UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
One Lafayette Centre
1120 20th Street, N.W. — 9th Floor
Washington, DC 20036-3419

PHONE:
COM (202) 606-5100
FTS (202) 606-5100

FAX:
COM (202) 606-5050
FTS (202) 606-5050

SECRETARY OF LABOR
Complainant,
v.
MEGAWEST FINANCIAL, INC.
Respondent.

OSHRC DOCKET
NO. 93-2879

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 May 19, 1995. The decision of the Judge will become a final order of the Commission on June 19, 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 June 8, 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:

Executive Secretary
Occupational Safety and Health
Review Commission
1120 20th St. N.W., Suite 980
Washington, D.C. 20036-3419

Petitioning parties shall also mail a copy to:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
Office of the Solicitor, U.S. DOL
Room S4004
200 Constitution Avenue, N.W.
Washington, D.C. 20210

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: May 19, 1995

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 93-2879

NOTICE IS GIVEN TO THE FOLLOWING:

Jaylnn K. Fortney
Regional Solicitor
Office of the Solicitor, U.S. DOL
1371 Peachtree St., N.E.
Room 339
Atlanta, GA 30367

Stephen Alan Clark, Esquire
7440 Southwest Fourteen Street
Ft. Lauderdale, FL 33317 4906

Peter D. Anzo
Megawest Financial, Inc.
Suite A-200
3111 Paces Mill Road
Atlanta, GA 30339

Nancy J. Spies
Administrative Law Judge
Occupational Safety and Health
Review Commission
1365 Peachtree St., N. E.
Suite 240
Atlanta, GA 30309 3119

00109685750:04

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1365 Peachtree Street, N.E., Suite 240
Atlanta, Georgia 30309-3119

Phone: (404) 347-4197

Fax: (404) 347-0113

SECRETARY OF LABOR, Complainant, v. MEGAWEST FINANCIAL, INC., Respondent.	OSHRC Docket No.: 93-2879

Appearances:

Stephen Alan Clark, Esquire
(Jaylynn K. Fortney, Regional Solicitor)
Office of the Solicitor
U. S. Department of Labor
Atlanta, Georgia
For Complainant

Peter D. Anzo
Megawest Financial, Inc.
Atlanta, Georgia
For Respondent

DECISION AND ORDER

Megawest Financial, Inc. (Megawest) owns, operates, and "fee manages" apartments in the South and Midwest. From its corporate office in Atlanta, Georgia, its president, vice-president and district manager oversee the staff of the various apartment communities under Megawest's control (Tr. 520). One of those apartment communities, The Villas Apartments (Villas), is a 405-unit, 20-acre site, located in Lauderhill, Florida. Lauderhill is a part of greater metropolitan Ft. Lauderdale, Florida (Tr. 95). The Villas is owned by the partnership of REV Joint Venture (REV). For three years during 1990 through 1993 Megawest fee managed the Villas for REV (Tr. 488, 527).

This case resulted from a July 9, 1993, complaint to the Occupational Safety and Health Administration (OSHA) from Megawest's Lauderhill staff at the Villas. The complaint presented OSHA with the difficult issue of the propriety of protecting employees

against violence in the workplace under the Occupational Safety and Health Act of 1970 (Act). Following an investigation by OSHA compliance officer Michael Illes on October 12, 1993, OSHA cited Megawest for violating § 5(a)(1) of the Act by failing to furnish a workplace free from the serious recognized hazard of violence:

> in that security measures were not taken to minimize or eliminate employee exposure to assault and battery by tenants of the apartment complex.

The Act's Enforcement Scheme. When Congress addressed the need for comprehensive safety and health legislation in 1970, it was in large part motivated by a desire to reduce the high numbers of workplace deaths and injuries occurring as a result of industrial accidents and exposures.[1] Congress created OSHA to implement the Act's preventative purpose through enforcement. During the decade of the 1980s, homicide became the third leading cause of death in the workplace.[2] OSHA understandably seeks an enforcement role in decreasing these grim statistics.

