2) for the stores' exit aisles.

On May 20, 1997, an order was entered granting summary judgment in respondents' favor with respect to the Secretary's interpretation that the 37(K)(2) standard required a 60-inch or a 44-inch width clearance for exit aisles. The ruling was confirmed on reconsideration by order entered on June 5, 1997. On June 24, 1997, respondents renewed their motion for partial summary judgment on the grounds that the Secretary was unable to establish that the exit aisles were obstructed or blocked as charged in 32 separate instances. By order entered on September 23, 1997, summary judgment was granted with respect to 29 of the 32 cited instances. Summary judgment was denied as to the remaining three instances where one aisle was blocked (Docket No. 95-895), and two aisles had less than the minimum 28 inches of width clearance (Docket No. 95-893).

On more than one occasion during the lengthy process that these cases have entailed, the parties indicated that resolution of the 37(K)(2) issue would most likely lead to an amicable settlement of all remaining issues. Unfortunately, that happy scenario has not come to pass. The

obstacle in the way of settlement is the open question of whether the Secretary will seek review of the 37(K)(2) issue by the Commission. Counsel for the Secretary has reported that a determination on that question is under consideration but there is no definite date as to when a decision will be made. During a prehearing telephone conference held last October 31, both parties expressed the view that the impasse offered no choice but to proceed to hearing on November 4, 1997, as scheduled.

As the parties were informed during the telephone conference, it is believed that to hold a hearing on the satellite issues in these nine cases before settling the question regarding the Secretary's position on the September 23 partial summary judgment, may unnecessarily engender tremendous costs in time and money and impose great demands upon the undersigned. Accordingly, it is **ORDERED** that the 29 citation items relating to the standard at § 1910.37(K)(2) cited in Docket Nos. 95-893, 95-895, 95-897 and 95-901 for which summary judgment in favor of respondents has been granted by order of September 23, 1997, are severed from those issues that remain for resolution. It is further

ORDERED that, in the interest of efficient case management, the remaining contested matters will be assigned new docket numbers, the parties to be notified of the new docket numbers at a later time.

The partial summary judgment of September 23, 1997, and all other papers comprising the record shall be submitted to the Commission's Executive Secretary on November 14, 1997. It will become the final order of the Commission at the expiration of thirty (30) days from the date of docketing by the Executive Secretary, unless within that time a Member of the Commission directs that it be reviewed. All parties will be notified by the Executive Secretary of the date of docketing.

RICHARD DeBENEDETTO
Judge, OSHRC

Dated: November 3, 1997
Boston, Massachusetts

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR	:	
	:	
Complainant	:	
	:	OSHRC DOCKET NOS. 95-0893
	:	thru 95-0901
v.	:	
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ABRAHAM & STRAUS, INC.	:	
STERN'S DEPARTMENT STORES, INC.	:	
	:	
Respondent	:	

**ORDER ENTERED UPON RESPONDENTS' RENEWED MOTION
FOR PARTIAL SUMMARY JUDGMENT**

Respondents' previously moved for partial summary judgment regarding the Secretary's application in these cases of the means-of-egress standard § 1910.37(K)(2) which reads:

Means of egress shall be continuously maintained free of all obstructions or impediments to full instant use in the case of fire or other emergency.

Three reasons were offered in support of the motion, including the argument that the Secretary's interpretation of the standard as requiring a 60-inch or a 40-inch clearance for exit aisles was unenforceably unreasonable. Summary judgment in favor of respondents was granted on that issue.

Respondents' have renewed their motion for partial summary judgment on the grounds that the Secretary cannot prove that the exit aisles were obstructed or blocked as charged by the Secretary. Respondents' were cited for 32 separate instances involving department stores located at Walt Whitman Mall in Huntington Station, New York, at Roosevelt Field in Garden City, New York, and at Smithaven Mall in Lake Grove, New York.

Here are some typical examples of the Secretary's factual allegations (supported by affidavits of the compliance officers), as described in the memorandum in opposition to respondents' renewed motion:

Instance (a) involved the lower level, east side of the Housewares Department, where display tables were so placed as to prevent free movements to exits in the event of fire or smoke. There were display tables of cheese baskets blocking a main aisle so that there was only 40 inches of clearance. Secretary's Memorandum at 4.

