

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR,

Complainant,

v.

DILLARD DEPARTMENT STORE, INC.

d/b/a DILLARD'S, and its successors,

Respondent.

OSHRC DOCKET NO. 98-0867

APPEARANCES:

For the Complainant:

Ernest A Burford, Esq., U.S. Department of Labor, Office of the Solicitor, Dallas, Texas

For the Respondent:

David M. Moore, Esq., Jacqueline L. Wood, Esq., Wilson, Grosenheider, Moore & Jacobs, L.L.P.,
Austin, Texas

Before: Administrative Law Judge: James H. Barkley

DECISION AND ORDER

This proceeding arises under the Occupational Safety and Health Act of 1970 (29 U.S.C. Section 651 *et seq.*; hereafter called the "Act").

Respondent, Dillard Department Store, Inc. d/b/a Dillard's and its successors (Dillard's), at all times relevant to this action maintained a place of business at 2901 Capital of Texas Highway, Austin, Texas, where it was engaged in retail sales. Respondent admits it is an employer engaged in a business affecting commerce and is subject to the requirements of the Act.

On January 13, 1998 the Occupational Safety and Health Administration (OSHA) conducted an inspection of Dillard's Austin, Texas work site. As a result of that inspection, Dillard's was issued citations alleging violations of the Act together with proposed penalties. By filing a timely notice of contest Dillard's brought this proceeding before the Occupational Safety and Health Review Commission (Commission).

On September 9, 1998, a hearing was held in Austin, Texas. At the hearing the Secretary withdrew citation 1, items 4(a) and 4(b). The parties have submitted briefs on the remaining issues and this matter is ready for disposition.

Alleged Violation of §1910.36(b)(1) and (b)(4)

Citation 1, item 1 alleges:

29 CFR 1910.36(b)(1): Building(s) or structure(s) designed for human occupancy were not provided with exits sufficient to permit the prompt escape of occupants in case of fire or other emergency:

(a) At establishment, first floor during non-business hours when occupied by 10 or more employees, exits are not within maximum travel distance of 200 feet as required by NFPA 25-2.6, exposing employees to the hazard of fire.

Citation 1, item 2 alleges:

29 CFR 1910.36(b)(4): Exit(s) were locked or fastened, preventing free escape from inside of the building:

(a) At establishment, first floor during non-business hours when occupied by 10 or more employees, store principal entrance/exits doors were locked, exposing employees to the hazard of fire. NFPA 25-2.2.2.2 refers to Exception 2 to NFPA 5-2.1.5.1 which requires in paragraph (c) that the locking device is of a type that is readily distinguishable as locked; and in paragraph (d) that a key is immediately available to any occupant inside the building when it is locked. Employees exposed to the hazard of fire or other emergency.

(b) At establishment, first floor during non-business hours when occupied by 10 or more employees, store entrance/exit door leading to mall pedestrian way was locked, exposing employees to the hazard of fire. NFPA 25-2.2.2.6 refers to Exception 2 to NFPA 5-2.1.4.1 which requires in paragraph (c) that the "Doors or grilles are not brought to the closed position when the space is occupied; and in paragraph (d) that doors be operable from within the space without the use of any special knowledge or effort." Because of size and weight, the sliding horizontal doors leading to the mall are difficult to open. Employees exposed to the hazard of fire or other emergency.

(c) At establishment, first floor employee entrance/exit on dock is equipped with a delayed egress locks. Employees are not informed of method to release lock. Employees exposed to the hazard of fire or other emergency.

Facts

OSHA Compliance Officer (CO) Vernonia Redden testified that on January 13, 1998 she inspected the cited Dillard's Department Store following OSHA's receipt of an employee complaint (Tr. 27). CO Redden testified that the first floor of the store was more than 45,000 square feet (Tr. 30-31). Redden stated that during business hours, when all the doors were unlocked, there are adequate fire exits (Tr. 32). Outside of business hours the principal exits to the parking lot and the exit to the mall, are key locked; doors are also dead bolted (Tr. 37-38, 40, 134-35). The principal exits consist of two

banks of glass doors with a vertical roll-down door in between (Tr. 42). Only the roll-down is tied to the smoke alarm systems and automatically opens in the event of fire (Tr. 42, 134). The glass doors can be opened only with a key (Tr. 44).

