

BEFORE THE NORTH CAROLINA OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION RALEIGH, NORTH CAROLINA

COMMISSIONER OF LABOR OF THE STATE OF NORTH CAROLINA, COMPLAINANT, v. HARRIS TEETER, LLC, and its successors, RESPONDENT. DOCKET NO.: OSHANC 2023-6531 INSPECTION NUMBER: 318253200 CSHO ID: E1150 DECISION AND ORDER DENYING RESPONDENT'S MOTIONS TO DISMISS OR FOR PARTIAL SUMMARY JUDGMENT AND GRANTING CONSOLIDATION

THIS MATTER came on before the undersigned on Respondent Harris Teeter's Motions to Dismiss or for Partial Summary Judgment, and Motion to Consolidate. The matter was heard on August 16, 2023, at the OSH Review Commission offices. The Complainant, Commissioner of Labor of the State of North Carolina ("Complainant"), was represented by Special Deputy Attorney General Stacey A. Phipps. Respondent, Harris Teeter, LLC, ("Respondent"), was represented by Attorney Travis W. Vance, Fisher & Phillips.

Pre-hearings briefs were timely filed by both parties. Having carefully considered the Motions, record, evidence, and parties' arguments, including post-hearing briefs, the undersigned makes the following Findings of Fact and Conclusions of Law and enters an Order DENYING the Motions to Dismiss or for Partial Summary Judgment and GRANTING the Motion to Consolidate.

ISSUES PRESENTED

- 1. Whether Complainant had the legal authority to initiate a new inspection based on a complaint and issue additional citations for similar items to those already under contest and whether it could do so simultaneous to another open inspection.

LEGAL STANDARDS

Motion to Dismiss-Rule 12(b)(6)

On a motion to dismiss pursuant to N.C.G.S. §1A-1, Rule 12(b)(6), "the standard of review is whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory." Stunzi v. Medlin Motors, Inc., 214 N.C. App. 332, 335, 714 S.E.2d 770, 773 (2011) (quoting Nucor Corp. v. Prudential Equity Group, LLC, 189 N.C. App. 731, 735, 659 S.E.2d 483, 486 (2008)). Dismissal under Rule 12(b)(6) is proper only in the following circumstances: "(1) the complaint on its face reveals that

no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim." *Wood v. Guilford Cnty.*, 355 N.C. 161, 166, 558 S.E.2d 490, 494 (2002) (citation omitted). As discussed further below, the 12-page Complaint demonstrates that the North Carolina Department of Labor (NCDOL) has alleged specific factual allegations to support violations under the Occupational Safety and Health Act of North Carolina (OSHANC or The Act). The record also clearly demonstrates that the four inspections of the Harris Teeter worksite were initiated as a result of five separate formal complaints of workplace hazards and/or alleged violations under the Act.

Summary Judgment-Rule 56

As recited in *Brooks v. Stroh Brewery Co.*, 95 N.C. App. 226, 239-30, 382 S.E.2d 874, 877, 1989 OSHD (CCH) P28, 698:

Summary judgment is appropriate only where the evidence presented to the court shows both a lack of genuine issue of material fact and movant's entitlement to judgment as a matter of law. *Bank v. Gillespie*, 291 N.C. 303, 310, 230 S.E.2d 375, 379 (1976); G.S. 1A-1, Rule 56(c). In ruling on a motion for summary judgment the court must closely scrutinize the movant's materials while it regards with indulgence the non-movant's materials. *Hillman v. United States Liability Ins. Co.*, 59 N.C. App. 145, 148, 296 S.E.2d 302, 304-305 (1982), *disc. rev. denied*, 307 N.C. 468, 299 S.E.2d 221 (1983). In order to survive a motion for summary judgment, the Commissioner need only forecast evidence showing that he can make a prima facie case of retaliatory discrimination at trial. *See Dickens v. Puryear*, 302 N.C. 437, 453, 276 S.E.2d 325, 335 (1981). Moreover, the non-movant need only present evidence sufficient to rebut the movant's showing of either an affirmative defense or nonexistence of an essential element of the claim. *Id.*