Instance (g) involved the first floor, north side of the Junior's/Cosmetics Departments, where display tables were so placed as to prevent free movement to exits in the event of fire or smoke. There were 4 glass tables with shirts on them obstructing the main aisle. Although the clearance in the aisle was greater than 5 feet at all locations, the tables were arranged in a serpentine manner, requiring people to snake through them. The clear, unobstructed clearance was 36 inches. Secretary's Memorandum at 5.

Instance (a) involved the first floor, main aisle west, in the Cosmetics Department, where display tables were so placed as to prevent free movement to exits in the event of fire or smoke. The aisle was 11 feet 6 inches wide, with 3 foot wide tables, resulting in approximately 48 inches clearance on either side. Secretary's Memorandum at 7.

In 29 of the 32 instances, the aisles had clearances ranging from 29 inches to 55 inches. There is only one instance where the Secretary alleges that an exit route was "blocked" (i.e., "in the Maternity Department, where a metal rack was so placed as to block the entrance to the fire stairs"). Memorandum at 8. And there are two instances where at certain locations clearances were 25 inches and 20 inches respectively. Secretary's Memorandum at 9 and 11.

The issues raised in the motion for summary judgment cannot be properly addressed without reference to other provisions contained in Subpart E of Part 1910 entitled Means of Egress. A good starting point is to look at the definition of "means of egress":

-2-

Means of egress. A means of egress is a continuous and unobstructed way of exit travel from any point in a building or structure to a public way and consists of three separate and distinct parts: the way of exit access, the exit, and the way of exit discharge. A means of egress comprises the vertical and horizontal ways of travel and shall include intervening room

spaces, doorways, hallways, corridors, passageways, balconies, ramps, stairs, enclosures, lobbies, escalators, horizontal exits, courts, and yards.

29 C.F.R. § 1910.35(a)

Paragraph (c) of § 1910.37 provides detailed specifications for calculating the width and capacity required for each means of egress. The capacity is derived by the number of persons per unit of exit width, and the exit route is measured in units of exit width of 22 inches. Paragraph (d)(1) of § 1910.37 addresses “Egress capacity and occupant load” in the following terms:

The capacity of means of egress for any floor, balcony, tier, or other occupied space shall be sufficient for the occupant load thereof. The occupant load shall be the maximum number of persons that may be in the space at any time.

In executing her enforcement strategy, the Secretary by-passed the onerous task of computing the geometric values along the lines called for by the regulations in determining the proper width of the exit route. That being the case, we are faced with the question of how to determine whether the exit aisles were maintained free of obstructions *to full instant use* within the meaning of § 1910.37(K)(2).

The gist of the Secretary’s position appears to be that we must take the exit routes as the compliance officers found them. That is to say, as the routes have been designated by the respondents’ own designs and arrangements of the stores’ furnishings and merchandise, and that such designated paths of travel must be kept clear and without encroachment regardless of the actual width of the aisles.

Respondents’ contend that a determination of the “occupant load” is a prerequisite to

-3-

establishing a violation of the cited 37 (K)(2) standard, and that in the absence of such evidence, the Secretary cannot prove that the aisles were obstructed. Respondents’ Memorandum at 1, 6-7.

In the absence of information relative to the occupant load or exit capacity, the only logical way to determine whether the cited 37(K)(2) requirement— — that the means of egress be “free of all obstructions... to full instant use”— — has been violated, is to direct our attention to paragraph (f)(6) of § 1910.37 which states that “[t]he minimum width of any way of exit access shall in no case be less than 28 inches.” The use of 37(f)(6) as a frame of reference in which to determine whether the exit

routes in these cases have met the clearance requirements of 37 (K)(2) does not in any way alter the pleadings or the charges against respondents. Consequently, the following argument made by respondents is not applicable:

To the extent that the Secretary will once again change her position and argue that the aisle widths that are less than twenty-eight inches constitute a violation, the Secretary did not cite Respondents for having aisle widths less than twenty-eight inches, and as this Court stated in its Order, it is now too late for the Secretary to amend the citation.

Respondents' Memorandum at 3 n. 1.

