United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR, Complainant, v. INTEGRA HEALTH MANAGEMENT, INC., Respondent.	OSHRC Docket No. 13-1124

APPEARANCES:

Lee Grabel, Attorney; Louise McGauley Betts, Senior Attorney; Charles F. James, Counsel for Appellate Litigation; Ann Rosenthal, Associate Solicitor of Labor for Occupational Safety and Health; M. Patricia Smith, Solicitor of Labor; U.S. Department of Labor, Washington, DC
For the Complainant

Kevin C. McCormick; Whiteford, Taylor & Preston, L.L.P., Baltimore, MD
For the Respondent

Lynn K. Rhinehart, Harold C. Becker, Yona Rozen, Angelia Wade Stubbs, Office of the General Counsel; Margaret Seminario, Rebecca Reindel, Safety and Health Department
For Amicus Curiae AFL-CIO, Washington, DC

Pamela Allen, Carol Igoe, Legal Department
For Amicus Curiae California Nurses Association/National Nurses United, Oakland, CA

Jacqueline M. Holmes, Jones Day, Washington, DC; Steven P. Lehotsky, Warren Postman, U.S. Chamber Litigation Center, Washington, DC
For Amicus Curiae Chamber of Commerce of the United States

Randy S. Rabinowitz, Occupational Safety and Health Law Project, Washington, DC
For Amici Curiae National Association of Social Workers, National Council for Occupational Safety and Health, and Service Employees International Union

Sky Westerlund, Executive Director
For Amicus Curiae Kansas Chapter, National Association of Social Workers, Topeka, KS

Antonia Domingo, Assistant General Counsel, United Steelworkers, Pittsburgh, PA
For Amicus Curiae United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied-Industrial and Service Workers International Union

DECISION

Before: MACDOUGALL, Chairman; ATTWOOD and SULLIVAN, Commissioners.

BY THE COMMISSION:

Section 5(a)(1) of the Occupational Safety and Health Act of 1970, known as the general duty clause, states that "[e]ach employer . . . shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." 29 U.S.C. § 654(a)(1). At issue here is whether Integra Health Management, Inc., violated this provision by failing to adequately address a workplace violence hazard—specifically, the risk of Integra's employees being physically assaulted by a client with a history of violent behavior during a face-to-face meeting. In the circumstances of this case, we conclude that a violation has been established and affirm the citation.

BACKGROUND

Integra employs "service coordinators" to help its clients—referred to by the company as "members"—obtain and maintain medical care. Health insurers send the members to Integra after reviewing claims histories to identify individuals who are not receiving appropriate care for, in many cases, chronic medical conditions like mental illness. Typically, the health insurers have been unable to maintain contact with these individuals, who tend to avoid visiting their regular physicians and taking their prescribed medications, resulting in costly emergency room visits and hospital stays.

Integra assigns a service coordinator to each member. The service coordinator is responsible for locating the member, introducing the company and its services, and obtaining consent from the member to receive assistance from Integra. If the member consents, the service coordinator will typically contact the member several times a month, both by telephone and face-to-face, and assist in ensuring that the member receives medical treatment. For example, the service coordinator will help set up doctor appointments for the member and ensure that the member goes to the appointments and takes any prescribed medications. Service coordinators are not clinically trained. According to Integra's president and CEO, the company does not "provide a clinical service. We provide a service that a community health worker would provide." In other words, Integra is "really just trying to get the [member] connected with things just like a family member might, a neighbor, a friend, if that person existed."

Integra trains its service coordinators in several ways. One is an internet-based course (referred to as the "Neumann training") with a session on "In-Home and Community Safety." This training includes PowerPoint presentations on "Screening the Dangerous Member" and "Safety in the Community." The "Screening the Dangerous Member" slides advise service coordinators to obtain "critical history about previous unsafe behaviors" and "collateral information from family members, friends, [and] clergy," and the record indicates that the service coordinators could obtain such information from the members themselves. At the time of the alleged violation, however, Integra did not require that this information be obtained, nor did the company conduct member background checks.[1] The "Safety in the Community" slides identify certain potential, high-risk behaviors, such as a "history of violence or self[-]harm" and "[c]riminal behavior," and instruct service coordinators to "[b]e [s]mart – use common sense" and "[l]isten to your gut." Service coordinators are tested at the end of the training, and they then "shadow" more senior staff in the field before taking on cases alone.

In addition to the Neumann training, Integra: (1) holds in-person training sessions, which include safety discussions and role-playing scenarios; (2) conducts weekly conference calls with service coordinators, including safety discussions; (3) uses a voluntary "buddy system," advising service coordinators who "feel uncomfortable" to call another service coordinator "and go out together;" and (4) maintains a written workplace violence prevention policy, stating that "[v]iolence . . . against an employee . . . will not be tolerated," advising employees to report any threatening communications to supervisors, and warning that "[v]iolations of this policy . . . may result in disciplinary action."