FINDINGS OF FACT

1. Complainant is an agency of the State of North Carolina charged with the administration and enforcement of the provisions of the OSHANC, including making inspections and issuing citations and other pleadings. N.C.G.S. § 95-126 *eq seq.*
2. Respondent is an "employer" within the meaning of N.C.G.S. § 95-127(11) and, at all times relevant to this matter, is subject to the provisions of the Act.
3. Respondent is a domestic limited liability company which maintains a place of business in North Carolina.
4. Respondent is in the supermarket business and its operations include distribution centers and frozen food warehouses. Its locations include a facility at 200 Distribution Drive, which is also identified as 800 Radar Road, in Greensboro, North Carolina.

5. On September 26, 2022, Compliance Safety and Health Officer (“Officer”) Arthur Richards, employed by the North Carolina Department of Labor, inspected Respondent’s worksite located at 200 Distribution Drive/800 Radar Road, Greensboro, North Carolina.
6. The inspection was initiated as the result of an employee complaint.
7. On February 21, 2023, as a result of the inspection, Complainant issued one SERIOUS citation with five subparts, carrying the following proposed abatement dates and penalties:

<u>Item No.</u>	<u>Standard</u>	<u>Abate Date</u>	<u>Penalty</u>
Citation One (Serious)			
001	1910.22(a)(3)	immed	\$ 14,502.00
002	1910.22(d)(1)	immed	\$ 5,850.00
003	1910.178(m)(7)	immed	\$ 9,000.00
004	1910.178(p)(1)	immed	\$ 5,850.00
005	1910.176(b)	immed	\$ 14,502.00
			\$ 49,704.00

8. Respondent submitted a timely Notice of Contest, dated February 27, 2023.
9. On or about April 21, 2023, Complainant received "Employer's/Respondent's Statement of Position," dated March 20, 2023, which requested that formal pleadings be served.
10. Thereafter, the parties timely filed their respective complaint and answer.
11. On May 15, 2023, Respondent filed an “Uncontested Motion to Consolidate.”
12. On May 18, 2023, Respondent filed a “Partial Motion to Dismiss and/or Partial Motion for Summary Judgment.”
13. Respondent had four separate NCDOL complaint-based inspections initiated at the same location during the period from September 2021, to September 2022, and each resulted in citations as follows:

	<u>OSHRC</u>	<u>Inspection</u>	<u>Complaint</u>	<u>Opened</u>	<u>Cites issued</u>	<u>NOC</u>
1	2022-6438	318230059	9/23/2021	9/28/2021	2/7/2022	2/15/2022
2	2022-6486	319244522	5/11/2022, 5/23/22	5/24/2022	8/12/2022	8/16/2022
3	2022-6492	318247434	6/21/2022	6/28/2022	9/6/2022	9/9/2022
4	2023-6531	318253200	9/23/2022	9/26/2022	2/21/2023	2/27/2023

Hall Aff. ¶¶7-11, Exhs. A-D. The four inspections of Respondent's worksite were initiated as a result of five separate formal complaints of workplace hazards and/or alleged violations under the Act.

14. At the time of this hearing, the four inspections and their respective citations listed above remained under contestment and without final orders.
15. The four inspections cited some, but not all, of the same alleged violations.
16. In addition to the five complaints which led to the above inspections, Complainant has received nine additional complaints involving this site for which it did not initiate inspections.

DISCUSSION

Respondent is in essence arguing a procedural defense challenging the authority of Complainant to issue the Citations at issue in this inspection. Respondent proceeds with this challenge by arguing for dismissal of the Complaint as it believes Complainant has failed to state a claim upon which relief can be granted. Further, Respondent contends that the NCDOL lacks authority to issue citations involving identical standards and alleged hazardous conditions where Respondent has contested those citations and the contestments are pending before the Commission. It does not appear that Respondent has raised the argument that there are no genuine issues of fact to be resolved in the pending case before the Review Commission, nor has it made comments on any of the other prior inspections that are yet to be resolved. Respondent merely contends that because a case has the same alleged hazards and abatements currently pending, no further inspection can be undertaken under any circumstances. Finally, Respondent contends that the Complaint should be dismissed because NCDOL conducted new inspections rather than seeking an imminent danger determination in Superior Court.