Only two doors are unlocked during the periods before the store opened and after it was closed to the public (Tr. 30, 142). One, at the dress entrance (Tr. 41), can be opened pushing a panic bar on the inside of the door (Tr. 30). The other door, in the dock, has a panic bar, but will only open if the bar is pressed continuously for 15 seconds, or if a buzzer-release is pressed from the upstairs offices (Tr. 30, 37, 107). Redden testified that employees working in the store at the furthest point from the first available exit would have to travel 463 feet along the open aisles to reach the door (Tr. 31). CO Redden stated that it would be difficult to cut through the clothes racks to reach the exits more quickly (Tr. 64). The dock door was 475 feet from the same point (Tr. 31). Redden stated that she referred to the National Fire Protection Association (NFPA) Life Safety Code, which requires that exits be available within 200 feet of any work location in a mercantile operation equipped with automatic sprinklers and smoke detectors, as is Dillard's (Tr. 33, 100-01). Redden further testified that the amount of time it takes to travel 475 feet to an exit is not "prompt," as required by the standard (Tr. 38).

Redden stated that up to 20 employees would be in the store for 10 to 15 minutes every day before and after business hours and up to 300 could be present during inventory (Tr. 32, 34, 94). Dan Boswell, the store manager testified that there are generally 8 to 10 employees on the first floor during non-business hours, in addition to four people working on the dock (Tr. 104).

Boswell stated that at least one manager is always present in the store, with keys to unlock the doors (Tr. 96-98). Boswell further stated that during inventory all twelve managers are in the store, and the mall doors are unlocked (Tr. 114). Boswell testified that there are telephones available at each of the cash registers; employees can call for assistance if they need a door unlocked (Tr. 99). In addition, the housekeeping staff would have the keys to the glass doors if they are cleaning the glass that day (Tr. 97, 99, 115). Boswell further testified that the dock door automatically opens in the event of fire, *i.e.*, if smoke is detected by the automatic sprinkler system, or a fire alarm is pulled (Tr. 101, 106).

Boswell testified that leaving all exits unlocked during store hours would constitute a greater hazard, inviting armed robbery and possible loss of life and/or property (Tr. 92-93). William Holland, Dillard's maintenance man, believed that the installation of panic bars on the locked doors was infeasible without replacing the main glass doors, but admitted he had not researched the possibility (Tr. 150-52). Dan Boswell testified that Dillard's had not solicited bids, and did not know whether panic bars could be installed on Dillard's glass doors (Tr. 136).

Discussion

Item 1: §1910.36(b)(1) - The cited standard requires, in relevant part, that “[e]very building or structure, new or old, designed for human occupancy shall be provided with exits sufficient to permit the prompt escape of occupants in case of fire or other emergency.

The cited standard requires that buildings be provided with an adequate number of fire exits. It does not contain any prohibition against locking fire exits. CO Redden admits that Dillard’s place of business is provided with adequate exits which, when open, allow the prompt escape of the structure’s occupants. OSHA’s citation is based solely on the unavailability of these exits outside of store hours, when they are locked. The locking of emergency exits is addressed by §1910.36(b)(4), which is also cited by Complainant. I find that §1910.36(b)(1) is inapplicable to the circumstances cited, and so is vacated.

Item 2: §1910.36(b)(4) - The cited standard provides:

In every building or structure exits shall be so arranged and maintained as to provide free and unobstructed egress from all parts of the building or structure at all times when it is occupied. No lock or fastening to prevent free escape from the inside of any building shall be installed except in mental, penal, or corrective institutions where supervisory personnel is continually on duty and effective provisions are made to remove occupants in case of fire or other emergency.

