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Before: Administrative Law Judge Ken S. Welsch

**DECISION AND ORDER DISMISSING  
UNTIMELY NOTICE OF CONTEST**

This is a proceeding under § 10(a) of the Occupational Safety and Health Act (Act), 29 U.S.C. § 651 *et seq.*, to determine whether Follett Corporation's (Follett) untimely notice of contest to citations issued by the Secretary should be excused as justified.

Follett operates a bookstore referred to as "Follett's Campus Bookstore" on the campus of Tuskegee University in Tuskegee, Alabama. As a result of an inspection by the Occupational Safety and Health Administration (OSHA) on April 4-5, 2001, Follett received serious and "other" than serious citations on August 8, 2001.

The serious citation (Citation 1) alleges violations of 29 C.F.R. § 1910.141(a)(3)(i) for failing to keep the second and third floors clean from accumulations of pigeon and rodent feces; 29 C.F.R. § 1910.141(a)(5) for failing to prevent the entrance or harborage of rodents, insects, or other vermin into enclosed workplaces; and 29 C.F.R. § 1910.1001(j)(7)(iv) for failing to provide asbestos awareness training to employees who perform housekeeping in areas with asbestos-containing material (ACM), or presumed asbestos-containing material (PACM). A total penalty of \$6,750 is proposed for the alleged violations in the serious citation.

The "other" than serious citation (Citation 2) alleges violations of 29 C.F.R. § 1910.1025(d)(2) for failing to make an initial determination of whether any employee may be exposed to lead at or above the action level; and 29 C.F.R. § 1910.1025(l)(1)(i) for failing to inform employees who are potentially exposed to airborne lead of the content of Appendices A and B of 29 C.F.R. § 1910.1025. No penalty is proposed for the alleged violations in the "other" than serious citation.

Follett's notice of contest to the citations was dated September 6, 2001, more than 15 days from receipt of the citations. The Secretary moves to dismiss the notice of contest as

untimely. Follett objects to the motion to dismiss and argues that it was due to excusable neglect, mistake and inadvertence.

A show cause hearing, scheduled on February 28, 2002, was canceled based on the parties' request to submit the case on stipulated facts, which were filed February 21, 2002, and amended on March 14, 2002. The parties filed briefs on March 15, 2002.

For the reasons discussed, justifiable circumstances are not found to waive the 15-working day statutory requirement. Follett's notice of contest is dismissed as untimely. The serious citation and "other" than serious citation issued on August 8, 2001, are affirmed and a total penalty of \$6,750 is assessed.

#### *The Citation*

The parties stipulate and the court finds the following facts to constitute the record in this case:

1. The correct name of Respondent is Follett Corporation and the citations and notifications of penalty, pleadings, and orders are amended to reflect the correct name of Respondent.
2. Follett is a privately held corporation, headquartered in River Grove, Illinois.
3. Follett, through its subsidiary, Follett Higher Education Group, Inc., headquartered in Oak Brook, Illinois, is engaged in the business of operating retail college bookstores, a business affecting commerce within the meaning of Section 3(5) of the Act. Follett is the largest operator of college bookstores in North America.
4. During the period of January 1, 2001, through August 8, 2001, Follett operated a retail college bookstore located at 1013 Old Montgomery Road, Tuskegee, Alabama, on the campus of Tuskegee University.
5. Follett leased the building in which its bookstore was located from Tuskegee University.
6. During the period from April 5, 2001, through August 8, 2001, at least 8 of Follett's employees, including Follett's bookstore manager, William Reynolds, worked at the bookstore on a daily basis, Monday - Friday, during normal work weeks.

7. Prior to April 5, 2001, Follett made repeated complaints to Tuskegee University officials regarding the condition of the building in which the bookstore was housed.

8. Prior to April 5, 2001, Follett requested information from Tuskegee University officials regarding the presence of lead and asbestos-containing materials in the building in which the bookstore was housed.

9. OSHA conducted an inspection of Follett's bookstore on the campus of Tuskegee University on April 5-6, 2001.

10. On August 9, 2001, Follett received two sets of Citations and Notifications of Penalties arising out of the OSHA inspection at Follett's bookstore on April 5-6, 2001; one set was issued to Follett, and one set was issued to Tuskegee University. Both sets of citations were addressed to 1013 Old Montgomery Road, Tuskegee, Alabama, the location of Follett's bookstore.

11. Both sets of Citations and Notifications of Penalty were received by one of Follett's employees, who delivered them to Follett's bookstore manager, William Reynolds, on August 9, 2001.

12. The Citations and Notifications of Penalty were issued to Follett on August 8, 2001, and delivered to Follett on August 9, 2001 (Exh. A).

13. On August 9, 2001, Follett, through its bookstore manager William Reynolds, contacted Jesse Barnes, Director of Environmental Health and Safety for Tuskegee University. Reynolds gave Barnes both sets of Citations and Notifications of Penalty received by Follett on August 9, 2001.