Article 16 of Chapter 95 of the North Carolina General Statutes sets forth the Act, N.C.G.S. § 95-126, *et seq.* N.C.G.S. § 95-126. Section 2(b) states that the Act's purpose is "to ensure so far as possible every working man and woman in the State of North Carolina safe and healthful working conditions...." This purpose is accomplished in part by each employer furnishing to "each of his employees conditions of employment and a place of employment free from recognized hazards that are causing or are likely to cause death or serious injury or physical harm to his employees." N.C.G.S. § 95-129(1).

Section 95-136 of the Act allows the Commissioner of Labor to enter without "delay and at any reasonable time, any factory, plant, establishment, construction site, or other area, workplace or environment where work is performed by an employee of an employer." N.C.G.S. § 95-136(a)(1). The purpose of this entrance is to conduct inspections and investigations. N.C.G.S. § 95-136(a)(2). Following an inspection, the Commissioner is authorized to issue citations for suspected violations of the Act. N.C.G.S. § 95-137(a). Following this issuance, the employer has the absolute right to contest the citation and/or the proposed penalty amount within the statutory timeframes. N.C.G.S. § 95-137(b). This chain of events is what Respondent challenges here, arguing that Complainant is without authority to conduct further inspections of the same worksite for the same hazards following Respondent's contestment of an issued citation.

Complainant gave Respondent notice of the claims against it when the citations were issued, and again when it filed its Complaint. The 12-page Complaint plainly alleges each element of a serious citation for each of the five items issued against Respondent. The Complaints do not fail to state a claim upon which relief can be granted.

Pursuant to Rule 8 allowing for notice pleading, all that is necessary is to allege the elements of a serious violation in order to put Respondent on notice of the serious citation against it. Complainant provided that notice in its Complaint for Citation One, Items 1-5. At the stage of determining whether dismissal is warranted, all factual allegations set forth in the Complaint are taken as true and interpreted in the light most favorable to the plaintiff, and the plaintiff must be given the benefit of every inference that reasonably may be drawn. *See State ex rel Cooper v. Ridgeway Brands Mfg.*, 362 N.C. 431, 666 S.E.2d 107 (2008).

Each citation item listed in the Complaint is followed by details of specific factual allegations, including the hazard and employee exposure to the hazard, the employer knowledge of the hazard, the serious nature of the hazard, and the appropriate nature of the penalty and abatement date. N.C.G.S. § 95-136(a)(1) of the Act provides that the Commissioner is statutorily authorized to enter without “delay and at any reasonable time . . . [a] workplace or environment where work is performed by an employee of an employer.” The undersigned notes that it is significant that Complainant has received nine more complaints than inspections initiated.

Respondent filed an Answer based on the Complaint and has not been hindered in any way in its preparation for hearing. These pleadings met the required level of notice pleading, and there is no basis to dismiss the Complaint.

Complainant properly conducted its inspection pursuant to the Act and the request to dismiss the Complaint, as well as the request for summary judgment are not well founded and should be denied. The record clearly demonstrates that genuine issues of material fact exist that require an evidentiary hearing.

The Act does not contain an express provision stating the process for conducting additional inspections and issuing additional citations to an employer where (1) a previous citation involving an identical standard and hazardous condition has been issued to the employer, (2) the employer contested the issued citation, and (3) the matter remains outstanding prior to the entry of a final order before the Review Commission. In trying to construe Complainant’s policy to prohibit such an action, Respondent cites to the Field Operations Manual (“FOM”) a number of times and in so doing analogizes it to promulgated regulations of other agencies. However, two issues are noteworthy with regard to the FOM. The FOM is not binding for determination of the issues in these Motions.

First, no provision of the FOM referenced by Respondent states directly that a citation cannot be issued under the circumstances of this contestment. Second, the “guidelines provided by the manual are plainly for internal application to promote efficiency and not to create an administrative straightjacket for Complainant. They do not have the force and effect of law, nor do they accord important procedural or substantive rights to individuals.” *See FMC Corp.*,

OSHARC 5 BNA OSHC, 1977-73 CCH OSHD ¶ No. 13155, 1977. Noncompliance with the instructions of the FOM is not a basis for invalidating a citation or granting a summary judgment motion. Since no procedural or substantive rights are provided to Respondent pursuant to the FOM, even if there were an explicit policy on this issue, it would not bind Complainant to follow the policy or grant Respondent rights if it did not. However, here there is no explicit policy.

In this instance, Respondent appears to conflate the effect of the contestment process on Respondent's requirement to abate the hazard with the effect of the contestment process on the ability to conduct a new inspection of the same location. Respondent quotes Chapter 3 of FOM page 61. The issue addressed by that section is the Effect of Contest upon abatement period. Nowhere in the citations at issue in this litigation is there any argument by Complainant that Respondent had failed to abate the previous citations in a timely manner. There are no failure to abate citations issued to Respondent, and no other classification issues are noted such as a repeat or willful determination. If Complainant believed that the requirement to abate had been triggered, the inspection taking place would not be a standard inspection but a follow-up inspection, and the violations issued as citations would be failure to abate citations with daily multipliers to the penalties rather than new serious citations.

Respondent fails to argue how the abatement period not running during contestment should preclude Complainant from enforcing the Act when it receives new complaints of workplace hazards and/or alleged violations under the Act. The inspection during the contestment period spurred by new complaints to the NCDOL does not harm or hinder the ability to contest the original citation, and it does not harm the ability of Respondent to contest the abatement. When the contested case is heard, if Respondent were to prevail on the same hazard and same standard citations, it would likely be able to then move to resolve the other issued citations. However, attempting to resolve all subsequent citations prior to any judicial resolution on the merits of the first issued citations is not required by the Act and would not follow the Act's purpose. Respondent is not obligated to abate if it believes it is not violating the standard and therefore it has the right to contest that citation. However, if Complainant conducts subsequent inspections following citations, there is nothing in the Act to require no citation be issued. In fact, N.C.G.S. § 95-129(1) requires that the employer provide a place free of recognized hazards. The process of contestment does not provide a pass from complying with the statutory requirements of the Act, it only pauses the timeframe for abating the issue if Respondent believes there is no hazard. In order to effectuate the Act, Respondent's argument must fail so Complainant can conduct the duties for which it is responsible.

Finally, Respondent contends that once it contested the citations and abatements associated with earlier inspections, Complainant's only remedy to protect employees from known hazards was to file an action pursuant to N.C.G.S. § 95-140. The statute provides the Commissioner a means to file a petition in superior court, "to restrain any conditions or practices in any place of employment which are such that a danger exists, which could reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated..." *Id.* Respondent then looks at the process for the imminent danger and points out that an OSHA-8 as part of that process does not lead to an additional citation or penalty. However, Respondent seems to misinterpret the due process notice purpose of the OSHA-8 process as precluding Complainant from taking action with further inspections of the location if it receives

additional Complaints. There is no basis for this determination.

