UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR,	:	
Complainant,	:	
v.	:	OSHRC Docket No. 93-2971
PRECAST SERVICES, INC.,	:	
Respondent.	:	

DECISION

BEFORE: WEISBERG, Chairman; MONTOYA, Commissioner.

BY THE COMMISSION:

At issue is whether the judge erred in finding that Precast Services, Inc.'s ("Precast's") violation of 29 C.F.R. §1926.28(a) was the result of unpreventable employee misconduct. We find that the judge did err, vacate his finding, and affirm the citation.

I. Background

In September, 1993, the Occupational Safety and Health Administration inspected a construction site in Mentor, Ohio where Precast's four-member crew was in the final stages of building a precast concrete addition to a newspaper building. Dale Thompson, an iron worker designated to serve as foreman while the regular foreman, Robin Harvey, was absent, instructed Vic Schossler, a journeyman iron worker with seventeen years of experience

whom Precast had hired two weeks earlier, to go to the top of a 40-foot-high precast panel and drop a line to extend a ladder to do other work on the panel. Foreman Thompson, relying on Schossler's judgment and resourcefulness as a "professional" to protect himself, did not ask or tell Schossler how he was to attach his safety belt and lanyard at the top. Schossler testified that he was only at the top for a brief time ("there and . . . gone") and that in such situations, an employee "just ha[s] to wildcat it . . . I mean, iron working is a dangerous trade." Schossler was straddling the top of the panel without any fall protection when he was observed by Compliance Officer Gus Georgiades. OSHA issued a citation alleging a violation of 29 C.F.R. §1926.28(a), which requires employers to ensure that employees wear appropriate personal protective equipment when exposed to hazardous conditions. A safety belt was practical under the circumstances, and Schossler could have tied off to the eyelets embedded in the concrete. Precast contended that Schossler's failure to tie off constituted unpreventable employee misconduct. Judge Robert A. Yetman accepted this argument and vacated the citation.

II. Discussion

To establish the affirmative defense of unpreventable employee misconduct, an employer is required to prove: "(1) that it has established work rules designed to prevent the violation; (2) that it has adequately communicated these rules to its employees; (3) that it has taken steps to discover violations; and (4) that it has effectively enforced the rules when violations have been discovered." *Nooter Construction Co.*, 16 BNA OSHC 1572, 1578, 1994 CCH OSHD ¶ 30,345, p. 41,841 (No. 91-0237, 1994). Adequate enforcement is a critical element of the defense.[1] The conventional way to prove the enforcement element is for the employer to introduce evidence of a disciplinary program by which the company reasonably expects to influence the behavior of employees. For instance, an employer may

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[1]Because we find that Precast did not effectively enforce its work rule, we do not reach or resolve any other elements of the defense.

provide evidence of a progressive disciplinary plan consisting of increasingly harsh measures taken against employees who violate the work rule. *See Asplundh Tree Expert Co.*, 7 BNA OSHC 2074, 1980 CCH OSHD ¶ 24,147 (No. 16162, 1979) (employer introduced evidence of company policy calling for a stern oral or written reprimand for the first violation, followed by discharge for a second violation). To prove that its disciplinary system is more than a "paper program," an employer must present evidence of having actually administered the discipline outlined in its policy and procedures. *See, e.g., Connecticut Light & Pwr. Co.*, 13 BNA OSHC 2214, 1987-90 CCH OSHD ¶ 28,508 (No. 85-1118, 1989) (reprimand letters issued); *cf. Constructora Maza, Inc.*, 6 BNA OSHC 1309, 1977-78 CCH OSHD ¶ 22,487 (No. 13680, 1978) (consolidated) (foremen had been disciplined but not suspended, and no disciplinary action had been taken against a non-supervisory employee). Evidence of verbal reprimands alone suggests an ineffective disciplinary system. *Pace Constr. Corp.*, 14 BNA OSHC 2216, 1991-93 CCH OSHD ¶ 29,333 (No. 86-758, 1991) (perennial verbal warnings ignored on a widespread basis); *Falcon Steel Co.*, 16 BNA OSHC 1179, 1993 CCH OSHD ¶ 29,055 (No. 89-2883, 1993) (consolidated) (same). On the other hand, evidence of a variety of punitive measures tends to demonstrate that an effective disciplinary system was in place. *Beta Constr.*, 16 BNA OSHC 1435, 1993 OSHD ¶ 30,239 (No. 91-102, 1993), *aff'd per curiam*, No. 93-1817 (D.C. Cir. Apr. 12, 1995); *Dover Elevator Co.*, 16 BNA OSHC 1281, 1993 CCH OSHD ¶ 30,148 (No. 91-862, 1993). In rare instances, the employer may be able to establish that its work rules were enforced with evidence of only verbal reprimands. *See Alabama Pwr. Co.,* 13 BNA OSHC 1240, 1986-87 CCH OSHD ¶ 27,892 (No. 84-357, 1987) (in light of a 24-year accident-free history and rare violations despite frequent opportunity, occasional oral warnings were sufficient).