Under the Act's enforcement scheme, § 6 permitted the Secretary to adopt then-existing Federal and national consensus standards or, following rulemaking, to promulgate new or emergency standards. Alternatively, if no specific standard applied to a perceived violation, the Secretary could enforce the general duty clause, § 5(a)(1), if an employer failed to render its workplace free from serious recognized hazards.

OSHA's specific standards address many identified hazards. There are no standards requiring employers to protect their employees against the criminal acts of violent persons. In some instances in the role of a good citizen, as well as in self-interest, an employer may be expected to utilize practical means to reduce the exposure to violence, although no law requires the action. When police fail to effectively control criminal conduct aimed at employees, and when the conduct appears to become more frequent and unpredictable, the burden on the employer becomes greater to assess methods of preventing violence to workers even without a mandatory requirement. The Secretary asserts that in other

---

[1] S. 2193, S. Rep. No. 91-1282, 91st Cong., 2d Sess. at 1-5 (Oct 5, 1970).

[2] National Institute for Occupational Safety and Health (NIOSH), *Alert* published by Center for Disease Control (CDC), Sept. 1993 (Exh. C-18).

instances, in order to provide a work environment free from a recognized hazard of violence, an employer must share with the police the responsibility for protecting employees. The issue here is whether Megawest was required to afford its office staff a feasible means to eliminate or materially reduce the threat of violent physical injury under the mandate of the Act.

In the debate surrounding OSHA's function in reducing violence in the workplace, certain facts must be accepted. First, nowhere in the legislative history pertaining to the Act or in the scope of the then-existing standards was there any implication that OSHA should police social behavior. Second, a potential for violence against employees working in the service sector exists for an extremely broad spectrum of employers. Undeniably, enforcement in this arena could place extraordinary burdens on an employer requiring it to anticipate the possibility of civic disorder. Third, enforcement in a sphere so distinct from that covered by OSHA's regulations would most surely tax OSHA's limited resources in ways difficult to control.

Factual Background

The Villas and Its Managing Staff. The Villas is made up of apartment units, a separate office and clubhouse building, a car wash, swimming pool, tennis courts and a lake (Tr. 44, 95, 588). The apartment units are "garden apartments," and the 20-acre site has several entrances and exits. Each unit has a separate address (Tr. 69).

Megawest employed four office persons to manage the Villas: the property manager, the assistant property manager, and two leasing agents. The property manager (and the assistant property manager under her direction) was responsible for collecting rents, approving rental applications, posting notices, walking the complex, and overseeing the office and maintenance staffs. The leasing agents showed model apartments, met with, and reviewed the qualifications of potential residents. Also employed at the complex were a maintenance supervisor, one or two assistants, a housekeeper, a porter and painters (Tr. 100-101, 571). These latter employees did not work out of the office or have much

direct interaction with the office staff (Tr. 140-141). A night security officer[3] patrolled during the nighttime hours after the office was closed (Tr. 123).

The office was staffed during 9:00 a.m. to 6:00 p.m (8:30 a.m. to 5:30 p.m. in the winter) on Monday through Friday. Only leasing agents worked on Saturdays and Sundays. Work by the office staff after regularly scheduled hours was discouraged as dangerous (Tr. 101, 108, 509). Several law enforcement officers were given rent consideration for living in the apartments. For example, Scott Shapiro, a law enforcement officer who lived at the Villas for a two-year period ending in May of 1993, was given free rent for the visibility of having his marked car on the premises in the evenings and for certain other minor duties (Tr. 77-78, 80). Except for a short period, however, no security personnel were employed during daytime office hours.

Residents' conduct. Walter Stanwick of the Broward County Sheriff's Office considered the one-square-mile area which encompassed the Villas as containing "probably one of the highest [crime areas] in Lauderhill" (Tr. 18). Although the Sheriff's Office was only 500 to 1,000 yards from the Villas, the police needed an average of twenty minutes to respond after receiving an emergency "911" call from the Villas (Exh. C-11; Tr. 36, 41). In Stanwick's opinion, police response was delayed because of the volume of calls they received for this area (Tr. 36-37). A computer list of police contacts made for January 1991 through August 1993[4] demonstrated that the police responded to a significant number of incidents at the Villas during this period (Exh. C-1; Tr. 20). Included among the requests for police assistance were those made by the Villas' office staff. Staff members testified that they were often subjected to threats or belligerent conduct and, on a few occasions, to physical attack (Exh. C-1; Tr. 108).