The Commission has held that a violation of §1910.36(b)(4) is established when a locked door, customarily used as an exit, deprives employees of free and unobstructed egress from a building or structure. *Gould d/b/a Gould Publications*, 16 BNA OSHC 1925, 1994 CCH OSHD ¶30,502 (No. 89-2033, 1994), citing *Spot Bilt, Inc.*, 11 BNA OSHC 1993, 1984-85 CCH OSHD ¶26,944 (No. 79-5328, 1984). In *Gould* the Commission found that a locked door in a 60' x 60' room “ could prevent the quick escape of any of the four employees who regularly work in the room and would be accustomed to the door being unlocked.” *Id.* at 1925. The Commission found that the availability of two other routes to the outside did not eliminate the hazard posed by the locked door.

Here, as in *Gould*, the locked doors are normally utilized as exits. Locking the doors outside of business hours limits employees’ escape routes to only two of five customary exits, both of which are over 450 feet from some work areas in the store. Complainant refers to the NFPA 101-1970 Life Safety Code §14-2161, which recommends that occupants be able to exit a structure without traveling more than 400 feet¹.

¹ Where a term is not defined in the standards, consideration must be given to the source of the cited standard, *i.e.* the NFPA’s 1970 Life Safety Code, just as the legislative history of the Act is considered in interpreting the Act’s provisions. *See, Cincinnati Inc.*, 17 BNA OSHC 1984, 1997 CCH OSHD ¶31,304 (No. 95-711, 1997).

The evidence supports the cited violation. Nonetheless, citation 1, items 2(a) through (c) are in direct conflict with items 3(a), 3(b) and 3(c), which require Dillard's to designate specific responsibilities for unlocking doors to permit emergency exit during non business hours, inform employees how to override the time delay lock on the dock door, and include all employees in semi-annual drills. Those citation items suggest that Dillard's current practice of locking the main and mall entrances, and the presence of a time delay on the panic bar are acceptable, so long as provisions are made for opening the doors in the event of an emergency, and Dillard's employees are properly trained in the procedures to be followed.

I am mindful that the Commission Rules provide for the pleading of alternative and conflicting theories of a case. In OSHA litigation, however, the final citation, as affirmed, must inform the cited employer of the precise nature of the cited hazard, and provide some guidance as to the abatement necessary to eliminate that hazard². Accordingly, at some point between the issuance of the citation and conclusion of litigation, inconsistencies in the citation and pleadings must be resolved, so that the employer knows what is required of it under the Act. While it is preferable that the Secretary resolve such conflicts, in this case she has not done so, either at the hearing, or in her brief, and that task falls to this judge.

Should citation 1, items 2(a) through (c) be affirmed, Dillard's would be constrained to replace the glass main and mall exit doors with doors that can be equipped with panic bars, and remove the time delay from the panic bar on the dock doors, a solution which will place a significant financial burden on Dillard's³. However, the designation of personnel to open locked emergency exits, the abatement required at citation 1, items 3(a) through (c) will, apparently, also eliminate the cited hazard at considerably less cost to Dillard's. Accordingly, citation 1, items 2(a) through (c) are vacated, in favor of the provisions cited at item 3. Item 3, requiring inclusion of provisions for unlocking the main and mall exits, and instruction on overriding the lock on the dock door in Dillard's emergency action plan, will be affirmed, as discussed below.

Alleged Violation of §1910.38(a)(1)

Citation 1, item 3 alleges:

² Under §17(d) of the Act, an employer is liable for additional penalties of up to \$1,000 per day for failure to correct cited violations.

³ A second Dillard's store has been cited with similar inconsistent citations in the companion case at Docket Number 98-0869. Affirmation of this citation could result in OSHA's inspection of Dillard's stores nationwide, seeking to exact the same abatement.

29 CFR 1910.38(a)(1): The emergency action plan required by 29 CFR 1910.157(a) or (b) when the employer has elected to partially or totally evacuate the workplace in the event of a fire emergency, or required by 29 CFR 1910.160(c)(1), did not cover the designated actions that the employer or employees must take to ensure employee safety from the fire and other emergencies:

NFPA 25-4.5.6 also requires an approved written emergency plan and all employees be instructed and periodically drilled with respect to their duties under the plan.