The record shows that Precast had a work rule requiring its employees to wear safety belts at all times and that there were disciplinary measures that would be taken if the rule were not followed. There is evidence that regular foreman Harvey had twice verbally

reminded Schossler to tie off during the two weeks he had been with the company: once at a height of approximately 15 feet on the second day of the job, and once as he stood on a stepladder at a height of approximately 6-8 feet about two weeks into the job, the day before the inspection. Both times, Schossler immediately complied. There is also testimony that Harvey had verbally warned Thompson to tie off his safety belt. The record does not indicate that written reprimands were issued on any of those occasions, although the date of one of Schossler's verbal warnings was committed to writing the day after the OSHA inspection.

We also considered the evidence Precast offered of the disciplinary measures it took after the inspection. Commission precedent does not rule out consideration of *post*-inspection discipline, provided that it is viewed in conjunction with pre-inspection discipline. *R. Zoppo Co.*, 9 BNA OSHC 1392, 1981 CCH OSHD ¶ 25,230 (No. 14884, 1981); *Asplundh Tree Expert Co.* Here, however, the company introduced no evidence of pre-inspection discipline other than the three verbal warnings to tie off, all of which took place on the Mentor job within the two-week period preceding the inspection. Schossler received his written reprimand and his discharge notice the day after the inspection. Foreman Thompson was verbally chastised on the day of the inspection and was issued a written reprimand the next day for his role in the Schossler incident.

We conclude that Precast has failed to demonstrate that its work rule was effectively enforced. Although Precast's post-inspection actions are evidence of a serious concern for safety, the record fails to show that Precast had ever taken any action to enforce its work rules before the start of the two-week-old Mentor job. The company introduced no evidence that prior to this job it had subjected an employee to termination, suspension, docked pay, or even a written reprimand or a verbal warning for failure to comply with a work rule. *See Jersey Steel Erectors*, 16 BNA OSHC 1162, 1993 CCH OSHD ¶ 30,041 (No. 90-1307,

1993), *aff'd*, 19 F.3d 643 (3d Cir. 1994)(termination of supervisor following OSHA inspection did not make up for ineffective enforcement program prior to inspection).

We reach the same conclusion with regard to Precast's claim of *supervisory* employee misconduct. Acting foreman Thompson, who himself had been verbally warned to tie off on this job, had overheard the regular foreman, Harvey, reminding Schossler to tie off at least once on this job. This incident should have served to heighten Thompson's awareness of Schossler's tendency to forget the tie-off rule or to rely on his own judgment instead of following the rules. In fact, Thompson testified that in his view, "guys . . . like Mr. Schossler" do not respond to verbal warnings and that the only way to get them to comply is to "stand[] there watching [them] and hold[] [their] hand." Precast failed to offer evidence that might have enabled the company to dissociate itself from the views expressed by its foreman. We reject Precast's supervisory employee misconduct defense for essentially the same reasons that we rejected that defense on the basis of Schossler's misconduct: failure to introduce evidence of enforcement prior to the inspection.