---

[3] The residential apartment industry uses the term "courtesy officer" rather than "security guard or security officer" for liability purposes to avoid "imply[ing] security to anybody for any reason" (Tr. 156-157).

[4] The citation was issued on October 12, 1993, and was based upon conditions existing around August 9, 1993. Thus, the occurrence of incidents in 1991 and 1992 is obviously not within the time frame of the alleged violation. However, these earlier incidents are relevant to the issues of hazard recognition and the seriousness of the hazard.

On September 11, 1991, Luanna Thompson, who was scheduled to move into the Villas that day, changed her mind and sought a refund of her security deposit. The property manager and assistant property manager were unavailable, and Thompson was advised to return in the morning. Thompson refused to leave, the police were called, and they escorted Thompson out of the office. The next morning property manager Paula Powers and assistant property manager Stacy Curiel refused to refund Thompson's security deposit in accordance with Megawest's policy. Thompson left but immediately returned and sprayed mace into the eyes of Powers and Curiel. Powers and Curiel were hospitalized with damage to their eyes and remained out of work for two weeks (Exh. C-3; Tr. 110-114, 284). Thompson was never apprehended or prosecuted, although the police investigated the incident and charges were filed (Tr. 125).

After that incident, at the specific request of the office staff, Megawest employed a daytime security guard who was stationed in the office. At the end of five weeks, Powers was directed to "let [the daytime security officer] go because we could not afford them." There had been no violent conduct directed against the staff during those five weeks (Tr. 117-118, 286). A few months later Powers was transferred to another Megawest property in favor of having a male property manager at the Villas (Tr. 279).

Male property manager Larry Melvin was also subjected to violent incidents. During 1992, a resident injured Melvin's finger by striking his hand with a telephone with such force that the telephone broke. A resident also came into the office to threaten Melvin with a 2-by-4 board. Later, a resident approached Curiel, who was also assistant manager under Melvin, in a threatening manner but she was able to duck under his arm, lock herself in the office, and call the police (Tr. 119-120; 288). After Melvin left, Powers was offered a $4,500 raise to return to the Villas as property manager, which she did (Tr. 289).

Powers described events occurring during the summer of 1993 as precipitating complaints to both Megawest's Atlanta management and to OSHA. Powers received "a large amount" of threats from residents during this period (Tr. 289). Examples included a resident who came into the office to threaten the staff that if they knocked on her door for rent again, "people had been shot for less" (Tr. 290-291). Later, resident Allen Lopez stated that "innocent people in the office were going to get hurt if his carpet was not

replaced" as Melvin had earlier promised him. The police had to be called to force Lopez to leave the office. (Tr. 290). Shortly after that incident, an individual who had his car towed came into the office and threatened to kill the night security officer. That resident also had to be escorted out of the office by police. One of the office staff, Kathy Kissel, decided to quit her job because of her fear of the threats. Powers asked Kissel to stay while Powers sought authority from the Atlanta management to hire daytime security. On June 16, 1993, a letter signed by the entire Villas office staff requested that Megawest "suppl[y] us with a security guard during operating hours" to avoid "life threatening situations."[5] A list of guard services and their fees was attached to the request (Exh. C-4; Tr. 292-293). Megawest did not respond to the letter, although the request for a security guard was repeated in several telephone conversations. A few weeks later, after Powers telephonically advised Lopez that action on his newest maintenance request might be delayed, Lopez kicked open the office door "yelling and screaming" and again refused to leave until after the police arrived. The office staff then filed a formal complaint with OSHA. (Exh. C-5; Tr. 108, 283, 290-296).