(a) At establishment, emergency action plan does not designate specific responsibilities for unlocking doors to permit emergency exit during non-business hours when occupied by 10 or more employees, exposing them to the hazard of fire.

(b) At establishment, dock exit, emergency action plan does not inform employees that a delay on door lock can be overridden to permit exit.

(c) At establishment, all employees not included in semi-annual emergency drill training.

The cited standard provides in relevant part:

The emergency action plan shall be in writing . . . and shall cover those designated actions employers and employees must take to ensure employee safety from fire and other emergencies.

(2) *Elements*. The following elements, at a minimum, shall be included in the plan: (I) Emergency escape procedures and emergency escape route assignments; . . .

Facts

CO Redden testified that Dillard's had an emergency action plan, but that it did not address emergency procedures outside of store hours (Tr. 45). Dillard's EMERGENCY PROCEDURES - FIRE SAFETY direct employees to call in a possible fire code; verify the existence of a fire; search the stockrooms, fitting rooms, and offices; call the fire department (Edh. R-1). The management team will then determine whether to order a partial or total evacuation of the store (Edh. R-1). A confirmed fire code is then called in and announced; mall security is notified; terminals and merchandise are to be secured and the cash locked up (Edh. R-1, FIRE EVACUATION). Store associates are to escort customers out of the store; once outside of the store, associates are to meet at a designated location to make sure no one is missing (Edh. R-1, FIRE EVACUATION). Store managers are directed to clear their areas of responsibility of customers/employees (Edh. R-1, FIRE BRIGADE).

Dillard's conducted emergency training once or twice a year prior to business hours (Tr. 49). Because not all of Dillard's employees report to work before opening, many had never participated in a fire drill (Tr. 50). No records had been kept concerning employees participation in fire drills (Tr. 50, 53). CO Redden testified that the emergency procedures for opening the dock door were not covered in the emergency action plan (Tr. 50).

Dan Boswell testified that, during their general orientation, new employees are shown various, though not necessarily all, the fire exits in the store, and told that they can find the evacuation plans and a list of fire exits for each area of the store (Tr. 110-12, 129; Edh. R-11; *See also*, testimony of Debra Kay Dubois, Tr. 148). Evacuation plans consist of a map of the store [Employees are told that a manager will instruct them in the event of an emergency (Tr. 113)]. Managers are expected to be familiar with the emergency action plan, so that they could effect the evacuation of employees and customers (Tr. 129).

Discussion

Item 3(a). In this case, the locked main and mall doors are identified as, and normally utilized as exits. Locking the doors outside of business hours limits employees' escape routes to only two of five customary exits, both of which are over 450 feet from some work areas on the main floor of the store. As discussed under item 2 above, the locked doors do limit employees' free exit from the store. Dillard's maintains that the doors can be unlocked in the event of any emergency. Through its citation, the Secretary appears to agree, so long as Dillard's designates specific responsibilities for unlocking doors to permit emergency exit during non-business hours, and includes such designation in its emergency action plan.

Because designating responsibilities for unlocking the doors is the least onerous means of abating the cited hazard, citation 1, item 3(a) will be affirmed.

Item 3(b). Because employees are expected to exit through the dock door, they should be informed of the delay on the panic bar, so that they are aware that exit route is open and available in the event of an emergency. The Secretary has proven the cited violation, and citation 1, item 3(b) will be affirmed.

Item 3(c). Training requirements are found at §1910.38(a)(5), which has not been cited here. Because the cited standard is inapplicable, this item will be vacated.

Penalty

In determining the penalty the Commission is required to give due consideration to the size of the employer, the gravity of the violation and the employer's good faith and history of previous violations. The gravity of the offense is the principle factor to be considered. *Nacirema Operating Co.*, 1 BNA OSHC 1001, 1972 CCH OSHD ¶15,032 (No. 4, 1972). Factors to be considered in determining the gravity of the offense include: (1) the number of employees exposed to the risk of injury; (2) the duration of exposure; (3) the precautions taken against injury, if any; and (4) the degree of probability of occurrence of injury. *Kus-Tum Builders, Inc.* 10 BNA OSHC 1049, 1981 CCH OSHD ¶25,738 (No. 76-2644, 1981).