Finally, we reject Precast's concurrent argument that the Secretary failed to establish that Precast had knowledge of the violation as required under *Astra Pharmaceutical Prods., Inc*, 9 BNA OSHC 2126, 2129, 1981 CCH OSHD ¶ 25,578, pp. 31,899-900 (No. 78-6247, 1981) ("In order to prove a violation . . . the Secretary must show . . . that (1) the cited standard applies, (2) there was a failure to comply with the cited standard, (3) employees had access to the violative condition, and *(4) the cited employer either knew or could have known of the condition with the exercise of reasonable diligence*") (emphasis added). We have found that Precast did not effectively enforce its work rule here. This evidence also establishes that Precast had constructive knowledge of the violative conduct. *See CF&T Available Concrete Pumping, Inc.*, 15 BNA OSHC 2195, 1991-93 CCH OSHD ¶ 29,945 (No. 90-329, 1993) (Secretary established employer knowledge element by submitting unrebutted evidence that CF&T had no enforcement program for its rules and instructions);

see also A.P. O'Horo Co., 14 BNA OSHC 2004, 1991-93 CCH OSHD ¶ 29,223 (No. 85-369, 1991) (Commission found that employer failed to establish the affirmative defense of unpreventable employee misconduct, and that the supervisor's knowledge was "therefore properly imputed" to the employer). As in *CF&T*, the evidence here shows that Precast "could have known, with the exercise of reasonable diligence, that its safety program was inadequate, and that a violation such as [Schossler's] would occur." *CF&T*, 15 BNA OSHC at 2199, 1991-93 CCH OSHD at p. 40,939. We therefore find that the Secretary succeeded in proving the employer-knowledge element of his prima facie case.

III. Order

We find that Precast failed to prove the affirmative defense of unpreventable employee misconduct because it failed to introduce evidence showing that it had an effective enforcement system in place at the time the violation was observed. We therefore find that the violation is established and affirm the citation. We assess the proposed penalty in the amount of $2500, which was not disputed by the parties.

Stuart E. Weisberg
Stuart E. Weisberg
Chairman

Velma Montoya by CW
Velma Montoya
Commissioner

Dated: November 14, 1995

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SECRETARY OF LABOR,

Complainant,

v.

PRECAST SERVICES, INC.,

Respondent.

Docket No. 93-2971

NOTICE OF COMMISSION DECISION

The attached decision and order by the Occupational Safety and Health Review Commission was issued on November 14, 1995. **ANY PERSON ADVERSELY AFFECTED OR AGGRIEVED WHO WISHES TO OBTAIN REVIEW OF THIS DECISION MUST FILE A NOTICE OF APPEAL WITH THE APPROPRIATE FEDERAL COURT OF APPEALS WITHIN 60 DAYS OF THE DATE OF THIS DECISION.** See Section 11 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 660.

FOR THE COMMISSION

Ray H. Darling, Jr.

Date: November 14, 1995

Ray H. Darling, Jr.
Executive Secretary

Docket No. 93-2971

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OSHRC DOCKET
NO. 93-2971

NOTICE OF DOCKETING OF ADMINISTRATIVE LAW JUDGE'S DECISION

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on January 20, 1995. The decision of the Judge will become a final order of the Commission on February 21, 1995 unless a Commission member directs review of the decision on or before that date. ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW. Any such petition should be received by the Executive Secretary on or before February 9, 1995 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

All further pleadings or communications regarding this case shall be addressed to:

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Petitioning parties shall also mail a copy to:

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If a Direction for Review is issued by the Commission, then the Counsel for Regional Trial Litigation will represent the Department of Labor. Any party having questions about review rights may contact the Commission's Executive Secretary or call (202) 606-5400.

FOR THE COMMISSION

Ray H. Darling, Jr.

Date: January 20, 1995

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 93-2971

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PRECAST SERVICES, INC.,
Respondent.

OSHRC Docket No. 93-2971

Appearances:

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U.S. Department of Labor
For Complainant

F. Benjamin Riek, III, Esq.
Cleveland, Ohio
For Respondent

Before: Administrative Law Judge Robert A. Yetman

DECISION AND ORDER

This proceeding arises under § 10 (c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et. seq.* ("the Act") to review a citation issued by the Secretary of Labor pursuant to § 9(a) of the Act and a proposed assessment of penalty thereon issued pursuant to § 10(a) of the Act.

As a result of an inspection of Respondent's worksite located at the Lake County News Herald construction project in Mentor, Ohio on September 29, 1993, the Secretary issued a serious citation to respondent on October 13, 1993 alleging one serious violation of 29 C.F.R. 1926.28(a) or, in the alternative, a violation of 29 C.F.R. 1926.105(a) with a proposed penalty of $2,500. Respondent filed a timely notice of contest and Complainant filed a complaint with this Commission on November 17, 1993 incorporating the violations as alleged in the citation. Respondent answered the complaint by admitting the jurisdictional allegations and denying that it violated the Act as alleged.

A hearing was conducted on June 7, 1994 at Cleveland Ohio at which time two written stipulations were filed by the parties. The stipulations are as follows:

Stipulation No. 1

1. Jurisdiction of this action is conferred upon this court by the Occupational Safety and Health Review Commission.

2. Respondent is, and at all times relevant to this proceeding, was, engaged in a business affecting interstate commerce.

3. Gus Georgiados, an OSHA inspector in the Cleveland, Ohio office conducted an inspection of such a worksite at (sic) located at 7085 Mentor Avenue, Mentor, Ohio;

4. The inspection was a construction type inspection in response to a complaint received by that office;

5. Respondent is a precast specialist installing precast walls;

6. Respondent employed approximately four (4) employees on the site during the inspection.

7. Respondent was working at the Southwest stair tower at the time of the inspection installing brackets to connect precast towers to hold the precast walls in place.

8. An employee was seen by the compliance officer straddling the top of the wall without fall protection i.e., no safety nets, ladders, scaffolds, catch platforms, temporary floors, safety lines or safety belts was use (sic) to protect the employee from a fall;

9. The employee that was spotted working without fall protection was subsequently disciplined by the Respondent for not being tied off;

10. The employee's foreman, who was on site at the time of the inspection, was also disciplined by the Respondent because he did not enforce the Company's safety rules;

11. Respondent's employees were exposed to the conditions surrounding the failure to provide fall protection to its employees;

Stipulation No. 2

1. At the time of the inspection at issue in this case, only one of Respondent's employees was engaged in the function of installing brackets on the southwest stair tower at this construction site;

2. Respondent conducted weekly safety meetings at this work site where it reviewed potential safety hazards that its employees would be exposed to;

3. On the day of the inspection, respondent's acting foreman, Dale Thompson, instructed Vic Schossler to secure brackets on the southwest stair tower while he and the remaining employees performed work on another portion of the project.

The testimony at the hearing establishes that the compliance officer, Gus Georgiados, arrived at Respondent's worksite to conduct a general safety inspection. The work performed by Respondent consisted of the erection and installation of precast concrete panels around stairwells and other sections of the addition to the existing building. As he approached the worksite, the compliance officer observed an individual straddling the top of one of the precast concrete walls approximately forty feet above ground level. The individual observed by the compliance officer was Vic Schossler, an employee of Respondent. Mr. Schossler was not tied off to a safety line nor was any other type of fall protection present to protect against a fall. Based upon those facts a citation was issued to Respondent alleging the following serious violation:

29 CFR 1926.28(a): Appropriate personal protective equipment was not worn by employees in all operations where there was exposure to hazardous conditions:

An employee was exposed to falls of approximately 40 feet while on the precast wall of the southwest stair tower.

> Feasible methods of abatement include, but are not limited to, rotating and articulating lifts, scaffolds, catch platforms, scizzors (sic) lifts, static and/or catenary lines in conjunction with safety belts and lanyards.
>
> "OR IN THE ALTERNATIVE"
>
> 29 CFR 1926.105(a): Safety nets were not provided when workplaces were more than 25 feet above the ground or water surface, or other surface(s) where the use of ladders, scaffolds, catch platforms, temporary floors, safety lines, or safety belts was impractical.