On August 9, 1993, compliance officer Illes met with the office staff at the Villas to investigate the complaint. While Illes was in the office building, resident Purlene Jefferson came to use the office telephone, which residents were not permitted to do. Jefferson had previously been advised that she should not use that telephone, but had done so anyway. On that earlier occasion, Jefferson remained on the telephone until forced to leave after the police had been called. On August 9, Jefferson again ignored the staff's direction and began using the telephone. Assistant Manager Karen Alkow approached Jefferson and depressed the receiver button disconnecting the call. Jefferson slapped and scratched Alkow on the face. Illes separated the two, and the police were called. Alkow retains a small scar from the attack (Exh. C-6; Tr. 236). Shortly after that incident Megawest's Atlanta office called Powers and admonished Alkow for confronting Jefferson, stating that Jefferson should have been removed by the police, as had been done in the prior incident. The staff's request for

---

[5] The Secretary concedes that although the employees perceived the threat of violence from residents to be "life threatening," homicide was not the probable result of the residents' actions (Sec. Brief, p. 39). This judge agrees with the Secretary's assessment.

a daytime security guard was also denied during that conversation. Powers, however, was afforded and accepted the option of transferring to another complex "to protect [her] pregnancy" (Tr. 298).

The Parties' Positions

The Secretary contends that he has established each element of a general duty clause violation and urges that violence in the workplace should not be considered fundamentally different from those hazards traditionally covered under the Act's § 5(a)(1). In urging the violation, the Secretary finds it significant that the employees had been subjected to a physical attack prior to the one which occurred during the investigation; the employer had contractual relationships with the potential attackers; the attacks were of a serious nature; the employees made repeated requests for additional security; a member of its lower-level management was one of those requesting the additional security; certain precautions suggested as abatement were already in use by surrounding apartment complexes; and the suggested abatement, *i.e.*, assessing the layout, training employees to diffuse anger, and installing a see-through barrier required minimal accommodation or expense.

Megawest, on the other hand, argues that there can be no general duty violation because the physical attacks were unforeseeable; such incidents had not occurred in the residential apartment industry before; neither it nor its regional management had reasons to believe that the first physical attack would be repeated; the police could have adequately handled the second incident; and the abatement suggested by the Secretary compromised its ability to lease apartments. Megawest also asserts that it is not a member of a high-risk industry and that it already takes many of the precautions suggested for reducing violence in high-risk workplaces. It further contends that rulemaking is necessary prior to alleging a violation for unlawful violent conduct affecting employees.

Discussion

Violence in the Workplace. Media accounts and studies of workplace trends document that criminal conduct is more and more often directed at employees who are, in effect, in

harm's way because they discharge the duties of their employment. Employees have become increasingly at risk from those they must serve.

Differing degrees of violence occur in the workplace. The conduct may range from harsh uncivil language to threats or to serious physical attacks and homicides. Only incidents giving rise to serious physical injuries or death are germane under § 5(a)(1) of the Act. Most information relevant to the subject focuses on the occurrence of homicides in the workplace. As one study suggested, however, "intentional injuries [resulting in nonfatal assaults] to workers occur much more frequently than occupational homicides. Efforts to prevent occupational homicide may also reduce the number of nonfatal assaults" (*Alert*, Exh. C-18, p. 2).

No Violation of Rulemaking. Megawest's argument concerning rulemaking will first be briefly discussed. Megawest cites *Kastalon, Inc. & Conap, Inc.*, 12 BNA OSHC 1928, 1986 CCH OSHD ¶ 27,643 (Nos. 79-3561 & 79-5543, 1986) in support of its argument that the Secretary is barred from asserting a general duty violation covering conduct which is the subject of rulemaking.

Megawest's reliance on *Kastalon* is misplaced. In *Kastalon*, the Commission consolidated two cases for the purposes of review: *Kastalon*, decided by Administrative Law Judge Alesia, and *Conap, Inc.*, decided by Administrative Law Judge Cerbone. *Kastalon* and *Conap* both dealt with 4,4'-Methylene (MOCA), a chemical used in the manufacturing process of polyurethane products. MOCA has been shown to cause cancer in animals. In 1974, the Secretary issued a detailed standard regulating the use of MOCA in the workplace, on the theory that MOCA acts as a carcinogen in humans.

The MOCA standard was ruled invalid because the Secretary had not conformed with the Act's requirements in its promulgation. In 1975, the Secretary proposed the same standard and held a hearing on the proposal. The Secretary took no further action on the proposal. Beginning in 1976, the Secretary began issuing citations to employers for violations of the general duty clause, alleging that the employers were not taking adequate precautions against exposure to MOCA.

The judges in *Kastalon* and *Conap* vacated the § 5(a)(1) violations on the grounds that the charges were attempts to enforce the invalid MOCA standard through the general duty clause. The Commission affirmed the judges' decisions, but expressly declined to rule on whether the Secretary had impermissibly sidestepped the Act's rulemaking requirements (*Kastalon*, 12 BNA OSHC at 1930):

> We need not, however, decide whether the Secretary exceeded the limits of his discretion here. Assuming *arguendo* that the general duty clause citations were properly issued, we conclude that the Secretary failed to prove that Kastalon and Conap violated § 5(a)(1), and we vacate the citations on that basis.

The Commission did express its misgivings regarding the Secretary's actions in dicta, stating (*Id.*):

> We are troubled, as were the judges, by the Secretary's apparent attempt to enforce an invalidated standard through citations under the general duty clause . . . . Particularly in a situation like this, where a standard has been proposed and rulemaking proceedings have been conducted, the Secretary's failure to complete the rulemaking, coupled with his issuance of citations under the general duty clause, do not promote the goals of "fairness and mature consideration of rules of general application" that the Act's rulemaking provisions were designed to foster.

The present case is distinguishable from *Kastalon*. Here, the Secretary has not issued a standard, valid or otherwise, addressing the prevention of workplace violence. There have been no proposals or hearings on proposals. The Secretary is not attempting to circumvent the rulemaking process, but rather is using the general duty clause for a situation in which no specific standard exists.[6]

Megawest cites a "recently published article" in its brief, quoting Jose Sanchez, OSHA's Area Director for South Florida, as saying that OSHA is "creating regulations" to

---

[6] That is not to say that the Secretary should not address the hazard of workplace violence with specific rulemaking. "Indeed, modern administrative law embodies the policy that agencies should make greater rather than less use of notice and comment rulemaking authority." *Simpson, Gumpertz, & Heger, Inc.*, 15 BNA OSHC 1851, 1863, 1991-1993 CCH OSHD ¶ 29,828, p. 40,676 (No. 89-1300, 1992). The promulgation of a specific standard would provide a fair warning to employers of what was expected of them. It would also allow their input into the creation of the standard. "[T]hose who come within the scope of the interpretation should be heard with respect to it" 15 OSHC at p. 1863.

deal with workplace violence (Brief of Megawest, p. 6). However, no evidence was adduced at the hearing that supported the conclusion that the Secretary had actually promulgated any such regulation. Nor is the Secretary prohibited from alleging a § 5(a)(1) violation merely because the possibility of some future rulemaking has been addressed. The Secretary is not precluded from asserting that workplace violence constitutes a general duty clause violation.

The General Duty Requirement of § 5(a)(1). In order to prove a violation of § 5(a)(1), the Secretary must show that: (1) a condition or activity in the employer's workplace presented a hazard to employees; (2) the cited employer or the employer's industry recognized the hazard; (3) the hazard was likely to cause death or serious physical harm; and (4) feasible means existed to eliminate or materially reduce the hazard. *Waldon Health Care Center*, 16 OSHC 1052, 1993 CCH OSHD ¶ 30,021 (Nos. 89-2804 and 89-3097, 1993) (consolidated); *Kastalon, supra.*

1. Existence of Hazard

Not every condition affecting the employment relationship is cognizable as a hazard under § 5(a)(1). In *American Cyanamid Co.*, 9 BNA OSHC 1596, 1981 CCH OSHD ¶ 25,338 (1981), *aff'd*, 741 F.2d 444 (D.C. Cir. 1984), a § 5(a)(1) case in which female employees underwent surgical sterilization to work in the lead pigments department, the Commission vacated the citation, finding that the surgical sterilization was not a "hazard" under the Act since "Congress conceived of occupational hazards in terms of processes and materials which cause injury or disease by operating directly upon employees as they engage in work or work-related activities." *Id.*, 1981 CCH OSHD at p. 31,431. In contrast here, the potential hazard arises from the critical element of the staff's job, *i.e.*, personal interaction with the residents. The duties of the office staff, with the possible exception of the leasing agents,[7] resulted in direct confrontations between the staff and the residents. The office staff predictably found that tenants became upset about receipt of a "three-day notice" before eviction; car towing; seven-day noncompliance notices; refusals to return

[7] The leasing agents showed apartments and contacted the residents while residents were seeking approval to live in or remain in the apartments. Normally, the residents' behavior during this period was not hostile and there were no threats or attacks (Tr. 172, 303, 571).

security deposits; and, on occasion, maintenance disputes (Tr. 290-291, 303). During Megawest's management of the property, the office staff attempted to reduce the high rate of monthly rent delinquencies, which also contributed to resident confrontations (Tr. 333-334). Tenants so often became angry with the office staff that Peter Anzo, Megawest's president and its representative in this case, considered responding to tenant threats to be a normal part of the staff's job (Tr. 504).

When residents threatened the staff, those residents seldom, if ever, suffered any consequences for their actions. Not only did the police fail to apprehend or prosecute the perpetrators of the physical attacks, but Megawest did not enforce the lease agreement which could have provided sanctions for a resident's threats and violent confrontations with the staff.[8] As Paula Powers explained (Tr. 332):

> Q. Ms. Jefferson, when she came in and had to be escorted off by the police, is that the type of thing that would indicate that some type of eviction should be started on her?
>
> A. See, normally, and on any other property, I would have to say yes. But even going back to Michael Griffin, when he threatened to pour boiling hot water on us[9], we tried to get him evicted. He even owed us, I think it was, two months rent at the time. The owners [REV] stepped in and they would not let us evict him for the threat.

The Villas staff was denied the protection anticipated by the contractual relationship as a response to violent threats or other inappropriate conduct. Further, although the office staff was expected to confront irate residents, they were not trained to diffuse anger or to lessen the impact of potential incidents until the police could arrive (Tr. 301). Nor did

---

[8] Although it may be argued that failure to sanction tenants' threatening confrontations may have lessened tenants' anger, it left the staff without appropriate tools to protect themselves from potentially dangerous tenants or to demonstrate that violence towards the staff had repercussions.

[9] This incident occurred after Powers became manager in March 1991 and before the macing incident in September 1991 (Tr. 277, 282).

Megawest take active preventative measures, such as ensuring the availability of properly functioning two-way radios, alarm buttons,[10] or similar devices (Tr. 118, 121-122, 317).

Megawest argues that in spite of the anticipated verbal abuse, there was no significant risk residents would physically attack the staff. Thus, it argues the physical injuries were unforeseeable. Under the direction of *Waldon Health Care,* the argument is rejected. As the Commission reasoned in finding a § 5(a)(1) hazard in the potential transmission of the virus HBV, *(Waldon Health Care,* 16 BNA OSHC at 1059):

> [T]here is no requirement that there be a 'significant risk' of the hazard coming to fruition, only that, if the hazardous event occurs, it would create a 'significant risk' to employees. [citation omitted]. There is no mathematical test to determine whether employees are exposed to a hazard under the general duty clause. Rather, the existence of a hazard is established if the hazardous incident can occur under other than a freakish or utterly implausible concurrence of circumstances. *National Realty & Constr. Co. v. OSHRC,* 489 F.2d 1257, 1265 n. 33.

Because the responsibilities of the office staff led to adversarial relationships with the tenants, the staff was not trained to diffuse anger, the residents often directed intimidating threats or conduct towards the staff, that conduct was not sanctioned, and because there were no positive measures in effect to discourage attacks, a future violent incident leading to serious physical harm was neither freakish nor implausible. The Secretary has established the first element of the § 5(a)(1) violation.

2. Recognition of the Hazard

Having established that the conditions as they existed at the Villas constituted a hazard to the office staff, the pivotal issue remains whether the hazard was one which was recognized. "A hazard is 'recognized' within the meaning of the general duty clause if the hazard is known either by the employer or its industry." *Waldon Health Care,* 16 BNA OSHC at 1061. Were this the typical case, the focus of the discussion would begin with

---

[10] Megawest's contention that its night security equipment should be considered the equivalent of a panic button alarm is without merit. Employees were unaware of the alarm system's panic button function (Tr. 134, 259, 300).

Paula Powers' (a supervisory employee's) perceived exposure to attacks. This, however, is not the typical case.

The hazards that the Act has traditionally dealt with have been hazards that arise from some condition inherent in the environment or the processes of the employer's workplace. Thus, the Act addresses the hazards of falling, of electrocution, of amputation, of suffocation, of overexposure to lead, and to noise. Standards have been fashioned to regulate the heights of guardrails, the depths of trenches, and the distances between the rungs of ladders. Regulations have been promulgated which aim to reduce employees' exposure to asbestos, bloodborne pathogens, and silica. The general duty clause has been effectively used to "fill those interstices necessarily remaining after the promulgation of specific safety standards." *Bristol Steel & Iron Works v. OSAHRC*, 601 F.2d 717, 721 (4th Cir. 1979).

These hazards are ones that the employer can anticipate and reduce or eliminate. "To respect Congress' intent, hazards must be defined in a way that apprises the employer of its obligations, and identifies conditions or practices over which the employer can reasonably be expected to exercise control." *Pelron Corporation*, 12 BNA OSHC 1833, 1835, 1986 CCH OSHD ¶ 27,605, p. 35,872 (No. 82-388, 1986). The element of an employer's control is a crucial one when determining the employer's duty under the Act. The Commission has "consistently held that employers are not to be held to a standard of strict liability, and are responsible only for the existence of conditions they can reasonably be expected to prevent." *Greene Construction Co. & Massman Construction Co.*, 4 BNA OSHC 1808, 1976-1977 CCH OSHD ¶ 21,235 (No. 5356, 1976).

For example, the Commission and the courts of appeal repeatedly have made allowances for employers who violate the Act because of unpreventable misconduct on the part of their employees. The D.C. Circuit aptly formulated the reasoning underlying this principle in its oft-cited *National Realty v. OSHRC*, 489 F.2d 1257, 1266 (D.C. Cir. 1973):

> A demented, suicidal, or willfully reckless employee may on occasion circumvent the best conceived and most rigorously enforced safety regime. This seeming dilemma is, however, soluble within the literal structure of the general duty clause. Congress intended to require elimination only of preventable hazards. It follows, we think, that Congress did not intend

> unpreventable hazards to be considered "recognized" under the clause . . . . Hazardous conduct is not preventable if it is so idiosyncratic and implausible in motive or means that conscientious experts, familiar with the industry, would not take it into account in prescribing a safety program.

Generally, when an employer addresses safety hazards in the workplace, he is dealing with inanimate objects or processes over which he can exercise a certain degree of control. A difference regarding employees is that the employer now must deal with people, capable of volitional, deliberate acts. Humans introduce a wild card into the scenario. Employers have less control over employees than they do over conditions because employees have a will, an intention, and an intellect that drives their behavior, and they are not always amenable to control. The court in *National Realty* recognized that the human factor in the workplace may thwart an otherwise safe working environment and preclude the violation. This is despite the fact that the employer has an array of methods for controlling its employees. The employer may discipline its employees through the use of reprimands, suspensions, and layoffs. The employer has even less control over the behavior of third parties not in its employ.[11]

The Secretary now asks employers to anticipate and prevent criminal behavior on the part of non-employees. Such behavior, while certainly hazardous to its victims, is completely different from any other hazards addressed by the Act. The hazard of physical assault in the present case arises not from the processes or materials of the workplace, but from the anger and frustration of people. The anger and frustration may be fueled by drugs, alcohol, or mental health problems. But the assaults are intentional acts, deliberately committed by reasoning (though, perhaps, irrational) beings.