In essence, the argument made by Respondent is that it should have been given the chance to voluntarily fix the hazard, and if it failed to take that opportunity, Complainant should have taken additional action to save Respondent from itself. However, when it was issued a citation with an abatement requirement, Respondent was given a chance to voluntarily fix the hazard. It chose to contest, and at the same point, chose to take no, or insufficient, abatement action as is its right pursuant to the law. Similarly, NCDOL has the right to conduct additional inspections when formal complaints are filed about a hazard alleged to exist at the worksite. Upon conducting those inspections pursuant to a complaint inspection, any potential hazard must be noted, and the issuance of citations is proper. Imminent hazard determinations require work to be stopped entirely subject to the abatement of the hazard. However, that relief is only prospective in nature. The citation and penalty of the inspection is for hazards that were faced by employees already and are retrospective with the abatement being prospective to protect employees going forward. The purpose of the penalty and the citations are both to protect employees in the future, as well as to punish violations of the standards in the past. While Respondent is concerned that it is being asked to open formal proceedings and incur the legal and other expenses therefrom more often than necessary, there is a right to contest and the right to not abate pending judicial determination for Respondent. Those rights, however, do not abrogate the obligation to provide a safe work environment and Complainant's enforcement of that obligation with inspections and issuance of citations and penalties.

CONCLUSIONS OF LAW


1. The foregoing findings of fact are incorporated by reference as Conclusions of Law to the extent necessary to give effect to the provisions of this Order.
2. Respondent is subject to the provisions of the Act.
3. Pursuant to N.C.G.S. § 95-135, the Review Commission has jurisdiction over the parties and subject matter to this action.
4. Considering the allegations in the light most favorable to Complainant, the Court concludes Plaintiff has alleged sufficient factual evidence in the Complaint to meet the pleading requirements. The allegations of the Complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory. Therefore, Respondent has failed to meet its burden under N.C.G.S. §1A-1, Rule 12(b)(6).
5. Each citation item listed in the Complaint is followed by details of specific factual allegations, including the hazard and employee exposure to the hazard, the employer knowledge of the hazard, the serious nature of the hazard, and the appropriate nature of the penalty and abatement date.
6. Complainant was legally authorized to open inspections based on employee complaints in the four cases proposed for consolidation. N.C.G.S. § 95-136(a).

7. Complainant was legally authorized to issue citations, including some for alleged violations of the same standards at the same facility, in the four cases proposed for consolidation.
8. For the inspections herein, Complainant was not obligated to utilize the imminent danger process pursuant to N.C.G.S. § 95-140.
9. The record clearly demonstrates that genuine issues of material fact exist that require an evidentiary hearing. Therefore, Respondent has failed to meet its burden under N.C.G.S. §1A-1, Rule 56.
10. OSHRC File Numbers 2022-6438, 2022-6486, 2022-6492, and 2023-6531 involve common questions of law or facts, and the same parties. Therefore, the court concludes that judicial economy requires that the four cases be tried in a single legal proceeding before this Court.

Based on the foregoing Findings of Fact and Conclusions of Law, IT IS ORDERED as follows:

1. Respondent's Motion to Dismiss is DENIED with prejudice.
2. Respondent's Motion for Partial Summary Judgment is DENIED with prejudice.
3. The Motion to Consolidate is GRANTED.

This the 12th day of December, 2023.


Reagan H. Weaver
Hearing Examiner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this date served a copy of the foregoing ORDER upon:

TRAVIS W. VANCE
FISHER & PHILLIPS
227 WEST TRADE ST.
SUITE 2020
CHARLOTTE, NC 28202

By depositing same in the United States Mail, Certified Mail, Return Receipt Requested, postage prepaid at Raleigh, North Carolina, and upon:

STACEY A. PHIPPS
NC DEPARTMENT OF JUSTICE
LABOR SECTION
PO BOX 629
RALEIGH, NC 27602-0629

By depositing a copy of the same in the United States Mail, first class, postage prepaid at Raleigh, North Carolina, and upon:

NC DEPARTMENT OF LABOR
LEGAL AFFAIRS DIVISION
1101 MAIL SERVICE CENTER
RALEIGH, NC 27699-1101
carla.rose@labor.nc.gov

via email.

THIS THE 13 DAY OF December 2023.



Karissa B. Sluss
Docket and Office Administrator
NC Occupational Safety & Health Review Commission
1101 Mail Service Center
Raleigh, NC 27699-1101
TEL.: (919) 733-3589
NCOSHRC@labor.nc.gov