14. On August 9, 2001, Reynolds, after discussing with Barnes the Citations and Notifications of Penalty issued to Follett, understood Barnes to indicate that he (Barnes) would handle the Citations and Notifications of Penalty issued to Follett and would contact OSHA regarding the Citations.

15. Follett relied upon Barnes, a representative of Tuskegee University, who was the owner of the property in which Follett's bookstore was housed, to respond to the Citations and Notifications of Penalty issued to Follett.

16. After OSHA was advised by Tuskegee University that the Citations and Notifications of Penalty issued to Tuskegee University had not been mailed to the proper address,

OSHA mailed new copies of the Citations and Notifications of Penalty issued to Tuskegee University to Leslie V. Porter, Vice President of Business and Fiscal Affairs, Tuskegee University, 204 Kresge Center, Tuskegee Institute, Alabama 36088. The new copies of the Citations and Notifications of Penalty issued to Tuskegee University were received by Tuskegee University on August 20, 2001. Tuskegee University understood that it had until September 11, 2001, to file its notice of contest to the Citations and Notifications issued to Tuskegee University. The deadline of August 30, 2001, for filing the notice of contest to the Citations and Notifications of Penalty issued to Follett remained unchanged.

17. Follett learned on September 6, 2001, that neither Barnes nor any other representative of Tuskegee University had taken any action regarding the Citations and Notifications of Penalty issued to Follett on August 8, 2001. Upon learning this fact, Follett immediately filed its notice of contest on September 6, 2001 (Exh. B).

#### *Discussion*

Section 10(a) of the Act provides that unless an employer's notice of contest is filed within 15 working days of receipt of the citation and assessment of penalty, the citation and assessment of penalty "shall be deemed a final order of the Commission and not subject to review by any court or agency." 29 U.S.C. § 659.

There is no dispute that Follett filed its notice of contest after the expiration of the statutory 15-working day period. Follett's notice of contest was filed on September 6, 2001. It should have been filed by August 30, 2001. It was 4 working days late.

The issue is whether Follett's untimely filing is excusable. Follett argues that the untimely filing was due to reasonable reliance upon Tuskegee University, who owned the property and caused the alleged violations, to timely file the notice of contest on Follett's behalf.

Section 10(a) of the Act does not bar granting relief for an employer's late filing of its notice of contest if substantial justification and circumstances exist. *Jackson Associates of Nassau*, 16 BNA OSHC 1261, 1264 (No. 91-0438, 1993) (Review Commission rejected the Secretary's argument, as in this case, that § 10(a) precludes relief or review under Rule 60(b) of the Federal Rules of Civil Procedure). For example, the Review Commission has found that an otherwise untimely notice of contest may be accepted where the delay in filing was caused by

deception on the part of the Secretary or by failure of the Secretary to follow proper procedures. Also, an employer may be entitled to relief under Rule 60(b)(1), if it is shown that a final order was entered as a result of “mistake, inadvertence, surprise, or excusable neglect,” or under Rule 60(b)(6) for such mitigating circumstances as absence, illness, or a disability which prevented the party from protecting its interests. *Branciforte Builders, Inc.*, 9 BNA OSHC 2113, 2117 (No. 80-1920, 1981). The burden is on the employer to show sufficient basis to grant such relief. *Roy Kay, Inc.*, 13 BNA OSHC 2021, 2022 (No. 88-1748, 1989).

Follett does not argue and the record does not show that the Secretary committed fraud or misrepresentation which prevented Follett from filing a timely notice of contest. Also, there is no showing of deception or failure to follow proper procedures on the part of the Secretary which caused the late filing. Follett does not assert that an absence, illness, or disability prevented it from acting to protect its interests, as required under Rule 60(b)(6).

Follett argues that the untimely notice of contest was the result of a reasonably founded mistake, wholly inadvertence, and excuseable neglect under Rule 60(b)(1). Follett states that it relied on the representations of Tuskegee University to respond to its citations. Follett argues that its reliance was reasonable because Tuskegee University had created the conditions on the property, had sole control over the conditions on the property, and was solely responsible for each of the cited violations. Also, by OSHA changing the due date for Tuskegee University’s notice of contest, the filing deadline was further obfuscated and prejudicial to Follett. The two sets of citations (Follett and Tuskegee University) related to the same conditions on the same property, but had 2 different contest dates. Tuskegee University was required to respond to its citations by September 11, 2001. Follett’s contest on September 6, 2001, was well within the University’s deadline. Follett claims that it would suffer irreparable harm if it were held liable for conditions for which it was not responsible without having a hearing on the merits and that the equitable remedy would not harm employees or otherwise delay OSHA’s enforcement. Since October 2001, Follett states that its bookstore has been operating from a new facility and is not presently in the building which was the subject of the citations.