Violence is, unfortunately, an all too common occurrence nowadays. It impacts upon all segments of society and is by no means limited to the workplace. While the threat of workplace violence is omnipresent, an employer may legitimately fail to recognize that the potential for a specific violent incident exists. It may reasonably believe that the institution

---

[11] The existence of the lease agreement provides for punishment for inappropriate conduct but does not confer a significantly greater ability upon the employer to prevent the conduct in the first instance.

to which society has traditionally relegated control of violent criminal conduct, *i.e.*, the police, can appropriately handle the conduct. To validly assess an employer's actual or constructive knowledge of workplace violence, it must be acknowledged that violence occurs when an intellect actively seeks to cause it, that violence exists in society and may occur unpredictably, and that society empowers the police to control the conduct. For these reasons, a high standard of proof must be met to show that the employer itself recognized the hazard of workplace violence. It is not enough that an employee may fear that he or she is subject to violent attacks, even if that fear is communicated to the employer, and even if the employee is one whose knowledge can be imputed to the employer. Nor is it sufficient that there has been a previous injury from a violent incident. Since these constituted the Secretary's primary proof on the issue, it cannot be found that Megawest recognized the hazard.

In addition, Megawest successfully rebutted the argument that the hazard of assault on office staff was a recognized hazard within the apartment management industry. Publicized studies, enactment of legislation, industry publications, or similarly disseminated information known to an applicable industry are all relevant to industry recognition. One month before Megawest was cited, and two months after OSHA's inspection, the CDC published the NIOSH *Alert* (Exh. C-18) warning employers of the high incidence of homicides in the workplace and seeking assistance in preventing these deaths. The publication advised employers of risk factors and recommended specific action in response (Exh. C-18, p. 3). The workplaces identified as having the highest rates of occupational homicide were (Exh. C-18, p. 3):

. taxicab establishments,

. liquor stores,

. gas stations,

. detective/protective services,

. justice/public order establishments (including courts, police protection establishments, legal counsel and prosecution establishments, correctional institutions, and fire protection establishments),

. grocery stores,

. jewelry stores,

. hotels/motels, and

. eating/drinking places.

Identified risk factors were (Exh. C-18, p. 4):

. exchange of money with the public,

. working alone or in small numbers,

. working late night or early morning hours,

. working in high-crime areas,

. guarding valuable property or possessions, and

. working in community settings (e.g., taxicab drivers and police).

As preventive measures, NIOSH suggested (Exh. C-18, pp. 4-5):

. Make high-risk areas visible to more people.

. Install good external lighting.

. Use drop safes to minimize cash on hand.

. Post [the fact].

. Install silent alarms.

. Install surveillance cameras.

. Increase the number of staff on duty.

. Provide training in conflict resolution and nonviolent response.

. Avoid resistance during a robbery.

. Provide bullet-proof barriers or enclosures.

. Have police check on workers routinely.

. Close establishments during high-risk hours (late at night and early in the morning).

Similarly, the State of Florida and the City of Lauderhill mandate that employers who operate convenience stores utilize these same basic types of protective measures to safeguard their employees from the general public (Exhs. C-7, C-8; Tr. 37).

This is not to imply that mere inclusion within a "high-risk" industry group would confer recognition that the hazard of workplace violence exists for a particular employer. In the present case, however, the apartment management industry, although a service

industry, is not identified as a high-risk employer. The fact that the Villas are located in a high crime area is of lesser significance since the potential perpetrators are residents, rather than members of the general public. Megawest knew the identities of the residents and had screened them before allowing them to move onto the property. Also, because of the hours the office was opened, its location, and the way in which the staff operated, Megawest complied with many of the recommended preventative measures listed in the NIOSH *Alert*, even if compliance was coincidental.

Megawest's witnesses testified, without contradiction, that over an extended period of time there were no physical injuries from attacks upon other office staffs by residents throughout the national and local residential apartment industry, except for the two at the Villas (Tr. 151, 207, 486, 564). Further, use of some security measures by other employers is not sufficient to establish that the industry recognized that a hazard existed for their management staffs.

The hazard was not recognized by Megawest or by its industry within the meaning of § 5(a)(1). Accordingly, the issues of whether the hazard could be expected to result in serious injury or whether the Secretary's suggested means of abatement would eliminate or materially reduce the hazard need not be addressed. The violation is vacated.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

ORDER

Based upon the foregoing decision, it is ORDERED that the alleged violation of § 5(a)(1) is vacated.

NANCY J. SPIES
Judge

Date: May 8, 1995