Dillard's is a large, nationwide employer. CO Redden testified that she gave no credit for size in calculating the penalty. No credit was given for history, because Dillard's had not been inspected in the previous two years (Tr. 39). A combined penalty of \$2,000.00 is proposed for these items.

In regards to the items concerning the main and mall exits, I conclude that the violation was serious, based on the CO's testimony that a fire could result in the death of exposed employees. Dillard's is not at high risk for fire, flammable materials are not in use, the store is equipped with a sprinkler system, and an automatic fire detection system. Fire alarms are located throughout the store. Exposure is minimal, in that 8 to 10 employees are exposed for only 10 to 15 minutes each day outside normal business hours. Employees working inventory are not exposed to the same hazard, because the mall doors are open during that time.

Employees working on the dock were not exposed to the same hazard as employees working on the floor because they had free access to the dock door, which opens automatically in the event of fire. While the door's lock disengages in the event of a fire alarm, some kinds of emergencies do not trigger an alarm. The locked dock door, because it was not open "at all times" does not comply with the cited standard. The violation, however, is of low gravity, in that the delayed egress feature may be disabled automatically with an alarm, or remotely by personnel in the upstairs offices.

Taking into account the relevant factors, I find that the gravity of the violation was overstated.

Further Dillard's was inappropriately denied credit for a good faith and history.

The OSHA CO refused to give Dillard's credit for good faith because Dillard's did not let her keep the emergency action plan in her possession as long as she desired. The CO's testimony appeared petty and vindictive, and fails to establish that Dillard's lacked a willingness to comply with the provisions of the Act.

The CO's denial of credit for good history was also improper. Dillard's had not previously been cited by OSHA. The CO attributed the absence of prior citations solely to OSHA's failure to inspect

Dillard's premises within the prior two years, and denied credit. The CO's departure from OSHA's usual policy of providing good history credit for employers who have not had a serious citation within the prior three years is unwarranted. I find that Dillard's should receive credit for both good faith and history.

I find that a penalty of \$50.00 is appropriate and will be assessed.

Alleged Violation of §1910.145(c)(3)

Citation 1, item 4 alleges:

29 CFR 1910.145(c)(3): Safety instruction signs were not used where there was a need for general instructions and suggestions relative to safety measures:

(c) At establishment's employee entrance/exit door on dock, signs complying with NFPA 25-2.2.2.4 reference to NFPA 5-2.1.6.1 paragraph (e) were not posted. Paragraph requires posting on or adjacent to delayed egress locks on exit door of sign that reads "PUSH UNTIL ALARM SOUNDS. DOOR CAN BE OPENED IN 15 SECONDS," exposing employees to the hazard of fire or other emergency.

Facts

CO Redden testified that there was no signage on the dock door informing employees of the means of opening the door in the event of an emergency (Tr. 55).

Discussion

As noted above, the cited door has a delayed egress feature that impedes employees' immediate exit, though the door is intended as an emergency exit. Because employees are not told how to override the lock on the exit door, there is a danger that those employees might abandon the door rather than to wait for the lock to disengage. The Secretary has established the cited violation.

Penalty

Because two of the three items under this citation were withdrawn, and for the reasons discussed above, I find a penalty of \$50.00 is appropriate, and will be assessed.

ORDER

1. Citation 1, item 1, alleging violation of 29 CFR 1910.36(b)(1) is vacated.
2. Citation 1, items 2(a) through (c), alleging violations of 29 CFR 1910.36(b)(4) are vacated.
3. Citation 1, items 3(a) and 3(b), alleging violations of 29 CFR 1910.38(a)(1) are affirmed, and a penalty of \$50.00 is assessed.
4. Citation 1, item 3(c), alleging violation of 29 CFR 1910.38(a)(1) is vacated.
5. Citation 1, item 4(c), alleging violation of 29 CFR 1910.145(c)(3) is affirmed, and a penalty of \$50.00 is assessed.

James H. Barkley
Judge, OSHRC

Dated: