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I. Administrative Law

I. ADMINISTRATIVE LAW

A. Burden of Proof as to Safety Program Adequacy

Employer[1] liability under the Occupational Safety and Health Act of 1970 (OSHA or the Act)[2] for violations caused by employee[3] misconduct has been the subject of substantial litigation.[4] Decisions by OSHA administrative tribunals[5] and by the federal circuit courts have yielded diverse and often contradictory results as to both procedural and substantive matters.[6] The resulting confusion does little to bolster employer confidence in OSHA enforcement and has created serious problems in defending against alleged health and safety violations.[7] The Fourth Circuit recently clarified the existing confusion with a ruling favoring employers.

In *Ocean Electric Corp. v. Secretary of Labor*,[8] following the accidental electrocution of a company employee, an OSHA compliance officer[9] cited Ocean Electric for a violation of the safety standard requiring that "extraordinary caution" be used in the handling of electrical equipment.[10] Specifically, the inspector charged Ocean with failing to provide a protective barrier between company employees and an

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[1] *See Fourth Circuit Review—Administrative Law*, 37 WASH. & LEE L. REV. 389, 391 n.4 (1980)[hereinafter cited as *Fourth Circuit Review—Administrative Law*].

[2] *See id.* at 389 n.1.

[3] *See id.* at 392 n.13.

[4] *See, e.g.*, Dunlop v. Rockwell Int'l, 540 F.2d 1283 (6th Cir. 1976); Horne Plumbing & Heating Co. v. OSHRC, 528 F.2d 564 (5th Cir. 1976); Brennan v. OSHRC (Alsea), 511 F.2d 1139 (9th Cir. 1975); National Realty & Constr. Co. v. OSHRC, 489 F.2d 1257 (D.C. Cir. 1973); Howard P. Foley Co., [1977-78] OCC. SAF. & HEALTH DEC. (CCH) ¶ 21,862, at 26,339 (1977); Briscoe/Arrace/Conduit, [1977-78] OCC. SAF. & HEALTH DEC. (CCH) ¶ 21,631, at 25,982 (1977); Robert W. Winzinger, Inc., [1976-77] OCC. SAF. & HEALTH DEC. (CCH) ¶ 20,929, at 25,133 (1976); Weatherhead Co., [1976-77] OCC. SAF. & HEALTH DEC. (CCH) ¶ 20,784, at 24,921 (1976); Murphy Pacific Marine Salvage Co., [1974-75] OCC. SAF. & HEALTH DEC. (CCH) ¶ 19,203, at 22,956 (1975); Mississippi Valley Erection Co., [1973-74] OCC. SAF. & HEALTH DEC. (CCH) ¶ 17,098, at 21,748 (1973). *See generally* M. ROTHSTEIN, OCCUPATIONAL SAFETY AND HEALTH LAW §§ 90, 100 (1978) [hereinafter cited as ROTHSTEIN]; Note, *OSHA: Employer Liability for Employee Violations*, 1977 DUKE L.J. 614 [hereinafter cited as *Employer Liability*].

[5] *See Fourth Circuit Review—Administrative Law, supra* note 1, at 393 n.19 & 394 n.21.

[6] *See* notes 49-52 *infra*.

[7] *See generally* Andrews & Cross, *Defending an Employer Against an Alleged Violation of the General Duty Clause*, 9 GONZ. L. REV. 399 (1974); *Employer Liabiltiy, supra* note 4, at 622 n.44.

[8] 594 F.2d 396 (4th Cir. 1979).

[9] A "Compliance Safety and Health Officer" is a person authorized by the Occupational Safety and Health Administration, U.S. Department of Labor, to conduct OSHA inspections. *See* 29 C.F.R. § 1903.21(d) (1979).

[10] 29 C.F.R. § 1926.957(a) (1979). Section 1926.957 (a)(3) requires the use of extraordinary caution in handling bus bars, tower steel materials, and equipment in the vicinity of energized electrical facilities.

energized electrical bus bar[11] within a switch gear.[12] Although a closed door in the switch gear housing normally prevented contact with the bus bar, Ocean's job foreman exposed the bar by inadvertently leaving the housing door open.[13] A company employee working under the foreman's orders accidentally touched the switch gear and was electrocuted.[14]

The citation[15] issued by the OSHA compliance officer resulted in the imposition of a $700 penalty against Ocean.[16] Ocean contested the citation before an Administrative Law Judge (ALJ),[17] denying responsibility for an unforeseeable and unpreventable accident caused by the foreman's error.[18] The ALJ rejected Ocean's argument and upheld the citation on the basis of the common law doctrine of respondeat superior, which holds a master liable for the wrongful acts of his servants.[19]

On review, the Occupational Safety and Health Review Commission (Commission)[20] affirmed the ALJ's holding[21] but used different reasoning. The Commission recognized that Congress did not intend to hold employers stricly liable for the acts of their superviory employees.[22] Rather, the Commission stated that liability should not attach where a company has taken all feasible precautions to assure compliance with OSHA standards, but an unforeseeable and therefore unpreventable violation is nevertheless caused by a supervisor.[23] The Commission's decision permitted an employer to establish an affirmative defense by

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[11] A bus bar is a metal bar designed to carry high voltage electricity. Contrary to good safety practice, the bus bar involved in the *Ocean* case was not insulated. Brief for the Secretary of Labor at 2, Ocean Elec. Corp. v. Secretary of Labor, 594 F.2d 396 (4th Cir. 1979) [hereinafter cited as Brief for the Secretary]. *See* note 12 *infra*.

[12] A switch gear is an electrical or mechanical device for switching on high voltage electricity. The door to the switch gear housing was not locked. The Navy was responsible for leaving the bus bar uninsulated and the housing door unlocked. Brief for Secretary, *supra* note 11, at 2 n.2. The Navy had contracted with Ocean Electric to install an additional switch gear at the Oceana Naval Air Station in Virginia Beach, Virginia. Ocean Elec. Corp. v. Secretary of Labor, No. 76-1060, slip op. at 4 (4th Cir., Aug. 2, 1977) (unpublished first opinion, withdrawn on rehearing).

[13] 594 F.2d at 398. Ocean's foreman, Watson, opened the housing door in the course of removing an unenergized ground bus bar from the switch gear. Removal of the ground bus bar was necessary to facilitate installation of the new switch gear unit beside the existing one. *Id.* at 397.

[14] *Id.* at 398.

[15] *See Fourth Circuit Review—Administrative Law, supra* note 1, at 393 n.16.

[16] The original amount of the penalty was $1000, but the penalty was reduced by 10% for good faith, and 20% because Ocean had no prior OSHA violations. 594 F.2d at 398.

[17] *See Fourth Circuit Review—Administrative Law, supra* note 1, at 393 n.19.

[18] Ocean Elec. Corp., [1974-75] Occ. Saf. & Health Dec. (CCH) ¶ 18,422, at 22,466 (1974) (CCH Summary).

[19] *Id.; see* text accompanying notes 29-32 *infra;* note 28 *infra* (Commission decision reversed on remand because respondeat superior analysis used).

[20] *See Fourth Circuit Review—Administrative Law, supra* note 1, at 394 n.21.

[21] Ocean Elec. Corp., [1975-76] Occ. Saf. & Health Dec. (CCH) ¶ 20,167, at 23,992 (1975).

[22] *Id.* at 22,993-94.

[23] *Id.* at 23,993.

demonstrating that all necessary precautions were taken to prevent the violation.[24] An employer's safety program would be a key element in establishing that a violation was unforeseeable and unpreventable. The Commission stated that safety violations committed by supervisors can be considered unforeseeable if the employer has provided effective safety training.[25] Thus, the Commission found that where an OSHA violation is caused by employee misconduct, an adequate safety program is a prerequisite to establishing a defense of unforeseeability.[26] The Review Commission's decision to sustain the citation turned on a finding that Ocean had not successfully met the requisite burden of proof in demonstrating the adequacy of its safety program.[27]

On appeal, the Fourth Circuit reversed the finding against Ocean.[28]

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[24] The Commission previously allowed defenses similar to the unforeseeability/unpreventability defense only when a violation was created by non-supervisory personnel. *See* text accompanying notes 48-51 *infra* (discussing unforeseeability/unpreventability defense). The Commission pointed out that the defense would be more difficult to establish where supervisory personnel are concerned. The Commission cited National Realty & Constr. Co. v. OSHRC, 489 F.2d 1257 (D.C. Cir. 1973), for the proposition that because supervisory personnel set an example in the workplace, the employer has a greater duty to insure the proper conduct of such personnel. *Id.* at 1267 n.38. Also, the fact that a foreman could feel free to breach a safety policy is strong evidence of substandard safety policy enforcement. [1975-76] Occ. Saf. & Health Dec. (CCH) ¶ 20,167, at 23,994 n.2.

[25] [1975-76] Occ. Saf. & Health Dec. (CCH) ¶ 20,167, at 23,994. The view that lack of an adequate safety program may constructively be used to indicate the foreseeability of a particular violation is widely accepted. *See, e.g.*, General Dynamics Corp. v. OSHRC, 599 F.2d 453, 459 (1st Cir. 1979); Horne Plumbing & Heating Co. v. OSHRC, 528 F.2d 564, 568-69 (5th Cir. 1976); Brennan v. Butler Lime & Cement Co., 520 F.2d 1011, 1017 (7th Cir. 1975); National Realty & Constr. Co. v. OSHRC, 489 F.2d 1257, 1266 n.37 (D.C. Cir. 1973); *Employer Liability, supra* note 4, at 621. *See also* notes 43 & 52 *infra*.

[26] [1975-76] Occ. Saf. & Health Dec. (CCH) ¶ 20,167, at 23,994.

[27] *Id.* Commissioner Cleary concurred in the *Ocean* decision but added that the actions and knowledge of supervisory personnel should be imputed to their employers. Cleary apparently would have allowed the unpreventability defense, however, had the case involved non-supervisory employees or a foreman not acting in his supervisory capacity. *Id.* at 23,994 n.5. Commissioner Cleary relied, in part, on the respondeat superior analysis used in Floyd S. Pike Elec. Contr., Inc., [1974-75] Occ. Saf. & Health Dec. (CCH) ¶ 19,274, at 23,047 (1975). The Fourth Circuit had previously vacated and remanded *Pike* because of the respondeat superior analysis used. Floyd S. Pike Elec. Contr., Inc. v. OSHRC, 557 F.2d 1045, 1046 (4th Cir. 1977).

Commissioner Moran dissented in *Ocean*, voicing two objections which ultimately were adopted by the Fourth Circuit. Moran objected that the citation and the conduct of the hearings did not emphasize the adequacy of Ocean's safety program, which ultimately became the basis for the Commission's decision. Additionally, Moran felt that the Secretary should have carried the burden of proving that Ocean's efforts, including Ocean's safety program, fell short of the standard of responsibility required to prevent such violations. Ocean Elec. Corp., [1975-76] Occ. Saf. & Health Dec. (CCH) ¶ 20,167 at 23,995 (1978) (Moran, C., dissenting).

[28] Ocean Elec. Corp. v. Secretary of Labor, 594 F.2d 396 (4th Cir. 1979). The Fourth Circuit previously filed an opinion affirming the Commission. Ocean Elec. Corp. v. Secretary of Labor, No. 76-1060 (4th Cir. Aug. 2, 1977) (unpublished first opinion, withdrawn on rehearing). Judge Craven, writing for the court, based his decision on agency/respondeat superior principles. Craven felt that a contrary holding would artifically separate a company

The court agreed with the Commission that application of the respondeat superior theory was improper in OSHA employeer liability cases.[29] The Fourth Circuit found that under OSHA case law, a citation is inappropriate if based on an employee act which is an "isolated incident of unforeseeable or idiosyncratic behavior."[30] The *Ocean* court reasoned that a contrary holding would go beyond congressional goals in enacting OSHA, since employers were not intended to be made insurers of employee safety.[31] Thus, the Fourth Circuit agreed with the Review Commission that holding employers liable for safety violations, regardless of efforts to comply, would only discourage such efforts.[32]

The Fourth Circuit disagreed with the Commission, however, on the issue of who must prove an accident's preventability, holding that the Secretary of Labor (Secretary) must bear this burden instead of the employer.[33] The court specifically ruled that the Secretary must prove employer knowledge of an OSHA violation.[34] This employer knowledge is the same knowledge which the Act requires to uphold a serious violation of a safety standard.[35] The court buttressed this holding by citing a regulation stating generally that the Secretary has the burden of proof in OSHA proceedings.[36] In addition, the *Ocean* court cited the D.C. Circuit's holding in *National Realty & Construction Co. v. Occupational Safety &*

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from its supervisors and render the Act meaningless. Ocean Elec. Corp. v. Secretary of Labor, No. 76-1060, slip op. at 8, 10 (4th Cir. Aug. 2 1977). The Chief Judge concurred in the original *Ocean* decision, although he disagreed with the application of respondeat superior prinicples. The Chief Judge's concurring opinion expressed the view that Ocean had not done everything reasonably possible to assure compliance with OSHA standards. *Id.* at 15-16. Judge Field dissented, noting the concern voiced in Commissioner Moran's dissent at the Commission hearing, *see* note 27 *supra*, and raised the possibility that the Commission's procedure violated due process. Ocean Elec. Corp. v. Secretary of Labor, No. 76-1060, slip op. at 23. After the original decision, however, the Fourth Circuit held a rehearing before a reconstituted panel. In reversing the Commission's decision following rehearing, the Fourth Circuit withdrew the original opinion.

[29] 594 F.2d at 403. Given that the purpose of OSHA is preventative rather than punitive or compensatory, a rule of strict liability under respondeat superior principles would appear to be counter-productive. *See* text accompanying notes 31-32 *infra*. *See* generally B & B Insulation, Inc. v. OSHRC, 583 F.2d 1364, 1371 (5th Cir. 1978) (discussing OSHA's preventative nature).

[30] 594 F.2d at 401.

[31] *Id.* at 399. The Fourth Circuit noted the congressional purpose behind OSHA, stated in 29 U.S.C. § 651(b) (1976), of assuring safe working conditions "so far as possible . . ." and implying that Congress meant to limit OSHA sanctions to situations where some practical remedial benefit could be realized. 594 F.2d at 399.

[32] 594 F.2d at 399.

[33] *Id.* at 403.

[34] *Id.*

[35] *See* text accompanying notes 51 & 56 *infra*. *See also* note 48 *infra* (discussing employer knowledge and relationship to other factors which are considered in OSHA proceedings).

[36] 29 C.F.R. § 2200.73(a) (1979). Section 2200.73(a) provides that the Secretary must carry the burden of proof in all proceedings commenced by a notice of contest. *Cf.* § 2200.73(b) (where proceedings are commenced by petition for modification of abatement period, petitioner has burden of establishing necessity of such modification).

Health Review Commission (OSHRC),[37] which placed the burden on the Secretary to show how a company could have improved its safety program and to demonstrate the feasibility and likely utility of such measures.[38] In reversing the Commission's finding against Ocean, the Fourth Circuit stated that the record failed to show that the company could have foreseen the accident.[39]

Additionally, the Fourth Circuit found that the Commission acted unfairly by failing to inform Ocean that the adequacy of its safety program would be an issue in the review proceeding.[40] The court stated that the issue of safety program adequacy was not before the ALJ and that the Commission's holding against Ocean for failure to carry the burden of proof bought up the issue for the first time.[41] Again citing *National Realty,* the court found that the Secretary's failure to amend the pleadings or otherwise bring the company's safety program into issue during the ALJ or Review Commission proceedings prejudiced Ocean.[42] The Fourth Ciruit reasoned that if Ocean had known that the safety program was at issue when the parties first realized that liability for the foreman's oversight was of central importance, the result of the trial might have differed.[43]

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[37] 489 F.2d 1257, 1268 (D.C. Cir. 1973); *see Fourth Circuit Review—Administrative Law, supra* note 1, at 398 n.47 (discussing *National Realty*); note 43 *infra.*

[38] 594 F.2d at 402. The Secretary attempted to distinguish *National Realty* as a general duty case, arguing that the broad scope of the general duty clause justified placing the burden of proof on the government. Under the general duty clause, 29 U.S.C. § 654(a)(1) (1976), an employer must furnish a workplace free from recognized hazards likely to cause death or serious bodily harm. *Cf. id.* § 654(a)(2) (1976) (specific duty clause which requires employers to conform to detailed health and safety standards promulgated by Secretary). The Fourth Circuit summarily rejected the Secretary's argument. 594 F.2d at 402. Both *National Realty* and *Ocean* addressed the burden of proof in specifying measures by which an employer could improve its safety program, and in establishing the practicality of the improvements. Therefore, the fact that an OSHA citation is based on a specific standard rather than the general duty clause should not require a different allocation of the burden of proof as to the same issue.

[39] 594 F.2d at 403. The *Ocean* court emphasized the stipulations that the forman's act in leaving the housing door open was accidental rather than intentional and that *Ocean* did not anticipate the occurrence.

[40] *Id.*

[41] *Id.* at 402.

[42] *Id.* at 403.

[43] *Id.* In *National Realty,* the D.C. Circuit ruled that deciding a case on a legal theory or set of facts not presented at the OSHA administrative hearing is "patently unfair". 489 F.2d at 1267 n.40. The D.C. Circuit also held that when an employer learns the exact nature of the alleged violation after the hearing, the employer is unfairly deprived of an opportunity to cross-examine the Secretary's witnesses or to present rebuttal evidence. *Id.* at 1267. *But see* General Dynamics Corp. v. OSHRC, 599 F.2d 453, 461 (1st Cir. 1979). In *General Dynamics,* an employer cited for a general duty clause violation defended on the grounds that the incident was an isolated occurrence of employee misbehavior. *Id.* at 457. *See also* text accompanying note 52 *infra* (discussing *General Dynamics*). The First Circuit rejected the employer's charge that the Review Commission acted improperly in affirming the general duty citation on the basis of safety program inadequacy. The court pointed out that although the citation had not referred to the employer's safety program, the Secretary

Ocean Electric is illustrative of a situation which commonly arises in OSHA litigation and which results in conflicting analysis by the courts.[44] The rule which exculpates employers from liability for unforeseeable employee misconduct has a sound policy basis, which is rooted in the notion that unpreventable hazards should not result in OSHA sanctions.[45] Since OSHA is remedial in nature, sanction should not apply against an employer for unpreventable safety violations.[46] Unfortunately, a morass of contradictory and unclear case law has obscured the basic concept of preventability.[47] Courts have utilized a variety of terms and theories as analytical tools when dealing with cases involving employee-generated violations. For example, when an employer pleads lack of responsibility for an OSHA violation, the courts have used such language as "idiosyncratic behavior," "foreseeability," "knowledge," and "isolated brief violation" in making their decisions.[48] Each of these terms, however, bears on the issue of preventability. In every instance, the courts appear to be concerned with whether, through reasonable precautionary measures, the violation could have been prevented.[49] The difficulty of

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brought the issue into contention at the review proceeding. 599 F.2d at 461. Thus, in contrast to *Ocean Electric*, the employer in *General Dynamics* was aware that safety program adequacy was at issue. *See* 594 F.2d at 402 (issue of safety program adequacy first brought into *Ocean* case in Review Commission opinion finding against employer for failure to carry burden of proof).

[44] *See generally* ROTHSTEIN, *supra* note 4, § 90, at 118; *Employer Liability, supra* note 4, at 614-30.

[45] *See* text accompanying notes 31-32 *supra.*

[46] *See* B&B Insulation, Inc. v. OSHRC, 583 F.2d 1364, 1371 (5th Cir. 1978) (emphasizing OSHA's remedial and preventative purpose).

[47] *See generally* General Dynamics Corp. v. OSHRC, 599 F.2d 453 (1st Cir. 1979); Ocean Elec. Corp. v. Secretary of Labor, 594 F.2d 396 (4th Cir. 1979); Dunlop v. Rockwell Int'l, 540 F.2d 1283 (6th Cir. 1976); Brennan v. OSHRC (Alsea), 511 F.2d 1139 (9th Cir. 1975); Interstate Roofing Co., [1978] OCC. SAF. & HEALTH DEC. (CCH) ¶ 22,803, at 27,536 (1978); Ocean Elec. Corp., [1975-76] OCC. SAF. & HEALTH DEC. (CCH) ¶ 20,167, at 23,992 (1975); Murphy Pacific Marine Salvage Co., [1974-75] OCC. SAF. & HEALTH DEC. (CCH) ¶ 19,203, at 22,956 (1975); Mississippi Valley Erection Co., [1973-74] OCC. SAF. & HEALTH DEC. (CCH) ¶ 17,098, at 21,748 (1973). *See also* notes 27, 28, & 43 *supra;* notes 51, 52, & 62 *infra.*

[48] *See, e.g.,* General Dynamics Corp. v. OSHRC, 599 F.2d 453, 462 (1st Cir. 1979) ("idiosyncratic conduct"); Brennan v. Butler Lime & Cement Co., 520 F.2d 1011, 1018 (7th Cir. 1975) ("foreseeability"); Brennan v. OSHRC (Alsea), 511 F.2d 1139, 1143 (9th Cir. 1975) ("knowledge"); Standard Glass Co., [1971-73] OCC. SAF. & HEALTH DEC. (CCH) ¶ 15,146, at 20,220 (1972) ("isolated, brief violation"). The relationship between these words may be illustrated in somewhat simplified form. If employee misbehavior is idiosyncratic *and* is an isolated occurrence, then the act is not foreseeable. *See generally* ROTHSTEIN, *supra* note 4, § 90, at 118-19; *Employer Liability, supra* note 4, at 621. If the employer was unaware of the accident at the time of its occurrence, and the accident was not foreseeable, then the employer had neither actual nor constructive knowledge of the event. Finally, if the violation was unforeseeable and the employer had no knowledge of the occurrence, then the violation was unpreventable and therefore not culpable. *See, e.g.,* Howard P. Foley, Co., [1977-78] OCC. SAF. & HEALTH DEC. (CCH) ¶ 21,862, at 26,339, 26,341 (1977) (violation unpreventable because not reasonably foreseeable). Problems exist, however, because courts have not been consistent in the terminology used to analyze cases involving employer liability under OSHA for employee caused violations.

[49] *See, e.g.,* National Realty & Constr. Co. v. OSHRC, 489 F.2d 1257, 1266 (D.C. Cir.

analysis is intensified because courts have reached varying conclusions in allocating the burden of proof, depending on which terminology is used in evaluating the case.[50] *Ocean* illustrates this difficulty. The federal circuit courts generally agree that the Secretary must prove employer knowledge as a matter bearing on foreseeability and preventability in order to sustain liabiltiy under an OSHA citation.[51] On the other hand, the Review Commission regards "isolated employee misconduct" as an affirmative defense to be proven by the employer.[52] *Ocean Electric* is a

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1973) (Congress only intended to require elimination of preventable hazards); ROTHSTEIN, *supra* note 4, § 90, at 119 (unfair to penalize employer for unpreventable conditions).

[50] *Cf.* Ocean Elec. Corp. v. Secretary of Labor, 594 F.2d 396, 403 (4th Cir. 1979) (Secretary must prove foreseeability); Brennan v. OSHRC (Alsea), 511 F.2d 1139, 1143 (9th Cir. 1975) (Secretary must prove employer knowledge); Floyd S. Pike Elec. Contr. Inc., [1978] OCC. SAF. & HEALTH DEC. (CCH) ¶ 22,805, at 27,541, 27,543-44 (1978) (employer must prove unpreventable employee misconduct); Mississippi Valley Erection Co., [1973-74] OCC. SAF. & HEALTH DEC. (CCH) ¶ 17,098, at 21,748, 21,750 (employer must prove isolated occurrence).

[51] *See, e.g.*, Dunlop v. Rockwell Int'l 540 F.2d 1283, 1289 (6th Cir. 1976); Horne Plumbing & Heating v. OSHRC 528 F.2d 564, 571 (5th Cir. 1976); Brennan v. OSHRC (Alsea), 511 F.2d 1139, 1143 (9th Cir. 1975). Alsea involved a lumber company charged with several serious violations of specific standards under 29 U.S.C. § 654(a)(2) (1976) (special duty clause). The Ninth Circuit held that employer knowledge is an element of all OSHA violations regardless of their severity. *See* note 36 *supra*. Under the Ninth Circuit's view, the Secretary has at least the initial burden of establishing a prima facie case before the burden of going forward shifts to the employer. 511 F.2d at 1143. *Alsea* has been characterized as the leading case on employer knowledge involving employee misconduct. *See* ROTHSTEIN, *supra* note 4, § 90, at 121. The Fifth Circuit expressly adopted the Ninth Circuit's position that the Secretary must prove employer knowledge. 528 F.2d at 571 (violation of trench shoring standard). In *Rockwell*, the Sixth Circuit also followed the Ninth Circuit's reasoning in affirming a Commission decision vacating a citation for failure to provide respirators for employees. The *Rockwell* court found that the Secretary must prove employer knowledge for both serious and trivial violations of the Act. 540 F.2d at 1289-91.

[52] *See, e.g.*, Briscoe/Arrace/Conduit, [1977-78] OCC. SAF. & HEALTH DEC. (CCH) ¶ 21,631, at 25,982 (1977); Robert W. Winzinger, Inc., [1976-77] OCC. SAF. & HEALTH DEC. (CCH) ¶ 20,929, at 25,133 (1976); Weatherhead Co., [1976-77] OCC. SAF. & HEALTH DEC. (CCH) ¶ 20,784, at 24,921 (1976); Murphy Pacific Marine Salvage Co., [1974-75] OCC. SAF. & HEALTH DEC. (CCH) ¶ 19,203, at 22,956 (1975); Mississippi Valley Erection Co., [1973-74] OCC. SAF. & HEALTH DEC. (CCH) ¶ 17,098, at 21,748 (1973). The rationale for placing the burden of proof on the employer rather than the Secretary is that the former has better access to information relevant to a particular defense. *See* Murphy Pacific Marine, [1974-75] OCC. SAF. & HEALTH DEC. (CCH) ¶ 19,205, at 22,958 (1975) (Moran, C., concurring).

The Commission regards the affirmative defense of isolated employee misconduct as containing three elements. First, there must be an isolated, brief violation of a safety standard by an employee. Second, the employer must have no knowledge of the violation. Finally, the violation must be contrary to an adequate and uniformly enforced work rule. *See* ROTHSTEIN, *supra* note 4, § 90, at 119-24; *Employer Liability, supra* note 4, at 622-23.

Courts commonly have looked to an employer's safety program when the isolated occurrence defense is raised. *See, e.g.*, General Dynamics Corp. v. OSHRC, 599 F.2d 453, 459 (1st Cir. 1979) (safety training relevant whenever employer defends on basis of idiosyncratic behavior); Horne Plumbing & Heating Co. v. OSHRC, 528 F.2d 564, 568-69 (5th Cir. 1976) (noting employer's excellent safety program); Brennan v. Butler Lime & Cement Co., 520 F.2d 1011, 1017 (7th Cir. 1975) (adequacy of safety program viewed as crucial); National Realty & Constr. Co. v. OSHRC, 489 F.2d 1257, 1266 n.37 (D.C. Cir. 1973) (hazardous employee conduct may be considered preventable by adequate safety training).

typical isolated employee misconduct case. The first two elements of the defense which the Commission requires, an isolated, brief violation and lack of knowledge, were stipulated in Ocean.[53] Ocean's safety training was the only element of the isolated occurrence defense in contention.[54] Safety program adequacy has been directly linked to the basic concept of preventability.[55] Courts have considered hazardous employee conduct to be preventable, even in the absence of actual knowledge, if an adequate safety program would have taught the employee to avoid such conduct.[56] The Fourth Circuit's decision regarding the Secretary's burden of proof recognizes this link between preventability and safety program adequacy.

When a question arises concerning safety program adequacy, the Fourth Circuit's holding in *Ocean* allows the Secretary to require that the employer fulfill the "burden of production" by coming forward with all relevant information on the matter.[57] Under the *National Realty* test relied on in *Ocean Electric,* the Secretary has the "burden of persuasion" and must affirmatively demonstrate the requirements of an adequate safety program, as well as the feasibility and likely utility of these requirements.[58] Finally, the Secretary must prove that the employer's program did not meet these requirements.[59] In *Ocean,* the Secretary presented no evidence on any of these points.[60]

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[53] 594 F.2d at 398.

[54] An inadequate safety program may indicate that violation of a safety standard by an employee is foreseeable. *See* Ocean Elec. Corp., [1975-76] Occ. Saf. & Health Dec. (CCH) ¶ 20,167, at 23,992, 23,994. *See also* Horne Plumbing & Heating, Inc. v. OSHRC, 528 F.2d 564, 569 (5th Cir. 1976); Brennan v. Butler Lime & Cement Co., 520 F.2d 1011, 1018 (6th Cir. 1975).

[55] *See* Brennan v. Butler Lime & Cement Co., 520 F.2d at 1018; National Realty & Constr. Co. v. OSHRC, 489 F.2d at 1266; Howard P. Foley Co., [1977-78] Occ. Saf. & Health Dec. (CCH) ¶ 21,862, at 26,339 (1977); Rothstein, *supra* note 4, § 90, at 122.

[56] *See* Brennan v. Butler Lime & Cement Co., 520 F.2d at 1017; National Realty & Constr. Co. v. OSHRC, 489 F.2d at 1266 n.37.

[57] 594 F.2d at 403 n.4. *See also* Danco Constr. Co. v. OSHRC, 586 F.2d 1243, 1247 n.6 (8th Cir. 1978) (upholding Commission determination that employer must come forward with evidence to rebut Secretary's prima facie showing of inadequate safety training and supervision).

[58] 594 F.2d at 402.

[59] *See* 489 F.2d at 1268.

[60] In ruling that the employer had failed to establish the adequacy of its safety program, the Commission noted several "requirements" which the evidence did not address. [1975-76] Occ. Saf. & Health Dec. (CCH) ¶ 20,167 at 23,994. For example, the Commission did not know whether regular safety meetings were held and employees were required to attend and discuss particular safety problems or whether specific rules were established and enforced. *Id.* By speculating about the particular requirements of an adequate safety program, the Commission engaged in a practice which had been specifically condemned in *National Realty.* The D.C. Circuit noted that the Secretary has considerable latitude before and during a hearing to alter the pleadings and legal theories involved. 489 F.2d at 1267. The court reasoned that an employer cannot adequately defend itself when the employer only learns of the exact nature of the alleged violation after the hearing. *Id.* Thus, the Commission may not serve as an expert witness for the Secretary. *Id.* at n.40. Rather, the Secretary must prove that demonstrably feasible procedures would have materially reduced the

Given *Ocean's* holding as to the burden of proof, the Fourth Circuit most likely will overturn cases which have held against employers for failure to prove isolated employee misconduct as an affirmative defense. The *Ocean* decision, however, should result in friction between the Fourth Circuit and the Review Commission. The "isolated employee misconduct defense" has been characterized as the most important of all substantive defenses to OSHA charges and has been used widely in OSHA proceedings.[61] Recent Commission decisions show no sign of abandoning the affirmative defense requirement.[62]

The Commission's maintenance of the "isolated employee misconduct defense," requiring that the employer prove safety program adequacy, is contrary to the requirement that the Secretary prove employer knowledge of OSHA violations, as consistently stated by the federal circuit courts.[63] Thus, the Fourth Circuit properly reallocated the burden of proof on the issues of safety program adequacy, foreseeability, and knowledge to the Secretary. The *Ocean* court's holding is in keeping with the general premise that liability should not attach for unforeseeable and unpreventable OSHA violations and that the burden of proof on this issue should rest with the Secretary.[64]

JEFFREY H. GRAY

B. *Broad Scope of General Safety Standards—Applicability in OSHA Litigation*

Congress enacted the Occupational Safety and Health Act of 1970 (OSHA)[1] to promote safe and healthful working conditions. OSHA

likelihood that such conduct would have occurred. 489 F.2d at 1267. The "demonstrably feasible measures" referred to by the *National Realty* court have been defined as enforcement techniques which may reasonably be required of employers faced with employee noncompliance problems, given the character of the hazard and the economics of the industry. *See* Note, *Employee Noncompliance with OSHA Safety Standards*, 90 HARV. L. REV. 1041, 1049-50 (1977).

[61] *See* ROTHSTEIN, *supra* note 4, § 90, at 118.

[62] In 1978, three years after deciding *Ocean Electric*, the Commission decided an almost identical case and reached the same result. In Interstate Roofing Co., [1978] OCC. SAF. & HEALTH DEC. (CCH) ¶ 22,803 at 27,536 (1978), the employer was cited for an OSHA violation created by one of its supervisory employees. The Commission held that the employer had the burden of proving that the supervisor's conduct was preventable and that to carry this burden, the employer must show that its employees had received "adequate" safety training. *Id.* at 27,538. The OSHRC concluded by ruling against the employer for failure to prove that an adequate safety program had been maintained. *Id.*

[63] *See* Ocean Elec. Corp., [1975-76] OCC. SAF. & HEALTH DEC. (CCH) ¶ 21,167, at 23,996-97 (1975) (Moran, C., dissenting); ROTHSTEIN, *supra* note 4, § 77, at 98 n.53.

[64] *See* text accompanying notes 30-32 *supra*.

[1] 29 U.S.C. §§ 651-678 (1976). The 91st Congress enacted OSHA, and President Nixon signed the Act into law on December 29, 1970. More Americans had been killed on the job in the four years prior to OSHA's passage than in the Vietnam War. In addition, industrial

charges the Secretary of Labor (Secretary) with promulgation[2] and enforcement[3] of health and safety standards, and requires employers[4] to

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accidents disabled more than two million persons annually, and during 1970, there were approximately 390,000 victims of job-related disease. HOUSE COMM. ON EDUCATION AND LABOR, OCCUPATIONAL SAFETY AND HEALTH ACT, H.R. DOC. No. 91-1291, 91st Cong., 2d Sess. 14-15 (1970) [hereinafter cited as H. REP.]. Lost wages amounted to over $1.5 billion per year, and the annual loss to the Gross National Product was over $8 billion. *See* S. REP. No. 1282, 91st Cong., 2d Sess. 2, *reprinted in* [1970] U.S. CODE CONG. & AD. NEWS 5177, 5178 [hereinafter cited as S. REP.]. The Occupational Safety and Health Act took effect on April 28, 1971 and represented the culmination of the federal government's concern for job health and safety. *See generally* Comment, *The Occupational Safety and Health Act of 1970: An Overview*, 4 CUM. SAM. L. REV. 525 (1974) [hereinafter cited as *Overview*]. Federal protection of safety and health is authorized by the commerce clause of the United States Constitution. U.S. CONST. art. 1, § 8, cl. 3. Congress determined that work-related injuries and sickness impose a substantial burden on interstate commerce through lost production, wage loss, medical expenses, and disability compensation payments. 29 U.S.C. § 651(a) (1976). Under the commerce clause, OSHA is applicable to any business affecting commerce among the states. The Act has extremely broad applicability and represents the full exercise of the commerce power. *See id.* § 651(b). Only a limited number of employees are outside the Act's jurisdiction. Workers whose employment is regulated by other federal and certain state agencies, 29 U.S.C. § 653(b)(1) (1976), as well as federal, state, and local employees, *id.* § 652(5), are exempt from OSHA regulation. OSHA applies to over 4 million businesses and over 57 million employees. *See Overview, supra* at 528.

[2] 29 U.S.C. § 655 (1976). Any interested person, a representative of any employer or employee organization, a nationally recognized standards-producing organization, the Secretary of Health, Education and Welfare (HEW), or a state or political subdivision may submit written information regarding promulgation of a specific health or safety standard. *Id.* § 655(b)(1). When the Secretary determines the need for a specific standard, he may appoint an advisory committee to assist in development of this standard. *Id.* The 15 member advisory committee shall include one or more designees of the Secretary of HEW and shall include an equal number of persons qualified by experience and affiliation to present the views of both employers and employees. The Secretary of Labor may also appoint other qualified persons to assist in the committee's work. These members may include representatives of professional organizations of technicians and professionals specializing in occupational safety or health, as well as representatives of nationally recognized standards-producing organizations. *Id.* § 656(b). The advisory committee submits recommendations to the Secretary within 90 days from the date of the committee's appointment. *Id.* § 655(b)(1). The Secretary's proposed rule is published in the Federal Register, and interested persons have 30 days to submit written data or comments. *Id.* § 655(b)(2). During this 30 day period, interested parties may file written objections with the Secretary regarding the proposed rule. The objecting party must state the grounds for the objection and may request a public hearing. The Secretary must then publish in the Federal Register a notice specifying the occupational safety or health standard to which objections have been filed and a hearing requested. This notice must specify the time and place for the requested hearing. *Id.* § 655(b)(3). The Secretary has 60 days following expiration of this 30 day comment/objection period or following the completion of any hearing which results to issue a new standard or to make a determination that a rule should not be issued. Any standard which is promulgated may have a delayed effective date in order to give employers and employees an opportunity to familiarize themselves with the standard's requirements. *Id.* § 655(b)(4). The above-described procedure for promulgation of standards also applies to the modification or revocation of any OSHA standard. *Id.*

[3] 29 U.S.C. §§ 657-659 (1976). The Secretary has broad powers to inspect and investigate places of employment to insure conformance with the Act. In enacting OSHA, Congress found that government personnel need a "right of entry" into any place of employment

within the Act's jurisdiction in order to ascertain safety and health conditions and the extent of compliance. *See id.* § 657. Under 29 U.S.C. § 657(a) (1976), the Secretary or his authorized compliance officer is authorized, upon presentation of appropriate credentials, to enter any workplace at reasonable times and without delay. Upon entry, the Secretary may inspect "within reasonable limits and in a reasonable manner" all pertinent conditions, structures, machines, apparatus, devices, equipment and materials therein, and may question privately any employer or employees. The Supreme Court has recently held that the owner of a business has not, by necessary utilization of employees in his operation, thrown open to warrantless inspection by the Secretary those areas where employees alone are permitted. Marshall v. Barlow's, Inc., 436 U.S. 307, 315 (1978).

During an OSHA inspection a representative of the employer and a representative of his employees must be given an opportunity to accompany the compliance officer. 29 U.S.C. § 657(e) (1976). The physical inspection of the workplace is commonly known as the "walk-around". *See* Comment, *Occupational Safety and Health Inspections*, 9 GONZ. L. REV. 555, 561 (1974). Following the walk-around, at a final meeting known as the closing conference, the compliance officer must inform the employer of the OSHA violations discovered during the inspection. 29 C.F.R. § 1903.7(e) (1979). At the closing conference, the employer is given an opportunity to bring any pertinent information regarding conditions of the workplace to the compliance officer's attention. *Id.* Either the employer or affected employees are given the right by 29 C.F.R. § 1903.19 (1979) to request an informal meeting with the Assistant Regional Director of the Occupational Safety and Health Administration, *see id.* § 1903.21(f), following an inspection. Discussion at this informal conference may cover any issues raised by an inspection, citation, notice of proposed penalty, or notice of intention to contest. *Id.* § 1903.19. Regardless of whether the employer or the employee requests the conference, the Assistant Regional Director is required under § 1903.19 to afford the other party an opportunity to participate. Either side may be represented by counsel. *Id.* There are no published statistics on the effect which these informal conferences have had on the selection or rejection of OSHA citations ultimately sent to the employer. *See* note 16 *infra*. The opportunity is clearly present for management or labor to take a position of advocacy, particularly if legal counsel is present. In addition, the informal conference would provide an opportunity to furnish the Occupational Safety and Health Administration with additional information concerning the employer's safety record. Such information might have a bearing on whether the employer receives a "serious" or "non-serious" citation. *See* 1 R. HOGAN & B. HOGAN, OCCUPATIONAL SAFETY AND HEALTH ACT § 5.01[5][d], 5-27 (1979) [hereinafter cited as HOGAN & HOGAN].

OSHA enforcement procedures have been the subject of substantial commentary. *See, e.g.*, Bobrick & Dunphy, *OSHA Inspections—Applicable Law Regarding Notice, Right to Accompany, Payments to Union Representatives, Post Inspection Meetings*, in PROCEEDINGS OF THE ABA NAT'L INST. ON OCCUPATIONAL SAFETY AND HEALTH LAW 7 (1976); Carter, *Advising Employers Under OSHA*, in OCCUPATIONAL SAFETY AND HEALTH ACT 7 (PLI No. 84) (1972); 1 CONNOLLY & CROWELL, A PRACTICAL GUIDE TO THE OCCUPATIONAL SAFETY AND HEALTH ACT 59 (1977); B. FELLNER & D. SAVELSON, OCCUPATIONAL SAFETY AND HEALTH-LAW AND PRACTICE 29 (1976); M. ROTHSTEIN, OCCUPATIONAL SAFETY AND HEALTH LAW §§ 201-33 (1978) [hereinafter cited as ROTHSTEIN]; Hunt, *The Elusive Burden of Proof Under the Occupational Safety and Health Act of 1970*, 30 SW. L. J. 693, 694 (1976) [hereinafter cited as Hunt]; Moran, *The Legal Process for Enforcement of the Occupational Safety and Health Act of 1970*, 9 GONZ. L. REV. 349 (1974) [hereinafter cited as Moran]. *See also* Atlas Roofing Co. v. OSHRC, 430 U.S. 442, 446 (1976) (discussing OSHA enforcement procedures).

[4] 29 U.S.C. § 652(5) (1976) defines "employer" as a "person" engaged in a business affecting commerce who has employees. The United States and any state or political subdivision are expressly excluded from the definition. *Id.* The term "person" is described under § 652(4) as one or more individuals, partnerships, associations, corporations, business trusts, legal representatives, or any organized group of persons. 29 C.F.R. § 1975.5(c) (1979) sets out factors to be used in determining whether an entity is exempt from employer status, and hence OSHA jurisdiction, as a state or political subdivision. These factors include whether the entity makes a profit, pays taxes, pays employee salaries, and whether the entity is administered by a public official. *Id. See generally* 1 HOGAN & HOGAN, *supra* note 3, §§ 3.01-.02; ROTHSTEIN, *supra* note 3, §§ 12-14.

conform to these standards.[5] Where specific standards promulgated by the Secretary are inapplicable, employers may nevertheless be subject to OSHA's general duty clause,[6] which mandates that employers furnish a workplace free from recognized hazards likely to cause serious physical harm.

The safety standards promulgated by the Secretary include both general and specific requirements.[7] Where a potential for conflict exists between general and specific standards, employers sometimes face major problems in determining their responsibilities under OSHA.[8] The Fourth Circuit recently provided guidance for employers in *Bristol Steel & Iron Works, Inc. v. Occupational Safety & Health Review Commission (OSHRC),*[9] holding that general standards can be used to extend employer duties well beyond the scope of more specific provisions.[10]

An OSHA officer inspected[11] a work site where Bristol was engaged in skeletal steel erection[12] and observed two of Bristol's employees[13] working approximately sixteen feet above a stairwell.[14] The employees were wear-

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[5] An employer's duties under OSHA are derived from two basic sources. First, under OSHA's "specific duty" clause, § 654(a)(2), an employer must conform to the detailed health and safety standards promulgated by the Secretary. 29 U.S.C. § 654(a)(2) (1976). Second, where no promulgated standards apply, an employer is subject to the requirements of the § 654(a)(1) "general duty clause". *Id.* § 654(a)(1); *see* text accompanying note 6 *infra.* Nearly all OSHA enforcement is based on the specific duty clause. In 1974, for example, fewer than one percent of all job safety citations included general duty clause allegations. *See* Moran, *supra* note 3, at 349.

[6] 29 U.S.C. § 654(a)(1) (1976). The Eighth Circuit has held that a "recognized hazard" within the meaning of the general duty clause is not limited to one which can be recognized directly by human senses without assistance of any technical instruments. American Smelting & Ref. Co. v. OSHRC, 501 F.2d 504, 510-11 (8th Cir. 1974). The general duty clause covers the most flagrant situations for which the Secretary has not promulgated appropriate regulations. Anning-Johnson Co. v. OSHRC, 516 F.2d 1081, 1086 (7th Cir. 1975). *See generally* Andrews & Cross, *Defending an Employer Against an Alleged Violation of the General Duty Clause,* 9 GONZ. L. REV. 399 (1974); Morey, *The General Duty Clause of the Occupational Safety Health Act of 1970,* 86 HARV. L. REV. 988 (1973).

[7] Subpart C of the 29 C.F.R. § 1926 (1979) construction regulations sets out general safety and health provisions for such areas as safety training (§ 1926.21), fire prevention (§ 1926.24), illumination (§ 1926.26), sanitation (§ 1926.27), and personal protective equipment (§ 1926.28). Other Subparts under the § 1926 construction regulations, however, deal specifically with particular construction processes or areas. These specific provisions include Subpart P (Excavations, Trenching, and Shoring), Subpart R (Steel Erection), and Subpart U (Blasting and Use of Explosives).

[8] *See* text accompanying notes 21-24 & 27-38 *infra*; note 91 *infra. See also* Builders Steel Co. v. Marshall, 575 F.2d 663, 665 (8th Cir. 1978); note 32 *infra.*

[9] 601 F.2d 717 (4th Cir. 1979).

[10] *Id.* at 721.

[11] OSHA inspections of work sites are authorized by 29 U.S.C. § 657(a) (1976); *see* note 3 *supra.*

[12] *See* note 23 *infra.*

[13] OSHA defines "employee" as an employee of an employer whose business affects commerce. 29 U.S.C. § 652(6) (1976). In § 654(b), employees are required to comply with all OSHA rules and regulations, but there is no provision for enforcing this requirement.

[14] 601 F.2d at 719. Bristol's employees were rigging a float scaffold and were working on

ing, but not using, safety belts or other fall protection equipment.[15] The OSHA inspector cited[16] Bristol for violation of the section 1926.28(a) general construction safety standard which mandates wearing "appropriate personal protective equipment" to reduce employee exposure to hazards.[17] Bristol contested the citation[18] before an administrative law judge (ALJ).[19] The ALJ affirmed the citation, reasoning that under the facts presented, no specific safety standard would preempt the section 1926.28(a) general requirement mandating the use of appropriate protective equipment.[20]

On review, the Occupational Safety and Health Review Commission

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a wall, 12 to 18 inches wide. The wall was located on the second floor of a building and was approximately 16 feet above concrete stairs. *Id.*

[15] *Id.* Bristol stipulated that the two employees were exposed to the hazard of falling and that if such a fall had occurred, there existed a substantial probability of serious injury or death. *Id.*

[16] Issuance of a citation for OSHA violations is authorized by 29 U.S.C. § 658(a) (1976). Under § 658(a), each citation must be in writing and must describe with particularity the provision of the chapter, standard, rule, regulation, or order which the employer allegedly violated. The citation must also fix a reasonable time for abatement of the violation. The OSHA citation has been compared to a ticket for a traffic offense. *See* Moran, *supra* note 3, at 350. The citation received by the OSHA violator lists a specific monetary penalty which has been previously established for the alleged violation. The OSHA violator then has the option of paying the fine or appearing in court on a specified date if he desires a hearing. Should he fail to do either by that date, the fine is automatically due and payable. Moran notes that this system, which has gained increasing popularity in recent years, favors judicial economy by expediting the disposition of cases. *Id.*

[17] 29 C.F.R. § 1926.28(a) (1979). Section 1926.28(a) provides that the employer must require the wearing of "appropriate" personal protective equipment wherever there is an exposure to hazardous conditions. The Fifth Circuit upheld § 1926.28(a) against a charge of unconstitutional vagueness in B&B Insulation, Inc. v. OSHRC, 583 F.2d 1364 (5th Cir. 1978). The *B&B* court applied a reasonable man test in determining that the requirements of § 1926.28(a) were not unforeseeable, and hence, not in violation of due process for being unconstitutionally vague. *Id.* at 1367; *see* note 43 *infra.*

[18] An employer is authorized to contest an OSHA citation under 29 U.S.C. § 659(a) (1976). If an employer notifies the Secretary that he intends to contest a citation, the Secretary must immediately forward this information to the Occupational Safety and Health Review Commission (Commission) *id.* § 659(c); *see* note 21 *infra.* After being advised of the notice of contest, the OSHRC must afford the employer an opportunity for a hearing before an administrative law judge (ALJ) 29 U.S.C. § 659(c); *see* note 19 *infra.*

[19] The Review Commission appoints an administrative law judge to give a preliminary review of an OSHA citation. 29 U.S.C.A. § 661(i) (Cum. Supp. 1979). There are 45 ALJs located in 10 offices throughout the country. The ALJs have life tenure and hold hearings in at least 75 cities. *See* Hunt, *supra* note 3, at 694 n.11. The ALJ's report becomes the Review Commission's final order and is appealable to a federal circuit within 30 days unless the Commission chooses to exercise its discretionary power of review. 29 U.S.C.A. § 661(i) (Cum. Supp. 1979). In practice, the ALJs render the final decision in over 90% of OSHA cases. *See* Moran, *supra* note 3, at 352.

[20] Bristol Steel & Iron Works, Inc. [1975-76] Occ. Saf. & Health Dec. (CCH) ¶ 20,437, at 24,400-01 (1976). The ALJ noted that where the § 1926.28(a) general construction safety standard applies, workers have the right to its protection unless a particular specific standard encompasses the same working conditions. *Id.* at 24,401.

(Commission)[21] affirmed the decision of the ALJ by a split vote.[22] Voting for affirmance, Commissioner Cleary felt that without an applicable specific safety standard, the section 1926.28(a) general construction safety standard was controlling.[23] Commissioner Barnako voted to reverse, reasoning that the Secretary covered the entire subject of fall protection for steel erection with specific safety standards for that part of the construction industry, and that these specific provisions did not require protective equipment at heights below twenty-five feet.[24] Thus, Barnako would have held that these specific regulations, found in Subpart R of the section 1926 construction standards, were exclusive in setting out fall protection precautions for employers engaged in steel erection.[25]

On appeal the Fourth Circuit reversed the Review Commission's decision against Bristol and remanded the case for further consideration.[26]

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[21] The Commission is established under 29 U.S.C. § 661(a) (1976) as a body of three members, appointed for six year terms by the President, with the advice and consent of the Senate. The President designates one Commission member as Chairman. The principal office of the OSHRC is in the District of Columbia. The Commission is authorized, however, under OSHA to hold hearings in other locations. *Id.* § 661(c). Any Commission member may order review of an ALJ decision, and review may be granted upon application by an employer or upon the Commission's own motion. 29 U.S.C.A. § 661(i) (Cum. Supp. 1979); *see* Hunt, *supra* note 3, at 698; Moran, *supra* note 3, at 352; ROTHSTEIN, *supra* note 3, at ch. 16; *Overview, supra* note 1, at 530.

While under § 661(a), the Review Commission is supposed to be a three member body, Commissioner Moran's tenure expired in April, 1977 and he was not reappointed. *See* 2 HOGAN & HOGAN, *supra* note 3, § 11.01[1]. Moran's position was still vacant at the time the *Bristol* case came before the Review Commission. Thus, there was not a third member to break the deadlock between Commissioners Cleary and Barnako. On August 31, 1977, President Carter appointed Commissioner Cleary to take over the duties of OSHRC chairman. Commissioner Barnako indicated that he would continue to serve on the Review Commission until his term expires in 1981. On September 7, 1977, President Carter nominated, and the Senate later confirmed, Bertram R. Cottine to fill Commissioner Moran's vacant position. *See* 2 HOGAN & HOGAN, *supra* note 3, § 11.01 n.5a (1979 ed. Cum. Supp.).

[22] Bristol Steel & Iron Works, Inc., [1977-78] OCC. SAF. & HEALTH DEC. (CCH) ¶ 22,240, at 26,764 (1977).

[23] *Id.* at 26,765. In arguing for affirmance of the citation against Bristol, Cleary felt that Bristol's employees were not actually engaged in steel erection. Cleary concluded that the scaffold work being done was only preparatory to steel erection itself. *Id.* The Fourth Circuit did not share Cleary's interpretation, and specifically stated that Bristol was engaged in skeletal steel erection. 601 F.2d at 719.

[24] Bristol Steel & Iron Works, Inc. [1977-78] OCC. SAF. & HEALTH DEC. (CCH) ¶ 22,240, at 26,765 (1977).

[25] Subpart R of § 1926 requires the following types of fall protection. If the structure is a tiered, *i.e.*, multifloored building, not adaptable to temporary flooring, and scaffolds are not used, safety belts must be used where the fall distance is more than 25 feet or 2 stories. 29 C.F.R. § 1926.750(b)(1)(ii) (1979). If the structure is a tiered building which is adaptable to temporary flooring, then a tightly planked and substantial floor is to be installed within 2 stories or 30 feet below or directly under that portion of each tier of beams on which work is being performed. *Id.* § 1926.750(b)(2)(i). Safety belts are to be used when gathering and stacking temporary floor planks. *Id.* § 1926.750(b)(2)(iii). The employer must supply safety belts to employees who are working on float scaffolds. *Id.* § 1926.752(k).

[26] Bristol Steel & Iron Works, Inc. v. OSHRC, 601 F.2d 717, 724 (4th Cir. 1979). The Fourth Circuit assumed jurisdiction to review the decision of an equally divided Commis-

The Fourth Circuit agreed with Commissioner Cleary that the Secretary's specific steel erection standards did not supplant the section 1926.28(a) general construction requirement.[27] The court specifically rejected Bristol's argument that the entire area of fall protection for steel erectors was specifically covered by Subpart R.[28] The Fourth Circuit felt that Bristol's argument ran counter to legislative policy,[29] noting that OSHA's purpose was to assure safe and healthful working conditions.[30] The *Bristol* court explained that OSHA is remedial and preventative in nature[31] and should be construed liberally in favor of the workers sought to be protected.[32]

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sion, despite a jurisdictional challenge by the Secretary. *Id.* at 720 n.7. The Secretary based the challenge on 29 U.S.C. § 661(e) (1976) which provides that official action may be taken by the Commision only by the affirmative vote of at least two members. The Secretary contended that absent the requisite two votes, there has been no official Commission action and therefore, no basis for appeal. *See* Cox Bros. v. Secretary of Labor, 574 F.2d 465, 467 (9th Cir. 1978); Shaw Constr. Co. v. OSHRC, 534 F.2d 1183, 1185-86 (5th Cir. 1976). However, the Fourth Circuit adopted the position that an equally divided Commission vote constitutes an affirmance of the ALJ's decision, although the decision of the Commission has no precedential value. 601 F.2d at 720 n.7. The Fourth Circuit rejected the Secretary's challenge to jurisdiction on the basis of an earlier decision. *See* George Hyman Constr. Co. v. OSHRC, 582 F.2d 834, 836-37 (4th Cir. 1978). In *Hyman* the Fourth Circuit expressed doubt that Congress intended the quorum requirement of 29 U.S.C. § 661(e) to serve as a bar to judicial review. 582 F.2d at 837. *See Fourth Circuit Review—Labor*, 36 WASH. & LEE L. REV. 634, 635-36 (1979). *Bristol* apparently settles the question of the appealability of split Commission decisions in the Fourth Circuit, holding such decisions reviewable. In the *Hyman* case, all three Commissioners voted, although they split their vote three ways. *Id.* at 635. The *Bristol* case put to rest in the Fourth Circuit the possibility that where only *two* Commissioners vote, there is not a reviewable "Commission decision". *But cf.* Cox Bros. v. Secretary of Labor, 574 F.2d 465, 467 (9th Cir. 1978); Shaw Constr., Inc. v. OSHRC, 534 F.2d 1183, 1185-86 (5th Cir. 1976) (requiring affirmative vote of at least two commissioners to constitute reviewable "official action" by Commission).

[27] 601 F.2d at 721.

[28] *Id.*

[29] *Id.; see* note 1 *supra.*

[30] 601 F.2d at 721 (citing 29 U.S.C. § 651(b) (1976)).

[31] 601 F.2d at 721. *See also* B&B Insulation, Inc. v. OSHRC, 583 F.2d 1364, 1370 (5th Cir. 1978) (since Act is remedial and preventative rather than punative in nature, tort law concept of reasonable man may not be used in broadest sense to establish liability under OSHA); Marshall v. Cities Service Oil Co., 577 F.2d 126, 130 (10th Cir. 1978); REA Express, Inc. v. Brennan, 495 F.2d 822, 825 (2d Cir. 1974).

[32] 601 F.2d at 721. *See also* Irvington Moore v. OSHRC, 556 F.2d 431, 435 (9th Cir. 1977) (broad construction given to OSHA standard dealing with point of operation guarding on industrial metal press); Southern Ry. v. OSHRC, 539 F.2d 335, 338 (4th Cir.), *cert. denied*, 429 U.S. 999 (1976); American Smelting & Ref. Co. v. OSHRC, 501 F.2d 504, 511 (8th Cir. 1974) (recognized hazard under general duty clause may be one needing technical instruments to detect). A general canon of statutory construction requires that remedial statutes be liberally construed in favor of their beneficiaries. *See, e.g.*, A.H. Phillips, Inc. v. Walling, 324 U.S. 490, 493 (1945); Reliable Coal Co. v. Morton, 478 F.2d 257, 262 (4th Cir. 1973); Wirtz v. Ti Ti Peat Humus Co., 373 F.2d 209, 212 (4th Cir.), *cert. denied* 389 U.S. 834 (1967). The Eighth Circuit has indicated, however, that the liberal interpretation rule for remedial statutes is not always applicable. *See* Builders Steel Co. v. Marshall, 575 F.2d 663, 666 (8th Cir. 1978). In *Builders*, an employer engaged in steel erection was cited for a violation of the 29 C.F.R. § 1926.105(a) (1979) construction industry standard which specifies that where other protective measures are impractical, safety nets are to be provided at

Bristol made the legal argument that under the section 1910.5(c)(1) provision on interpretation of standards, an applicable specific regulation prevails over any different general standard which might otherwise be controlling.[33] The Fourth Circuit, however, found the specific regulatory provisions of Subpart R inapplicable to the facts of the *Bristol* case, since the Subpart R provisions deal with precautionary measures to be taken at heights of twenty-five feet or greater[34] and Bristol's employees were working at a height of sixteen feet.[35] Thus, the court relied on the language of section 1910.5(c)(2), providing that if particular standards are prescribed for an industry but are inapplicable to a given situation, then other standards may be utilized.[36] The Fourth Circuit reasoned that reading the section 1910.5(c) regulation on statutory interpretation in the manner suggested by Bristol would prevent the Secretary from coping with a variety of hazards not covered by the specific standards.[37] Hence, the court concluded that the section 1926.28(a) general construction safety standard compliments the Subpart R specific fall protection standards dealing with steel erection by requiring that appropriate protective equipment be used to reduce hazards to employees working at heights below twenty-five feet.[38]

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workplaces above 25 feet in height. The employer contended that the specific Subpart R steel erection standards should be controlling. Subpart R § 1926.750(b)(2)(i), *see* note 25 *supra*, requires precautionary measures to be taken where employers are working on tiered structures at heights above 30 feet. Since Builders' employees were working at a height below 30 feet, the company argued there was no violation of the applicable OSHA provisions. 575 F.2d at 665. In dealing with this conflict between OSHA standards, the Eighth Circuit noted that where, as in *Builders*, ambiguity exists, the standards must be viewed in a more critical manner despite their remedial nature. *Id.* at 666. The court remanded the case, however, for a determination of whether the Subpart R standard, which applied to multi-story buildings, should also be applicable to the facts of the *Builders* case, which involved a single story building. *Id.* at 667.

[33] 601 F.2d at 722. 29 C.F.R. § 1910.5(c) (1979) reads in pertinent part as follows:

> (1) If a particular standard is specifically applicable to a condition, practice, means, method, operation, or process, it shall prevail over any different general standard which might otherwise be applicable . . . .
>
> (2) On the other hand, any standard shall apply according to its terms to any . . . place of employment . . . even though particular standards are also prescribed for the industry, as in Subpart B or Subpart R of this part, to the extent that none of such particular standards applies . . . .

[34] 601 F.2d at 720-21.

[35] *See* note 13 *supra*. Concurring in *Bristol*, Judge Widener noted that if a specific standard had been applicable to the facts of the *Bristol* case, then under § 1910.5(c)(1) no general standard could then be used to require another duty for a condition already covered by the specific regulation. The concurring opinion was evidently reacting to footnote 11 of the majority opinion, 601 F.2d at 721, which stated that specific standards insure a minimum level of employee protection under recognized hazardous conditions. Judge Widener's position that an applicable specific provision prevails over any potentially applicable general regulation represents the accepted view. *See, e.g.*, United States Steel Corp. v. OSHRC, 537 F.2d 780, 784 (3d Cir. 1976); McLean-Behm Steel Erectors, Inc., [1978] Occ. Saf. & Health Dec. (CCH) ¶ 23,139, at 27,956, 27,957-58.

[36] 601 F.2d at 722; *see* note 33 *supra*.

[37] 601 F.2d at 722.

[38] *Id.* at 721.

While the Fourth Circuit applied the section 1926.28(a) general safety standard beyond the scope of the Subpart R specific regulations, the court recognized that in order to satisfy due process, the standard should be construed so as to give an employer reasonable notice of required safety measures.[39] The *Bristol* court pointed out that other federal circuit courts require employers to take the precautions a reasonable man would take under the general duty clause and the various general safety standards found in the Secretary's regulations.[40] The Fourth Circuit declined, however, to determine reasonableness solely on the custom and practice of the particular industry involved.[41] The court reasoned that there may be customary industry practices which fail to protect against generally known hazards.[42] Thus, the *Bristol* court imposed a duty on the employer to look beyond the custom and practice of the industry and make an independent assessment of necessary safety precautions.[43]

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[39] *Id.* at 722. *See also* B&B Insulation, Inc. v. OSHRC, 583 F.2d 1364, 1367-69 (5th Cir. 1978) (construing § 1926.28(a) general construction safety standard); McLean Trucking Co. v. OSHRC, 503 F.2d 8, 10-11 (4th Cir. 1974) (rejecting charge of unconstitutional vagueness against personal protective equipment standard used in citation for failure to provide protective footwear); Ryder Truck Lines, Inc. v. Brennan, 497 F.2d 230, 233 (5th Cir. 1974) (personal protective equipment standard mandating that employers provide protective footwear not unconstitutionally vague).

[40] 601 F.2d at 722-23. *See, e.g.*, B&B Insulation, Inc. v. OSHRC, 583 F.2d 1364, 1369-70 (5th Cir. 1978); American Airlines, Inc. v. Secretary of Labor, 578 F.2d 38, 41 (2d Cir. 1978); Brennan v. Smoke-Craft, Inc., 530 F.2d 843, 845 (9th Cir. 1976); Arkansas-Best Freight Systems, Inc. v. OSHRC, 529 F.2d 649, 655 (8th Cir. 1976); Cape & Vineyard Div. v. OSHRC, 512 F.2d 1148, 1152 (1st Cir. 1975); McLean Trucking Co. v. OSHRC, 503 F.2d 8, 10 (4th Cir. 1974); Ryder Truck Lines, Inc. v. Brennan, 497 F.2d 230, 233 (5th Cir. 1974).

[41] 601 F.2d at 723.

[42] *Id.*

[43] In support of the decision to impose a broad standard of employer duty when interpreting general safety and health standards, the *Bristol* court followed the First Circuit's decision in Cape & Vineyard Div. v. OSHRC, 512 F.2d 1148 (1st Cir. 1975). In *Cape & Vineyard*, the First Circuit used a reasonable man test in construing a general personal protective equipment standard. The *Cape & Vineyard* court noted that industry custom could normally be expected to establish the required standard of conduct. The First Circuit concluded, however, that where industry custom fails to take reasonable precautions against generally known hazards, holding the employer to a higher standard than that of actual practice is not unfair. *Id.* at 1152. The Fourth Circuit also cited the Ninth Circuit case of Brennan v. Smoke-Craft, Inc., 530 F.2d 843, 845 (9th Cir. 1976), as authority for adoption of a reasonable man standard which is not limited to industry custom and practice. 601 F.2d at 723. Whether *Smoke-Craft* supports the Fourth Circuit's position is unclear. In *Smoke-Craft*, the employer was cited for violation of the § 1910.132(a) general personal protective standard since management did not require sausage cutters operating a saw blade to wear protective gloves. In reversing the Review Commission's order to vacate the citation, however, the Ninth Circuit noted that there was no relevant industry custom with which to compare the employer's conduct. Smoke-Craft's procedure for using the saw was unique in the sausage industry. Thus, the Ninth Circuit stated that in the absence of relevant industry custom or practice for comparison, the court would have to determine whether a reasonable man familiar with the industry would find it necessary to protect against the hazard. Ascertaining whether the court would have upheld the citation had there been an identifiable industry custom with which Smoke-Craft was in compliance is therefore difficult.

The Fourth Circuit recognized that the position adopted on the standard of reasonable-

The *Bristol* court imposed a heavy burden on employers by broadly interpreting the applicability and scope of the general safety standard. The court lightened the employer's task, however, by holding that the Commission erred in allocating the burden of proof.[44] Specifically, the Fourth Circuit held that an employer should not be forced to prove, as an affirmative defense, that protection by means of safety belts was infeasible.[45] The Fourth Circuit reasoned that the Commission's holding ignored the OSHA regulation clearly stating that the burden of proof shall rest with the Secretary in all proceedings commenced by the filing of a notice of contest.[46]

Bristol's holding on the burden of proof issue followed the reasoning of the D.C. Circuit in the landmark case of *National Realty and Construction Co. v. OSHRC.*[47] In *National Realty*, which dealt with a violation of OSHA's general duty clause, the D.C. Circuit held that the Secretary must produce evidence on all necessary elements of a violation.[48] Thus, the Secretary must not only set out the particular steps that an employer could have taken to avoid citation but must also demonstrate the utility of those measures.[49]

In *Bristol*, the Fourth Circuit found no evidence in the record that a reasonably prudent employer familiar with steel erection would have protected against the hazard of falling by the means specified in the citation.[50] The *Bristol* court concluded that the Commission's finding of a violation of the section 1926.28(a) general construction safety standard was not supported by substantial evidence.[51] Accordingly, the Fourth Circuit reversed the Commission's order and remanded the case for further proceedings consistent with the opinion.[52]

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ness was contrary to that of the Fifth Cirrcuit in B&B Insulation, Inc. v. OSHRC, 583 F.2d 1364 (5th Cir. 1978). *See* text accompanying notes 67-69 *infra*. In *B&B*, the Fifth Circuit refused to go beyond customary industry practice in construing the § 1926.28(a) general construction safety standard. The *B&B* court reasoned that where the government seeks to encourage a higher standard of performance than is customary in a given industry, the proper recourse is through the promulgation of specific standards. 583 F.2d at 1371.

[44] 601 F.2d at 723.

[45] *Id.*

[46] *Id.* (citing 29 C.F.R. § 2200.73(a) (1978)).

[47] 489 F.2d 1257 (D.C. Cir. 1973). In *National Realty*, the employer was cited for violation of OSHA's general duty clause, 29 U.S.C. § 654(a)(1) (1976). The citation alleged that an employee was improperly permitted to ride on the running board of a front-end loader while the loader was in operation. The employee died when the loader rolled over on top of him. The evidence indicated that equipment riding by employees was contrary to company policy. Faced with an employee's disregard of company safety policy, the *National Realty* court concluded that the record failed to demonstrate what the employer could have done to improve its safety policy, as well as the feasibility and likely utility of these measures. 489 F.2d at 1268. Therefore, the D.C. Circuit vacated the citation against National Realty. *Id.*

[48] 489 F.2d at 1267-68.

[49] *Id.* at 1268.

[50] 601 F.2d at 724.

[51] *Id; see* 29 U.S.C. § 660(a)(1976) (Commission findings of fact are conclusive if supported by substantial evidence).

[52] 601 F.2d at 724.

Bristol's holding on the burden of proof issue conflicts with the Review Commission's position, recently set out in *S&H Riggers & Erectors, Inc.*[53] *S&H* was the first case in which a majority of commissioners agreed on an interpretation of the section 1926.28(a) general construction safety standard.[54] The Review Commission held that where citations are based on a violation of section 1926.28(a), the Secretary must specify the appropriate form of personal protective equipment to eliminate the hazard.[55] The Commission broke with precedent, however, by overruling previous decisions which held that the Secretary must prove the feasibility and likely utility of the recommended form of personal protective equipment.[56] The Commission now would require the employer to argue and prove infeasibility as an affirmative defense.[57] The Commission noted in *S&H* that the previous position to the contrary was based on the reasoning of the *National Realty* case, which dealt with violations of OSHA's general duty clause.[58] The Commission concluded that unlike the general duty clause, the section 1926.28(a) general construction safety standard specifies that the employer may avoid citation by using personal protective equipment, and thus sets forth a specific duty.[59] The Commission in *S&H* did not address the procedural regulation which places the burden of proof on the Secretary in OSHA proceedings.[60]

The Fourth Circuit in *Bristol* makes no reference to the *S&H* decision and expressly relies on the analysis in *National Realty*,[61] which the Review Commission rejected. The Fourth Circuit's approach, however, is better reasoned. In instances of general duty clause violations as in *National Realty*,[62] or of section 1926.28(a) violations as in *S&H*,[63] the Secretary must specify the means to reduce the hazard. The courts require specification because both sections are broadly written.[64] Neither section

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[53] [1979] 3 EMPL. SAF. & HEALTH GUIDE (CCH) ¶ 23,480, at 28,432. *S&H*, published two months prior to the Fourth Circuit's *Bristol* decision, upheld a citation for violating the § 1926.28(a) general construction safety standard, *see* note 16 *supra*, where the employer failed to require tied-off safety belts for employees working at a height of 40 feet. The employer argued unsuccessfully that the § 1926.105(a) construction safety belt standard was more specific than § 1926.28(a) and that the company had complied with the former standard. The Commission concluded that § 1926.105(a) was not more specifically applicable to the facts of *S&H* than § 1926.28(a). [1979] 3 EMPL. SAF. & HEALTH GUIDE (CCH) ¶ 23,480, at 28,437.

[54] [1979] 3 EMPL. SAF. & HEALTH GUIDE (CCH) ¶ 23,480, at 28,437.

[55] *Id.* at 28,439.

[56] *Id.*

[57] *See id.*

[58] *Id.* at 28,438.

[59] *Id.*

[60] *See* text accompanying notes 46 *supra* & 67 *infra*.

[61] 601 F.2d at 723-24.

[62] *See* note 47 *supra*.

[63] *See* note 53 *supra*.

[64] *See* 489 F.2d at 1268; [1979] 3 EMPL. SAF. & HEALTH GUIDE (CCH) ¶ 23,480, at 28,438-39.

states a particular method of abatement to be utilized.[65] Given this similarity, there is no logical distinction as to the burdens of proof on feasibility and likely utility of the suggested precautions. By placing the burden on the government, the Fourth Circuit avoids placing an undue hardship on employers. Allocation of the burden of proof often can determine the litigation's outcome.[66] The *Bristol* holding is also in keeping with the OSHA procedural regulation which states that the burden of proof shall rest with the Secretary.[67]

The *Bristol* court's interpretation of section 1926.28(a) to impose a reasonableness standard not limited to industry custom and practice is consistent with the position of the Review Commission in *S&H*. Both decisions emphasize that the failure of industry to deal adequately with a particular hazard should not excuse an employer's failure to provide a safe workplace.[68] Both the Commission in *S&H* and the Fourth Circuit in *Bristol* expressly declined to limit the reasonableness determination to industry custom and practice.[69]

The broad standard of interpretation adopted by the Fourth Circuit and the Review Commission arguably comports with OSHA's Congressional purpose of providing a safe and healthful workplace.[70] Nevertheless, where industry custom does not provide a standard of care which the government deems desirable, there are better ways of improving employee safety than allowing selective enforcement of a general safety standard. The enactment of specific standards provides a better assurance that employers will be aware of the conduct required of them.[71] In addition, the use of standard-making procedures insures that the responsibility for upgrading industry safety is borne equally by all industry members.[72] By having precise guidelines to follow, employers can develop safety training programs and work rules designed to meet required standards.[73] Enactment of specific provisions to upgrade industry safety prac-

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[65] While 29 C.F.R. § 1926.28(a) (1979) states a general requirement that personal protective equipment be used, the provision does not particularize what equipment must be used in a given situation. Thus, the *S&H* decision requires that the Secretary specify the appropriate form of protective equipment to eliminate the hazard when issuing citations under § 1926.28(a). *See* text accompanying note 55 *supra*.

[66] *See* Note, *OSHA: Employer Liability for Employee Violations*, 1977 DUKE L.J. 614, 622 n.44.

[67] 29 C.F.R. § 2200.73(a) (1979) *see* Bristol Steel & Iron Works, Inc. v. OSHRC, 601 F.2d at 724; B&B Insulation, Inc. v. OSHRC, 583 F.2d at 1372.

[68] 601 F.2d at 723 (citing Cape & Vineyard Div. v. OSHRC, 512 F.2d 1148 (1st Cir. 1975)); [1979] 3 EMPL. SAF. & HEALTH GUIDE (CCH) ¶ 23,480, at 28,436 (also citing *Cape & Vineyard.*).

[69] 601 F.2d at 723 (citing Cape & Vineyard Div. v. OSHRC, 512 F.2d 1148, 1152 (1st Cir. 1975)); [1979] 3 EMPL. SAF. & HEALTH GUIDE (CCH) ¶ 23,480, at 28,437 (also citing *Cape & Vineyard.*).

[70] *See* note 1 *supra*.

[71] *See* B&B Insulation, Inc. v. OSHRC, 583 F.2d at 1371-72.

[72] *Id.*

[73] *See* 601 F.2d at 721 n.11 (one function of specific standards is to provide basis for adequate employer safety programs).

tices also insures that the resulting standards benefit from the input of industry experts and other interested parties.[74] Thus, the likelihood of having well-considered, rational standards on which to base citations would appear to be considerably greater than in instances where, as in *Bristol*, an OSHA compliance officer makes an on-the-spot determination of the specific measures warranted under general safety standards.

As *Bristol* indicates, the Secretary has a duty to promulgate and proceed under specific safety standards where feasible.[75] If an unsafe practice is so widespread as to warrant designation as an industry custom, however, then surely the Secretary can promulgate standards which deal with that practice. A rule limiting the reasonableness standard to industry custom and practice could serve as an administrative check to insure that the Secretary fulfills his responsibility of promulgating and relying on specific standards wherever feasible.[76] Under such a rule, if work conditions are observed which the Secretary considers hazardous yet which are in keeping with industry custom, citations could not be issued until the Commission promulgates specific standards to cover the activity. Use of the narrow reasonableness standard of interpretation would by no means preclude citations based on general safety standards. Where no industry custom addresses the circumstances of a particular hazardous activity or where such activity is in violation of an identifiable industry custom, a general standard citation would be proper, assuming that no other specific regulation is applicable.[77]

The *Bristol* court recognized that a specific regulation applicable to a given situation precludes a citation based on a general safety standard.[78] The Fourth Circuit noted, however, that the Secretary could not anticipate and respond to the myriad of conditions to which specific standards might be addressed.[79] Thus, the Secretary necessarily must resort to general safety standards where no applicable specific regulations exist.[80] The Fourth Circuit held that the Subpart R fall protection standards did not preclude a citation based on the section 1926.28(a) general safety standard under the facts of the *Bristol* case.[81] The court's decision was based on the conclusion that Subpart R, which mandates fall protection measures for steel erection at heights over twenty-five feet, was not applica-

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[74] *See* note 2 *supra*. Uncertainty as to what specific measures must be taken to comply with OSHA may well have an economic impact on employers in the construction industry. The *B&B* court notes that only the employer who is aware of his OSHA responsibility to provide expensive safety equipment, for instance, will be able to cover its cost in contract bids. 583 F.2d at 1367 n.4. If a bid includes costs which an employer erroneously thought OSHA standards required, the bid may be noncompetitive with those which did not include this cost, and the employer may lose the job. *Id.*

[75] 601 F.2d at 721 n.11.

[76] *See id.*

[77] *See* note 35 *supra*.

[78] *See* 601 F.2d at 721 n.11.

[79] *Id.*

[80] *Id.*

[81] *Id.* at 721.

ble[82] to the situation at hand since Bristol's employees were working at a height of sixteen feet.[83]

The Fourth Circuit appears to have been unimpressed by the fact that the Secretary had reconsidered the effectiveness of the Subpart R fall protection standards subsequent to their enactment. In 1974, the Secretary amended the steel erection regulations by increasing the height threshold of the standard which requires the use of temporary flooring.[84] In promulgating the amendment, the Secretary flatly stated that the standard continues to provide adequate protection to employees engaged in steel erection.[85] This statement would tend to refute the presumption that the Secretary simply had no opportunity to consider or enact specific standards covering the subject of fall protection for steel erectors working at heights of sixteen feet. In reconsidering and amending the Subpart R standard, the Secretary made no mention of any requirement that safety belts be used at lower heights. Given the fact that the Secretary failed to broaden the requirements of Subpart R when an opportunity was presented and given the Secretary's statement that existing Subpart regulations adequately protect employee safety,[86] the conclusion would appear appropriate that safety belts were not required of steel erectors at heights of sixteen feet.

The conclusion that safety belts were not required under the facts of the *Bristol* case would also appear to be mandated by the language of the section 1910.5(c) provision on interpretation of general and specific standards (interpretation provision).[87] The critical question again is whether a particular provision applies to a given set of facts. A particular standard, where applicable, will prevail over any different general provisions.[88] On the other hand, a general standard may be used if specific industry provisions exist but are not applicable to a given situation.[89] Bristol argued that because Subpart R specified methods of fall protection for steel erectors, Subpart R controlled the situation at hand and prevented the imposition of liability under any general standard.[90] The Fourth Circuit disagreed, reasoning that since Subpart R only specified protective measures to be taken at heights of twenty-five feet or more, the standard did not apply to hazardous conditions at lower heights.[91]

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[82] *Id.* at 722.

[83] *Id.* at 719.

[84] 29 C.F.R. § 1926.750(b)(2)(i) (1979).

[85] 39 Fed. Reg. 24360, 24361 (1974); *see* Bristol Steel & Iron Works, Inc., [1977-78] Occ. SAF. & HEALTH DEC. (CCH) ¶ 23,240, at 26,765 (Review Commission decision); Brief for Appellant at 8, Bristol Steel & Iron Works v. OSHRC, 601 F.2d 717 (4th Cir. 1979). *See also* Builder's Steel Co. v. Marshall, 575 F.2d 663, 666 (8th Cir. 1978).

[86] *See* text accompanying note 85 *supra.*

[87] *See* text accompanying note 33 *supra.*

[88] 29 C.F.R. § 1910.5(c)(1) (1979); *see* note 33 *supra.*

[89] 29 C.F.R. § 1910.5(c)(2) (1979); *see* note 33 *supra.*

[90] *See* text accompanying note 33 *supra.*

[91] *See* text accompanying notes 34-38 *supra.* The example given by the § 1910.5(c)(2) provision allowing use of a general standard does not appear to support the Fourth Circuit's

The Fourth Circuit stated that reading the interpretation provision in the manner suggested would prevent the Secretary from coping with a variety of hazards not covered by the specific standards.[92] Under the *Bristol* decision, however, specific safety provisions for a particular industry will provide little guidance for an employer seeking to ascertain the scope of his OSHA responsibilities. Given the Fourth Circuit's logic, Bristol might have been cited for failing to provide protective equipment to employees working at heights of five feet, assuming that a potential fall from that height could be considered dangerous.[93]

With the possible exception of the Fourth Circuit's allocation of the burden of proof, the *Bristol* decision should receive a favorable response from the Occupational Safety and Health Administration. On the other hand, *Bristol* may result in apprehension among employers in the steel erection business and add fuel to the growing "Stop OSHA" movement.[94] There will almost certainly be conflict ahead between the Fourth Circuit

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decision that the general construction safety standard governs the facts of the *Bristol* case. The example given by § 1910.5(c)(2) points out that the pulp and paper industry, which is covered by extensive specific regulation, is also subject to a separate general provision on noise exposure. None of the particular pulp and paper standards, however, deal in any way with noise exposure. On the other hand, the subject of protective fall equipment, with which Bristol's general construction standard citation dealt, is specifically addressed by the Subpart R steel erection industry fall protection requirements. The Subpart R regulations simply do not require fall protection for the 16 foot height at which Bristol's employees were working. The concurring opinion in Bristol reiterates the majority position that because Subpart R only requires fall protection at heights above 25 feet, no specific standard covers the facts of the case. 601 F.2d at 724 (Widener, J., concurring); *see* note 35 *supra*.

Despite the language of the *Bristol* opinion however, the example provided by the § 1910.5(c)(1) provision excluding the use of general standards appears more analogous to the facts of the case. The example notes that a particular standard specifies the personal protective equipment required for ship repairmen working in designated areas. The illustration states that this standard may not be modified or superceded by any different general standard which might otherwise be applicable to ship repairmen engaged in the designated activity. Under the facts of *Bristol*, Subpart R specifies the fall protection to be taken where an employer is engaged in the designated activity of steel erection. Again, the basic question is whether employees engaged in steel erection at a height of 16 feet are within the designated activity governed by Subpart R. The answer to this question will determine which provision on interpretation is controlling.

[92] 601 F.2d at 722.

[93] The Fifth Circuit noted in *B&B* that under the argument made by OSHA personnel, use of safety belts would seem to be required for an ordinary set of stairs, because people do fall down stairs on occasion, and are seriously injured. 583 F.2d at 1372. The *B&B* court concluded that to state such a proposition is in itself enough to refute the suggestion that Congress intended its regulations to go so far. *Id.*

[94] On November 24, 1978, the Stop OSHA campaign led to revocation of all or part of some 928 regulations. 43 Fed. Reg. 49726, 49726-67 (1978), 1 HOGAN & HOGAN, *supra* note 3, § 1.01 n.20 (1979 ed. Cum. Supp.). Groups recommending modification of OSHA requirements included trade associations, management, and labor unions. 43 Fed. Reg. 49727. The most frequent criticisms of OSHA provisions charged that the standards contained unnecessary detail, that other general standards adequately covered the subject matter, that the standards addressed concerns apart from employment safety and health, and that the regulations were obsolete or inconsequential. *Id.* at 49728.

and the Review Commission on the issue of proving feasibility of the measures suggested by the Secretary in any citation under the section 1926.28(a) general construction safety standard. Yet *Bristol's* decision placing the burden on the Secretary appears to be the better-reasoned choice and will at least give employers a fighting chance in OSHA litigation. *Bristol's* liberal conclusions as to general safety standard applicability, however, will do little to encourage the Secretary to promulgate and rely on specific standards wherever possible.

JEFFREY H. GRAY

C. *EEOC Reasonable Cause Determinations Not Subject to Judicial Review*

The Equal Employment Opportunity Commission (EEOC or Commission)[1] enforces the anti-discrimination policy of Title VII of the 1964 Civil Rights Act.[2] When an aggrieved employee[3] or Commission member

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[1] The EEOC is a five member Commission appointed by the President with the advice and consent of the Senate. 42 U.S.C.A. § 2000e-4(a) (Cum. Supp. 1979). EEOC Commissioners serve five year terms and no more than three Commission members may belong to the same political party. *Id.* The President has the power to designate Commission members to fill the positions of Chariman and Vice-Chairman. *Id.* The Commission's General Counsel is appointed in the same manner as Commission members and serves a four-year term. 42 U.S.C. § 2000e-4(b) (1976). The General Counsel is responsible for conducting litigation on behalf of the Commission. *Id.* The EEOC is empowered under 42 U.S.C. § 2000e-5 (1976) to prevent unlawful employment practices. *See* note 2 *infra.*

[2] 42 U.S.C.A. §§ 2000e to 2000e-17 (Cum. Supp. 1979). Title VII defines and prohibits unlawful employment practices, 42 U.S.C. §§ 2000e-2 to 2000e-3 (1976); *see* note 4 *infra,* and establishes enforcement procedures to insure employer compliance. 42 U.S.C. § 2000e-5 (1976). Title VII is aplicable to employers having fifteen or more employees, employment agencies, and labor organizations. *See* notes 5-7 *infra.* Title VII also prohibits discriminatory employment practices by the federal government, placing enforcement power in the Civil Service Commission. 42 U.S.C. § 2000e-16 (1976).

The EEOC enforces Title VII where non-governmental entities are involved. The Commission may seek a temporary restraining order or other form of temporary relief when, after a preliminary investigation, the Commission determines that such action is necessary to effectuate the purposes of Title VII. *Id.* § 2000e-5(f)(2). The United States district courts have jurisdiction over employment discrimination actions brought under Title VII. *Id.* § 2000e-5(f)(3). If the district court finds that the respondent in a Title VII suit has engaged in an unlawful employment practice, the court may issue an injunction. *See, e.g.,* James v. Stockham Valves & Fittings Co., 559 F.2d 310, 354 (5th Cir. 1977), *cert. denied,* 434 U.S. 1034 (1978) (district court should enter broad injunction against employer's segregation of facilities and programs unless court found clear and convincing evidence that employer would not continue to discriminate); Groves v. McLucas, 552 F.2d 1079, 1080 (5th Cir. 1977) (trial judge has great discretion in preliminary injunction order under Title VII); Head v. Timken Roller Bearing Co., 486 F.2d 870, 878 (6th Cir. 1973) (before issuing injunction, district court should determine whether challenged system was discriminatory and, if so, whether discrimination was justified by business necessity). The district court may also order such affirmative action as may be appropriate, including reinstatement or hiring of employees, payment of back wages, or other equitable relief. *See, e.g.,* Cross v. National Trust Life Ins. Co., 553 F.2d 1026, 1029-30 (6th Cir. 1977) (reinstatement); Pearson v. Western Elec. Co., 542 F.2d 1150, 1152 (10th Cir. 1976) (back pay); Jersey Central Power & Light Co.

alleges an unfair employment practice[4] against an employer,[5] employment agency,[6] or labor organization,[7] the Commission must complete a four step procedure before commencing litigation.[8] The Commission must notify the employer of the charge, conduct an investigation, determine whether there is reasonable cause to believe the charge is valid,[9] and at-

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v. Local Union 327 of Intern. Bhd. of Elec. Workers, 542 F.2d 8, 10 (3d Cir. 1976) (district court may order that individuals be granted seniority that would have been theirs had they not suffered employment discrimination). *See generally* B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW (1976) [hereinfter referred to as SCHLEI & GROSSMAN]; Hunter & Branch, *Equal Employment Opportunities: Administrative Procedures and Judicial Developments Under Title VII of the Civil Rights Act of 1964 and the Equal Employment Opportunity Act of 1972*, 18 How. L.J. 543 (1975) [hereinafter referred to as Branch]; Sape & Hart, *Title VII Reconsidered: The Equal Employment Opportunity Act of 1972*, 40 GEO. WASH. L. REV. 824 (1972); Note, *In America, What You Do is What You Are: The Equal Employment Opportunity Act of 1972*, 22 CATH. UNIV. L. REV. 455 (1973); Note, *Sex Discrimination by Private Employers: The Equal Employment Opportunities Act*, 14 WASHBURN L.J. 557 (1975).

[3] Title VII defines "employee" as an individual employed by an employer. The term employee expressly excludes elected public officials of a state or political subdivision as well as staff members appointed by such officials. 42 U.S.C. § 2000e(f) (1976); *see* note 5 *infra* (defining "employer").

[4] 42 U.S.C. §§ 2000e-2 & 3 (1976) of Title VII define "unlawful employment practices." Employment practices which discriminate on the basis of race, color, religion, sex, or national origin are generally unlawful. *Id.* § 2000e-2. *See, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424, 429-33 (1971) (race/color); Redmond v. GAF Corp., 574 F.2d 897, 900 (7th Cir. 1978) (religion); Acha v. Beame, 570 F.2d 57, 65 (2d Cir. 1978) (sex); Cariddi v. Kansas City Chiefs Football Club, Inc., 568 F.2d 87, 88 (8th Cir. 1977) (national origin). *See generally* SCHLEI & GROSSMAN, *supra* note 2, at 15-25.

[5] Title VII defines "employer" as a person engaged in an industry affecting commerce who has fifteen or more employees. 42 U.S.C. § 2000e(b) (1976). "Person" is futher defined as including one or more individuals, governments, governamental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in bankruptcy, or recievers. 42 U.S.C.A. § 2000e(a) (Cum. Supp. 1979).

[6] An "employment agency" is defined as any "person who regularly undertakes to procure employees for an employer or to procure employment for employees. 42 U.S.C. § 2000e(c) (1976).

[7] Title VII defines "labor organization" as an organization engaged in an industry affecting commerce, including any such group in which employees participate and which deals with employers concerning grievances, labor disputes, wages, hours, and other matters. 42 U.S.C. § 2000e(d) (1976).

[8] *Id.* § 2000e-5(b).

[9] Section 40 of the EEOC Compliance Manual outlines the process by which the Commission issues determinations of reasonable cause. EEOC COMPL. MAN. (CCH) ¶ 1061. Originally, issuance of a reasonable cause determination meant only that there was sufficient evidence to settle the case. *See* SCHLEI & GROSSMAN, *supra* note 2, at 211 n.42 (1979 Supp.). On July 20, 1977, however, the Commission issued a resoltuion tightening the standard for such determinations. EEOC COMPL. MAN. (CCH) ¶ 1061. Under the new policy, issuance of a reasonable cause determination means that the claim of employment discrimiantion has sufficient merit to warrant litigation. Thus, the investigation of claims must meet a more stringent standard and the EEOC investigator must state more precisely and thoroughly the relationship of applicable law to the existing and obtainable evidence. *Id.* The Commission tightened the standard for reasonable cause determinations in order to secure leverage during settlement negotiations. The employer now faces a greater likelihood of litigation should

tempt to eliminate the alleged unlawful practice through conference, conciliation, and persuasion.[10] The EEOC may institute suit only if the efforts to secure an acceptable conciliation agreement prove fruitless.[11] In *Georator Corp. v. EEOC*,[12] the Fourth Circuit recently held that the Commission's preliminary determination of reasonable cause is not reviewable by the court. While acknowledging that employers may not have an opportunity to be heard during the EEOC's reasonable cause determination, the Fourth Circuit found no violation of due process, noting that the reasonable cause determination has no legal effect.[13]

In *Georator*, an individual who had been denied employment with Georator Corporation filed a charge with the EEOC alleging that the company had engaged in discriminatory employment practices.[14] The EEOC

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negotations fail. Under the former policy few cases in which reasonable cause was found were taken to court. *See* SCHLEI & GROSSMAN, *supra* note 2, at 211 n.42 (1979 Supp). Thus, the new policy eliminates the double standard which formerly existed for conciliation and litigation. *Id.*

When an EEOC supervisor agrees with the investigator's recommendation that reasonable cause be found, the supervisor sends the investigation file to the EEOC regional attorney. EEOC COMPL. MAN. (CCH) ¶ 1062. The regional attorney makes an independent review of the file to see whether the case meets the requirements for a reasonable cause determination. *Id.* If the regional attorney agrees that the case is suitable for litigation, the case is returned to the supervisor, who submits the proposed determination of reasonable cause to the EEOC district director. *Id.* ¶ 1063. The director may then send a letter to the parties stating that a determination of reasonable cause has been made and inviting the parties to conciliate or otherwise settle the dispute. *Id.* ¶¶ 1066-76. *See* text accompanying notes 10-11 *infra*.

[10] 42 U.S.C. § 2000e-5(b) (1976); *see* EEOC v. Raymond Metal Prods. Co., 530 F.2d 590, 592 (4th Cir. 1976) (noting the four steps required by Title VII at § 2000e-5(b)).

[11] 530 F.2d at 592 (citing 42 U.S.C. § 2000e-5(f)(1) (1976)) (Commission may bring civil suit against respondent if unable to secure acceptable conciliation agreement).

[12] 592 F.2d 765 (4th Cir. 1979).

[13] *Id.* at 768. While a reasonable cause determination has no legal effect, *see* text accompanying notes 29, 31-32 *infra*, the EEOC must find reasonable cause as a prerequisite to instituting formal conciliation attempts and bringing civil suit against the respondent for unlawful employment practices.

[14] 592 F.2d at 767. Georator denied the discrimination charge filed with the EEOC. The Commission then issued a subpoena duces tecum, directing Georator to appear before the Commission and produce certain documents. *Id.* Georator contested the subpoena and when the Commission modified and reissued the subpoena, the company filed suit in federal district court to have the demand set aside. Georator also filed a motion with the district court to dismiss the claim of discrimination on the grounds that the charge failed to state a cause of action and that the EEOC unreasonably delayed processing the charge. In a memorandum filed with the district court on October 21, 1977 Georator requested judicial relief after more than three years of EEOC proceedings. *See* Joint Appendix at 28, Georator Corp. v. EEOC, 592 F.2d 765 (4th Cir. 1979) [hereinafter cited as Joint Appendix]. The EEOC moved to dismiss Georator's complaint. Prior to the hearing on the motion to dismiss, the Commission determined that reasonable cause existed to believe that the charge of discrimination was valid. The Commission invited Georator and the charging party to conciliate. 592 F.2d at 767. *See* note 9 *supra*. Georator responded by filing a motion with the district court to hold the Commission in contempt of court. Georator argued that the Commission's determination justified a citation for contempt because the determination was a subterfuge which attempted to convey the impression that Georator's complaint was moot.

concluded that there was reasonable cause to believe that the charge was valid. Georator subsequently filed a complaint in federal district court seeking review of the Commission's determination. The district court dismissed the complaint for lack of subject matter jurisdiction and failure to state a claim upon which relief could be granted.[15]

On appeal to the Fourth Circuit,[16] Georator argued that the Administrative Procedure Act (APA)[17] provides for review of reasonable cause determinations made by the EEOC.[18] Georator further contended that if review is not provided by the APA, Title VII of the 1964 Civil Rights Act violates the fifth amendment due process clause.[19] The Fourth Circuit rejected both contentions.[20]

The procedures the EEOC must follow in bringing an employment discrimination suit are set out in Title VII.[21] Title VII does not provide for preliminary review of an EEOC finding that reasonable cause exists to believe that an employment discrimination charge is valid. Nevertheless, Georator argued that the APA provides for judicial review of final agency action.[22] The APA defines agency action as an "order."[23] An "order" con-

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See Joint Appendix, *supra*, at 43. Thus, Georator contended that the EEOC's action sought to deprive Georator of its day in court and willfully interfered with the orderly progression of the company's cause. *Id.* The district court granted the Commission's motion to dismiss but allowed Georator to file an amended complaint seeking review of the reasonable cause determination. *See* 592 F.2d at 767.

[15] *See* 592 F.2d at 767; Joint Appendix, *supra* note 14, at 68-69 (transcript of remarks of district court judge in granting EEOC's motion to dismiss). The district court noted that the EEOC is an investigative agency, *see* note 33 *infra*, and that an EEOC finding of reasonable cause carried no determinate consequences which would justify judicial review. *See* text accompanying notes 27-29 *infra;* Joint Appendix, *supra* note 14, at 68.

[16] Georator Corp. v. EEOC, 592 F.2d 765 (4th Cir. 1979).

[17] 5 U.S.C.A. §§ 551-706 (1977 & Cum. Supp. 1979). Congress enacted the APA in order to standardize administrative practice and procedure, to facilitate court review of administrative action, and to create safeguards against arbitrary encroachment on private rights by overzealous administrators. *See* Shaughnessy v. Pedreiro, 349 U.S. 48, 51 (1955) (APA intended to faciliate review of administrative action); Wong Yang Sung v. McGrath, 339 U.S. 33, 41, *modified on other grounds*, 339 U.S. 908 (1950) (APA enacted to standardize administrative practice and procedure); United States v. Morton Salt Co., 338 U.S. 632, 640 (1950) (APA intended to create safeguards against encroachment of private rights). The APA allows, with certain exceptions, public access to agency records and proceedings. *See* 5 U.S.C. §§ 552a-552b (1976); 5 U.S.C.A. § 552 (Cum. Supp. 1979). The Act also outlines procedures for agency rule making, adjudication and hearings, and the exercise of power or authority by an agency. *See* 5 U.S.C. §§ 553 (rule making), 558 (exercise of authority) (1976); 5 U.S.C.A. §§ 554 (adjudication), 556 (hearings) (1977 & Cum. Supp. 1979).

[18] 592 F.2d at 767.

[19] *Id.; see* U.S. CONST. amend. V.

[20] 592 F.2d at 767-69.

[21] 42 U.S.C.A. § 2000e (1974 & Cum. Supp. 1979); *see* note 2 *supra*.

[22] 5 U.S.C. § 704 (1976) (final agency action for which there is no other adequate remedy is reviewable). 42 U.S.C. § 2000e-12 (1976) provides a link between the APA and Title VII, authorizing the Commission to promulgate procedural regulations in conformity with the APA. *See also* 29 C.F.R. §§ 1600.735-101 to 1613.710 (1979) (rules and regulations adopted by EEOC).

[23] 5 U.S.C. § 551(13) (1976). Agency action includes "the whole or a part of an agency

stitutes all or part of a final disposition, which may be affirmative, negative, injunctive, or declaratory in form.[24] Georator contended that the Commission's reasonable cause determination falls within the APA definition of order as a declaratory final disposition.[25]

Rejecting Georator's argument, the Fourth Circuit relied on a recent Supreme Court case interpreting the APA provision defining "order." In *ITT Corp. v. Local 134, International Brotherhood of Electric Workers,*[26] the Supreme Court reasoned that by using the term "final disposition" in defining an order, Congress intended that there be some determinate consequences for the party to the proceeding.[27] The Fourth Circuit noted that courts have typically equated finality with the fixing of obligations or legal relationships.[28] Using the "finality/determinate consequences" test

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rule, order, license, sancton, relief, or the equivalent or denial thereof, or failure to act . . ." *Id. See* text accompanying notes 26-27 *infra. See also* Niagara Mohawk Power Corp. v. F.P.C., 538 F.2d 966, 970-71 (2d Cir. 1976) (F.P.C. order instituting an anticompetitive practice investigation against electric utility not reviewable "final agency action"); Gifford-Hill & Co., Inc. v. FTC, 523 F.2d 730, 732-33 (D.C. Cir. 1975) (FTC decision to institute adjudicatory proceedings against plaintiff not "agency action" under APA); City of Phila. v. SEC, 434 F. Supp. 281, 286 (E.D. Pa. 1977), *appeal dismissed,* 434 U.S. 1003 (1978) (SEC agency action in conducting preliminary investigation into the offer, sale, and resale of city's securities was sufficiently "final" for judicial review under APA).

[24] 5 U.S.C. § 551(6) (1976). An order includes any licensing actions but does not include rule making. *Id.*

[25] 592 F.2d at 768.

[26] ITT Corp. v. Local 134, Int'l Bhd. of Elec. Workers, 419 U.S. 428 (1975). In *ITT Corp.,* the Supreme Court addressed the question whether a National Labor Relations Board (NLRB) § 10(k) determination regarding an unfair labor practices charge is a reviewable final disposition under the APA. A § 10(k) proceeding is a nonadversary hearing between labor and management conducted by a hearing officer whose primary interest is in developing a factual record. This record is used for a determination of the issues by the NLRB. 29 C.F.R. § 101.34 (1979). After all parties are afforded an opportunity to be heard, the case is transmitted to the NLRB for decision. *Id.* The NLRB § 10(k) decision, while not legally binding, practically determines who will prevail in a subsequent, binding proceeding, which may result in the issuance of a cease and desist order. 419 U.S. at 444-47. Nevertheless, the findings and conclusions in the § 10(k) determination do not have res judicata effect on the unfair labor practice issue in the subsequent proceeding. *Id.* at 446. In *ITT,* the Supreme Court ruled that the NLRB § 10(k) determination is not reviewable under the APA. *Id.* at 447. The Court stated that while, in a tautological sense, the NLRB's § 10(k) determination is a "final disposition" of that particular proceeding, a "final disposition" for the purpose of the APA requires some determinate consequences for the party to the proceeding. 419 U.S. at 443. The Supreme Court noted that the NLRB makes no order to anyone at the close of a § 10(k) proceeding and that the § 10(k) decision, standing alone, binds no one. *Id.* at 443-44. Thus, the *ITT* Court ruled that the § 10(k) decision did not meet the requirements necessary to qualify as an APA "final disposition." *Id.*

[27] 592 F.2d at 768. *See, e.g.,* Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp., 333 U.S. 103, 112-13 (1948) (final order is one imposing an obligation, denying a right, or fixing some legal relationship); Ecee, Inc. v. F.P.C., 526 F.2d 1270, 1273 (5th Cir.), *cert. denied,* 429 U.S. 867 (1976).

[28] 592 F.2d at 786. *See* Ewing v. Mytinger & Casselberry, 339 U.S. 594 (1950). *Mytinger* concerned the power of the Commission of the Food and Drug Administration (FDA) to issue probable cause determinations that misbranding of products was dangerous, fraudulent, or misleading. The FDA Commissioner's probable cause determination could be made

as a guide, the Fourth Circuit found that no such finality exists with respect to EEOC reasonable cause determinations, which neither fix obligations nor impose liability on an employer.[29]

Having determined that an EEOC reasonable cause determination is not subject to review under the APA, the Fourth Circuit further held that fifth amendment due process is not violated by the non-reviewability of the determination.[30] The court again emphasized that EEOC reasonable cause determinations have no determinate consequences,[31] noting that Commission proceedings are not binding on an employer and are investigative rather than adjudicative in nature.[32] Where an agency utilizes only investigative powers, due process considerations do not attach.[33] Georator

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without an opportunity for a hearing and could lead to libel suits. The Supreme Court ruled that the probable cause determination was not reviewable since the determination was without binding legal significance. *Id.* at 600. *See also* note 44 *infra* (subsequent cases citing *Georator*).

[29] 592 F.2d at 768.

[30] The due process clause of the fifth amendment provides that no person shall be deprived of life, liberty, or property withhout due process of law. U.S. CONST. amend. V. The essence of due process is fair play. *See* Galvan v. Press, 347 U.S. 522, 530, *rehearing denied*, 348 U.S. 852 (1954). The due process clause protects individuals against arbitrary exercise of governmental power and is intended to secure equal protection of the law for all citizens. *See* La Porte v. Bitker, 55 F. Supp. 882, 886 (E.D. Wis.), *aff'd*, 145 F.2d 445 (7th Cir. 1944). A fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a reasonable manner. *See* Mathews v. Eldridge, 424 U.S. 319, 333 (1976). Where a hearing is not included in the administrative process, however, due process requirements may be adequately met by the opportunity for a judicial proceeding in which new evidence may be supplied and full opportunity afforded for an exploration of the basis of a disputed administrative order. *See* Jordan v. American Eagle Fire Ins. Co., 169 F.2d 281, 289 (D.C. Cir. 1948). The holding of a hearing is not a condition precedent to guaranteeing the constitutionality of administrative action. *See* White v. Herzog, 80 F. Supp. 407, 410 (D.D.C. 1948).

[31] 592 F.2d at 768.

[32] *Id. See, e.g.*, Francis-Sobel v. University of Maine, 597 F.2d 15, 18 (1st Cir. 1979) (reasonable cause determination is nonbinding and nonfinal; investigative and not adjudicative); EEOC v. Raymond Metal Prods. Co., 530 F.2d 590, 593 (4th Cir. 1976) (actions of EEOC are administrative in nature and do not enforce any rights or impose any obligations).

[33] 592 F.2d at 768. The Fourth Circuit applied the distinction between adjudication and investigation set out by the Supreme Court in Hannah v. Larche, 363 U.S. 420 (1960). *Hannah* held that government agencies are bound by procedures traditionally associated with the judicial process when binding determinations are made which directly affect the legal rights of individuals. *Id.* at 442. The Court observed, however, that when the government's actions are of an investigatory rather than adjudicatory nature, the full range of judicial procedures need not be used, thus implying that constitutional due process considerations do not apply. *Id. See also* EEOC v. Kimberly-Clark Corp., 511 F.2d 1352, 1361 (6th Cir. 1975) (citing *Hannah* in making distinction between adjudicative and "pre-adjudicative" agency activities); Genuine Parts Co. v. FTC, 445 F.2d 1382, 1387 (5th Cir. 1971) (investigative and adjudicative proceedings are separate and distinct, serving different functions and entitling the parties to different rights under the fifth aendment due process clause); United States v. Steel, 238 F. Supp. 575 , 577 (S.D.N.Y. 1965) (due process does not require granting rights which are normally associated only with adjudicatory proceedings to persons being investigated).

argued that because there was no opportunity to be heard in the Commisson's reasonable cause determination, a due process violation would occur when the determination was admitted at a subsequent employment discrimination trial.[34] The Fourth Circuit, however, found no detrimental consequences attributable to the employer's lack of opportunity to be heard in the EEOC's preliminary determination of reasonable cause.[35] The court held that, if admissible,[36] the reasonable cause determination, like any other piece of evidence, would carry only as much weight as the trial court determined relevant.[37] The *Gerator* court reasoned that the employer would have full opportunity to contest the allegation of discrimination when and if the Commission or affected employee brought suit in district court.[38]

The Fourth Circuit's holding in *Gerator* may be viewed as an aid to administrative efficiency. A decision to allow review of the EEOC's preliminary determination of reasonable cause could result in substantial disruption of the Commission's investigation and enforcement of nondiscriminatory employment practices.[39] The potential for delay and diver-

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[34] 592 F.2d at 769.

[35] *Id.*

[36] The Fourth Circuit adknowledged that the admissibility of an EEOC reasonable cuase determination at a subsequent unfair employment practices trial is by no means a settled question. *Id.* The court pointed out, however, that a refusal to admit records of EEOC investigations has been upheld. *See, e.g.,* Moss v. Lane Co., 471 F.2d 853, 856 (4th Cir. 1973) (upholding refusal by district court to admit EEOC records; admission is within discretion of district court). *But cf.* Bradshaw v. Zoological Soc., 569 F.2d 1066, 1069 (9th Cir. 1978) (error for district court to hold that EEOC determination of "probable cause" to be given no weight); Smith v. Universal Servs., Inc., 454 F.2d 154, 157-58 (5th Cir. 1972) (refusal to admit an EEOC investigative report constitutes reversible error). The *Gerator* court declined to decide the admissibility issue, however, until presented with an appropriate case. 592 F.2d at 769 n.4.

[37] 592 F.2d at 769. *See* EEOC v. Raymond Metal Prods. Co., 530 F.2d 590, 593-94 n.8 (4th Cir. 1976). In *Raymond,* the Fourth Circuit observed that EEOC investigative reports have been admitted as evidence in private litigation under 28 U.S.C. § 1732 (1976) (Business Records Act). The *Raymond* court emphasized, however, that even if admissible, the reports are not binding on the court and are entitled to no more weight than any other testimony. 530 F.2d at 593-94 n.8 (citing Smith v. Universal Servs, Inc., 454 F.2d 154 (5th Cir. 1972)).

[38] 592 F.2d at 769. *See also* EEOC v. General Elec. Co., 532 F.2d 359, 370 (4th Cir. 1976) (employment discrimination trial is *de novo* and employer has full opportunity to be heard); EEOC v. Raymond Metal Prods. Co., 530 F.2d 590, 594 (4th Cir. 1976); note 37 *supra.* The Fourth Circuit noted that Georator alleged procedural irregularities on the part of the EEOC. The court made no evaluation of the propriety of Commission methods, but expressed doubts as to whether such irregularities can bar the charging parties' cause of action. *See* Ramirez v. National Distillers and Chem. Corp., 586 F.2d 1315, 1320-21 (9th Cir. 1978) (indicating that procedural error by EEOC could not bar employee's right to pursue Title VII claim); Miller v. International Paper Co., 408 F.2d 283, 287 (5th Cir. 1969) (EEOC action or inaction cannot affect rights of aggrieved employee under Title VII). Even if the EEOC declines to bring action for employment discrimination, the affected employee may sue in his own right, regardless of the position the EEOC takes, 42 U.S.C. § 2000e-5(f)(1) (1976).

[39] *See* text accompanying note 40 *infra.*

sion resulting from such a determination is enormous.[40] Even after the Commission has issued a determination of reasonable cause, there is no guarantee that suit will be filed.[41] As the Fourth Circuit noted, an employer has ample opportunity to refute a discrimination charge should suit be brought. Even if suit is brought, the trial is *de novo* and the EEOC has the burden of proving that discriminatory employment practices occurred.[42] The court will not determine whether substantial evidence supports the preadjudication finding of reasonable cause.[43]

Since the Fourth Circuit's decision, other federal courts have relied on *Georator* for the proposition that reasonable cause determinations are not reviewable.[44] Given the reasoning and policy considerations behind the Fourth Circuit's holding, *Georator* is likely to gain wide acceptance in equal employment opportunity litigation.

JEFFREY H. GRAY

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[40] *See* EEOC v. Western Elec. Co., 382 F. Supp. 787, 794 (D. Md. 1974); EEOC v. DuPont, 373 F. Supp. 1321, 1338 (D. Del. 1974), *aff'd*, 516 F.2d 1297 (3d Cir. 1975). In *DuPont*, the district court refused to review the factual basis of an EEOC reasonable cause determination. The court noted the delay and diversion which would result from a decision allowing review and reasoned that any benefit to be so derived would be insufficient to outweigh the adverse consequences. 373 F. Supp. at 1338. The Commission must determine whether reasonable cause exists whenever a complaint charging unfair employment practices is filed. Yet, even if the Commission makes an affirmative determination, there is no guarantee that suit will be filed. *See* note 41 *infra*. Regardless of the outcome of the determination, the Commission would likely be forced to defend the decision in federal district court. If the Commission found reasonable cause to believe that the charge of discrimination was valid, the employer would bring suit. Conversely, if the Commission found no reasonable cause, the employee would institute a challenge. Because the reasonable cause determination is a prerequisite to the conciliation process and to the filing of suit by the EEOC, *see* text accompanying notes 8-11 *supra*, any action on the claim would be foreclosed and resolution of the matter delayed pending resolution of the appeal. The Maryland District Court noted in EEOC v. Western Elect. Corp. that if reasonable cause determinations were reviewable, there would be no need for an EEOC. 382 F.2d at 794.

[41] *See* 592 F.2d at 768. Alternatives to filing suit for Title VII violations include conciliation, settlement, and voluntary compliance by the employer. Any of these alternatives would preclude the necessity for bringing an employment discrimination suit. *See* text accompanying notes 10-11 *supra*.

[42] *See, e.g.*, Albermarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973); Naraine v. Western Elec. Co., 507 F.2d 590, 593 (8th Cir. 1974).

[43] 592 F.2d at 767. *See* EEOC v. General Elec. Co., 532 F.2d 359, 370 (4th Cir. 1976) (EEOC proceedings are not binding on employer and are not reviewable); EEOC v. DuPont, 373 F. Supp. 1321, 1338 (D. Del. 1974), *aff'd* 516 F.2d 1297 (3d Cir. 1975); note 40 *supra*.

[44] In Francis-Sobel v. University of Maine, 597 F.2d 15 (1st Cir. 1979), the EEOC was particularly slow in handling plaintiff-employee's charge of discrimination. Eventually, the Commission issued a determination that there was not reasonable cause to believe the truthfulness of the plaintiff's allegations. The employee then brought suit charging that the EEOC's improper handling and disregard of the validity of her complaints gave rise to an implied right of action under the due process clause of the fifth amendment. The First Circuit found that the plaintiff's arguments were simply veiled attempts to obtain judicial review of the correctness of the EEOC's negative reasonable cause determination. Citing *Georator*, the First Circuit stated that the court lacked power to redress an adverse Com-