Based on the record in this case, the circumstances show that Follett’s negligence and poor business practices in handling the citations caused the delay in filing a timely notice of contest. Rule 60(b)(1) requires a showing of “excusable” neglect rather than mere negligence or

carelessness. The citations were received by Follett on August 9, 2001, and given to its store manager, William Reynolds. Follett's store manager chose to contact Tuskegee University to handle the citations issued to Follett, as well as the citations issued to the University. It is not shown that Tuskegee University agreed to file Follett's notice of contest or assumed any responsibility for protecting Follett's legal rights. Tuskegee University had received its own citations and, according to Follett, was also accountable for the citations issued to Follett. To believe that a potentially accountable third-party would protect the rights of Follett is not reasonable. Follett's reliance on a representative of Tuskegee University was unreasonable and insufficient to invoke equitable tolling.

Follett, through its bookstore manager, had actual notice of the Citations and Notifications of Penalty issued to Follett. On the second page of the citation, under the subheading "Right to Contest," an employer is provided all the necessary information to file its own notice of contest. Follett's manager not only had actual knowledge of the citations, but he was aware that a response to the citations was required since he discussed such action with a representative of Tuskegee University.<sup>1</sup>

Follett failed to show reasonable diligence. There is no showing that Follett's manager, after giving the citations to a representative of Tuskegee University on August 9, 2001, followed up or had other contact regarding the status of the citations issued to Follett prior to the contest due date of September 30, 2001. The manager's understanding that Tuskegee University "would handle" the citations issued to Follett and "would contact OSHA" does not necessarily show that the University's responsibility extended to filing a notice of contest on behalf of Follett.

Also, it is not shown that Follett was even aware of the new citations issued to the University on September 20, 2001. Therefore, there should have been no confusion as to Follett's contest due date.

There is no dispute that Follett's store manager was the proper company official to respond to the citations. Even if not the proper official, the store manager's failure to bring the citations to the attention of the proper company official would not constitute excusable neglect. *Stroudsburg Dyeing & Finishing Co.*, 13 BNA OSHC 2058 (No. 88-1830, 1989) (the failure of

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<sup>1</sup>A supervisory employee's actual or constructive knowledge is imputed to the employer. *Dover Elevator Co.*, 16 BNA OSHC 1281, 1286 (No. 91-862, 1993).

an employee who received the mail to bring it to the attention of the proper officer does not justify relief). As the Review Commission has observed on numerous occasions, “a business must maintain orderly procedures for handling important documents.” *Louisiana-Pacific Corp.*, 13 BNA OSHC 2020, 2021 (No. 86-1266, 1989).

Follett bears the burden of its own lack of diligence in failing to act upon information contained in the citations. *Acrom Construction Services, Inc.*, 15 BNA OSHC 1123, 1126 (No. 88-2291, 1991). The onus is upon the employer to see that OSHA matters are handled properly. In this case, the untimely filing was due to Follett’s negligence and unreasonable assumption that a third party, who Follett claims is accountable for the violations, would protect its interest. There is no evidence that Tuskegee University had any authority or obligation to respond to the citations on Follett’s behalf.

Even if Follett’s reliance upon Tuskegee University was reasonable, Follett is not relieved of its responsibility to assure that its rights were protected. Follett is bound by its selected agent’s lack of diligence. *Byrd Produce Company*, 16 BNA OSHC 1268 (Nos. 91-823, 91-824, 1993) (not excusable neglect where employer relied upon attorney who failed to file timely notice of contest). An employer is accountable for the acts or omissions of its chosen representative.

Follett’s own actions in choosing to rely on the University contributed to the delay in filing a timely notice of contest. There is no showing that Follett made a reasonable or good faith effort to assure that its own legal interests were protected. Follett failed to take reasonable steps.

While I am not unsympathetic to Follett’s arguments and belief that it lacked any responsibility for the violations cited by OSHA, the circumstances here are insufficient to establish that Follett is entitled to relief from the statutory requirement to file its notice of contest within 15 working days. Follett knew the requirement. Its voluntary reliance on a third party to protect its legal interest was neither excusable nor justified.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure.

**ORDER**

Based upon the foregoing decision, it is ORDERED that:

1. Follett's notice of contest was untimely filed. The Secretary's motion to dismiss is GRANTED.
2. Citation 1, Item 1, violation of § 1910.141(a)(3)(i), is affirmed as serious and a penalty of \$2,625 is assessed.
3. Citation 1, Item 2, violation of § 1910.141(a)(5), is affirmed as serious and a penalty of \$2,625 is assessed.
4. Citation 1, Item 3, violation of § 1910.1001(j)(7)(iv), is affirmed as serious and a penalty of \$1,500 is assessed.
5. Citation 2, Item 1, violation of § 1910.1025(d)(2), is affirmed as "other" than serious and no penalty is assessed.
6. Citation 2, Item 2, violation of § 1910.1025(l)(1)(i), is affirmed as "other" than serious and no penalty is assessed.

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/s/  
KEN S. WELSCH  
Judge

Date: March 28, 2002