Respondent does not dispute that its employee was observed by the compliance officer at the top of a forty foot wall without any fall protection as required by the standard. However, in order to establish a violation of the cited standard, the Secretary must prove the following elements: (1) there was exposure to a hazardous condition, (2) some other section in Part 1926 indicates a need for using personal protective equipment, in this case, safety belts, and (3) the employer failed to require the use of the equipment. *L.E. Myers Co.* 12 BNA OSHC 1609; *Pace Construction Corporation* 14 BNA OSHC 2217. The first element was clearly established by Complainant and conceded by Respondent. Similarly, although pled in the alternative, the reference to 29 C.F.R. 105(a) requires the use of safety belts and safety lines when practical and the case was presented by Complainant and defended by Respondent on the basis that the use of a safety belt and lanyards were practical under the circumstances. Respondent strongly argues however, that it required its employees to use safety belts whenever exposed to the hazard of falling. Respondent maintains that the citation should be vacated on the basis of employee misconduct.

The affirmative defense of employee misconduct is well established. *See Nooter Construction Co.* 16 BNA OSHC 1572; *Jensen Construction Company* 1979 CCH OSHD ¶ 23,664. In *Nooter* the Review Commission stated:

> In order to establish the affirmative defense of unpreventable employee misconduct under Commission case law, an employer bears the burden of proving: (1) that it has established work rules designed to prevent the violation; (2) that it has adequately communicated these rules to its employees; (3) that

> it has taken steps to discover violations; and (4) that it has effectively enforced the rules when violations have been discovered.

16 BNA OSHC at 1578.

Respondent asserts that it has an established written work policy regarding the use of safety belts and that policy was in effect at the time of the alleged violation. Respondent's General Statement of Policy (Respondent's Exhibit R-5) states, in pertinent part, that the Company provides "protective equipment for employees where required." Respondent's General Work Rules, also in effect at the time of the inspection, requires that safety belts with lanyards must be worn by employees at all times at construction sites (Respondent's Exhibits R-6). Respondent's Exhibit R-10 lists the disciplinary action that will be taken in the event that employees violate the listed company rules. An employee's failure to use company issued safety equipment when required will result in a written warning for the first offense and discharge for the second offense. An employee's inability to perform assigned duties in a safe manner will result in discharge for the first offense. In this instance, Mr. Schossler, the employee observed by the compliance officer at the top of the wall without fall protection, was terminated by respondent.

Respondent's foreman, Robin Harvey, testified that he was in charge of a four man work crew, including Mr. Schossler, at the jobsite. The job was approximately two and one half weeks long and was in its final phase at the time the OSHA inspection was conducted (Tr. 300-302). Mr. Harvey conducted a meeting with his crew on the first day of the project and instructed the crew regarding the company's safety rules. The written safety rules and policies (Exhibit R-5 and 6) as well as Respondent's disciplinary policy were distributed to the crew members . (Exhibit R-10). Mr. Harvey specifically instructed the crew to be tied off at all times and if a worker could not tie off, he was instructed to contact the foreman for instructions (Tr. 306-307).

Mr. Harvey also determined that each crew member had the appropriate safety equipment and gave Mr. Schossler a safety belt (Tr. 324). Mr. Harvey observed Mr. Schossler using his safety belt on most occasions when required; however, according to Mr. Harvey, on two occasions Harvey observed Schossler without being properly tied off and he

instructed him to tie off with his lanyard (Tr. 308-309). Mr. Schossler testified that he did not recall these instances and stated that he always tied off (Tr. 181). Two other members of the crew, Dale Thompson and Harry Baynes, testified that they attended the meeting conducted by Mr. Harvey and confirmed that the crew was instructed to tie off with a safety belt and lanyard when ten feet off the ground (Tr. 235, 236, 329). The warning given to Mr. Schossler by Harvey to tie off was overheard by Thompson and Baynes (Tr. 238, 330).

Mr, Victor Schossler, at the time of the inspection, had been an iron worker for seventeen years (Tr. 166) and had completed a three year apprenticeship training program before becoming a journeyman. He testified that he was fully trained as an ironworker (Tr. 165-166). On September 14, 1993 Mr. Schossler was hired by Respondent and assigned to foreman Harvey's crew at the News Herald construction site as an ironworker. His work activity included unloading materials from trucks and welding precast slabs (Tr. 185). Mr. Schossler was provided with a safety belt and lanyard when he was hired by Respondent as well as copies of the company's written safety rules and policies (Tr. 173). Mr. Schossler acknowledged that he was informed during the first day on the job of the company's policy that employees were required to be tied off when more than ten feet in the air (Tr. 176). He described Respondent as "a very safety oriented company" (Tr. 170).

On September 29, 1993, the date of the OSHA inspection, foreman Harvey was at another worksite and Dale Thompson was assigned as acting foreman. Mr. Thompson assigned Schossler the task of welding two precast slabs at the top interior of the stairwell. It was decided to complete the welding from a ladder; however, because of the confined space within the stairwell Thompson told Schossler to climb to the top of the precast wall and lift the ladder by rope (Tr. 155, 156). Schossler accessed the top of the wall by ladder on the outside of the stairwell and crawled along a ledge on the top interior of the wall to the point where he intended to drop a line to the ladder lying at the bottom interior of the stairwell (Tr. 161, 162), Mr. Schossler was wearing a safety belt with a lanyard while engaged in this work activity (Tr. 161). It was at this point that Schossler was observed by the compliance officer.

There was a series of lifting eyelets along the top of the precast panels which were used to lift the panels into place. The Respondent maintains, and Schossler acknowledges,

that the eyelets could have been used to provide fall protection by hooking the safety belt lanyard to an eyelet. However, the eyelets were approximately six feet apart which necessitated the use of two lanyards in order to safely traverse along the top of the wall by hooking and unhooking each lanyard as Schossler moved along the top and ensuring that one lanyard was always hooked to an eyelet (Tr. 196, 197). Mr. Schossler acknowledged that he could have used the eyelets to tie off; however, he did not because "...I wasn't there for any length of time. I mean, I was there and I was out. Gone. Done." (Tr. 216)

From the foregoing it is clear that Respondent has established all of the elements of employee misconduct. First, Respondent had an established policy regarding the use of safety belts when working more than ten feet in the air. That rule was communicated to all employees both in writing and verbally. Respondent, through its foreman, Robin Harvey, enforced the safety belt policy and warned employees when infractions were observed. Lastly, Respondent effectively enforced the rule by warning violators and, as in this case, terminating repeat offenders. In this case an experienced worker who was aware of the company policy regarding the use of safety belts, knowingly violated that policy. *See Texland Drilling Corp.* 9 BNA OSHC 1023, 1026. That employee had been warned previously when observed violating the rule and was ultimately terminated for failing to comply with the company safety belt rule. *Pennsylvania Power and Light Co., v. OSHRC* 737 F.2d 350 (3rd Cir. 1984). Mr. Schossler, while acknowledging that Respondent is "a safety oriented Company," knowingly refused to comply with respondent's safe work practices. For these reasons the citation and proposed penalty are **vacated.**

FINDINGS OF FACT

Findings of fact relevant and necessary to a determination of all issues have been made above. Federal Rules of Civil Procedure 52(a). All proposed findings of fact inconsistent with this decision are hereby **denied.**

CONCLUSIONS OF LAW

1. Respondent is engaged in a business affecting commerce and has employees within the meaning of Section 3(5) of the Act.

2. Respondent, at all times material to this proceeding, was subject to the requirements of the Act and the standards promulgated thereunder. the Commission has jurisdiction of the parties and of the subject matter of this proceeding.

3. At the time and place alleged, Respondent was not in serious violation of 29 C.F.R. 1926.28(a) or, in the alternative, 29 C.F.R. 1926.105(a).

ORDER

Serious Citation No. 1, item No. 1, dated October 13, 1993 is **VACATED.**

ROBERT A. YETMAN
Judge, OSHRC

Dated: January 6, 1994
Boston, Massachusetts