Because the Secretary did not determine the exit route capacity based upon the occupant load, the lines must be drawn at the minimum width of 28 inches. At this juncture, it is relevant to note the following comments made by the Secretary in the preamble to the proposed rule to revise the means of egress standard:

The purpose of this revision is to rewrite the existing requirements of Subpart E in plain English so they will be more understandable to employers, employees, and others who use them. This revision does not in any way change the regulatory obligations of employers or the safety and health protections provided to employees. To further the plain English goal, OSHA is also proposing to change the name of Subpart E from "Means of Egress" to "Exit Routes."

* * * *

-4-

This project is a language revision project, not an effort to substantively revise OSHA's means of egress standards. Therefore, the Agency has been careful to ensure that the protections afforded to employees by Subpart E are not weakened in the revision process. Employers who were in compliance with Subpart E prior to this proposal will continue to be in compliance with the new regulation after it becomes effective.

* * * *

In addition, the proposed revisions to Subpart E increase the performance orientation and compliance flexibility of the standards where national consensus standards have led the

way (without, of course, reducing employee protection). For example, § 1910.37(c) contains detailed specifications for the number of persons per unit of exit width required for each means of egress. These specifications are extremely difficult for users to understand. The NFPA [National Fire Protection Association] no longer relies on the number of persons per unit of exit width to determine adequate exit capacity. Instead, the NFPA's Life Safety Code incorporates the concept of exit geometry. Exit capacity, according to the NFPA, is determined not by width alone, but by considering the distance to be traveled to the exit and other factors affecting the flow of people out of the workplace. *The performance-oriented language of the proposed regulations allows employers to consider the newer NFPA approach.*

61 Fed.Reg. 47712-14 (1996). (Emphasis added.)

What are the results of the proposed revision to Subpart E as they relate to the exit route capacity? The complex exit geometry has been omitted and the following “performance-oriented” criteria have been substituted:

§ 1910.36 Design requirements for exit routes.

* * * *

(i) *The Capacity Of An Exit Route Must be Adequate.*

Each exit route must support the maximum-permitted occupant load for each floor served by the exit route. The capacity of an exit must not decrease with the direction of exit travel.

-5-

(j) *An Exit Must Meet Minimum Height and Width Requirements.*

(1) The exit route must be at least 6 feet, 8 inches high at all points.

(2) An exit route must be at least 28 inches wide at all points between handrails. An exit route must be wider than 28 inches if necessary to accommodate the expected occupant load.

(3) *Objects that project into the exit route must not reduce the minimum height and width of the exit route.*

Id. at 47719. (Emphasis added.)

In her comments, the Secretary emphasized the role to be played by current consensus standards, including the National Fire Protection Association:

For some employers, reliance on performance-

oriented regulations may create confusion as to the specific precautions necessary in a variety of situations. In the past, OSHA has used the NFPA Life Safety Code as an aid in interpreting Subpart E. OSHA intends to continue to rely on the NFPA Life Safety Code and other consensus standards as guidance in implementing performance oriented requirements of revised Subpart E.

Id. at 47714.

This recent historical setting has been elaborately produced to remove any doubt about the most vital aspect of this case, and that is that the Secretary always maintained and continues to maintain the position that objects may project into the exit route provided the required width is not reduced. Although it is no so clearly formulated, the language of the current regulations is readily susceptible of such meaning.

We need pause only briefly to consider the question raised by the few citation items involving aisles containing tables or other furnishings “arranged in a serpentine manner, requiring people to snake through them.” Such a condition does not constitute an obstruction or impediment within the purview of § 1910.37 (K)(2). In fact, the condition is dealt with under 37(g)(4) in connection with “exterior way of exit”:

-6-

A permanent, reasonably straight path of travel shall be maintained over the required exterior way of exit access....

There being no evidence presented in these cases regarding occupant load so as to require an exit route wider than the minimum 28-inch clearance, it is ORDERED that respondents’ motion for partial summary judgment is granted with respect to the 29 cited instances where the aisles had width clearances of at least 28 inches. It is further ORDERED that the motion for summary judgment is denied with respect to the remaining three cited instances where one aisle was blocked, and two aisles had width clearances less than 28 inches.

RICHARD DeBENEDETTO
Judge, OSHRC

Dated: September 23, 1997
Boston, Massachusetts

-7-