Integra was founded in 2007 and is based in Owings Mills, Maryland. The company began operating in Florida in 2012 after contracting with Amerigroup to provide services to several of its insureds. An online posting for Integra's Florida-based service coordinator position, dated July 17, 2012, stated that the "ideal candidate(s) would be able to provide support services to a specific group of individuals with serious mental/somatic illness through community-based teams," and

[1] By the time of the hearing, Integra had implemented new protocols, including performing background checks on all members, "red-flagging" those members with criminal backgrounds, taking certain members with violent criminal histories off the company's rolls, establishing a liaison with local law enforcement, instituting a written workplace violence prevention program with mandatory reporting of incidents, and conducting de-escalation training for service coordinators.

must have a bachelor's degree. The posting also stated that "interest in social work, psychology or a related field and possessing 2 years [of] experience in the field is a plus." In August and September 2012, Integra hired several new service coordinators for its Florida team, including Employee-A, a 25-year-old recent college graduate with no prior experience in social work or working with the mentally ill. After providing the requisite training, Integra assigned Employee-A the case file for Member-L, who suffered from cardiovascular disease and schizophrenia. Unknown to Employee-A, Integra, and Amerigroup, Member-L had a prior criminal record—he served a total of approximately 15 years in prison for grand theft of a motor vehicle in 1981, battery in 1982, aggravated battery with a deadly weapon in 1990, and aggravated assault with a weapon in 1995.

After several attempts to contact Member-L by phone, Employee-A visited him at his home three times in October and November 2012. On October 12, Employee-A made her first visit, introducing herself and making an appointment with Member-L to conduct an initial assessment three days later at his home. Employee-A stated in her Progress Note Report (Report)—a record that Integra requires all service coordinators to complete and submit any time they have contacted a member—that Member-L "said a few things that made [her] uncomfortable, so [she] asked [him] to be respectful or she would not be able to work with him," and that, because of this, she was "not comfortable being inside [Member-L's home] alone with [him] and will either sit outside to complete [the] assessment or ask another [service coordinator] to accompany her."

On October 15, Employee-A visited Member-L's home for their scheduled appointment, but he refused to sign the required consent form without his case manager from his healthcare provider being present. Employee-A phoned the case manager and told Member-L that she would arrange a meeting among the three of them. Employee-A stated in her Report of this visit that Member-L "showed [her] a print of The Last Supper, [erroneously] crediting it to Michelangelo," and identified Jesus as "my father," "someone else in the picture" as himself, and "a few others in the picture" as "people in the community, such as the waitress who works down the street." On November 14, Employee-A returned to Member-L's home and stated in her Report that he initially "pretended to be his own twin brother," but then "admitted to being himself," "agreed to sign the consent without his [case manager] present," "discussed how he sometimes has a hard time with police stopping him because they say he looks suspicious," and "told [Employee-A] to get a

cowboy hat and go to a rodeo." This Report along with the two previous October Reports were reviewed by Employee-A's supervisors.

After an unsuccessful attempt to meet with Member-L on November 26, 2012, Employee-A returned to Member-L's home on December 10 to complete her assessment, which had to be done, per Integra's requirements, by December 14, thirty days from the date that Member-L signed the consent form. During this visit, Member-L attacked Employee-A with a knife, stabbing her nine times while chasing her across his front yard. Member-L then went inside his home, leaving Employee-A wounded on the lawn. A passerby saw Employee-A lying on the ground and drove her to the hospital, where she died later that day.

Following an inspection, the Occupational Safety and Health Administration issued Integra a citation alleging a violation of the general duty clause for exposing employees "to the hazard of being physically assaulted by members with a history of violent behavior." After a hearing, Administrative Law Judge Dennis L. Phillips affirmed this citation.[2]

DISCUSSION

To prove a violation of the general duty clause, the Secretary must establish that: (1) a condition or activity in the workplace presented a hazard; (2) the employer or its industry recognized the hazard; (3) the hazard was causing or likely to cause death or serious physical harm; and (4) a feasible and effective means existed to materially reduce the hazard.[3] *Arcadian Corp.*,

---

[2] The judge also affirmed an other-than-serious citation alleging that Integra violated 29 C.F.R. § 1904.39(a) for failing to notify OSHA of its employee's death. Integra does not seek review of this violation, conceding that the company did not notify OSHA of the fatality.

[3] Commissioners Attwood and Sullivan take issue with their colleague's assertion in her concurrence that these long-standing elements of a general duty clause violation—as articulated in well-established precedent from the Commission and Courts of Appeals—are somehow "flaw[ed]" because, in her view, they fail to "address the ability of an employer to '*free*' a workplace of a recognized hazard." This is simply not the case. The text of the general duty clause does not limit applicability only to hazards that can be completely eliminated; it simply states that the employer shall provide a workplace that is "free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees"—the provision is silent as to the extent of an employer's obligation if it is not possible to eliminate the hazard. 29 U.S.C. § 654(a)(1).

Under long-standing precedent, the Commission and courts have resolved this question by recognizing that employers should not be liable for failing to eliminate a hazard if that is not feasible—it is sufficient for employers in such circumstances to reduce the hazard *to the extent* feasible. *See*, *e.g., Carlyle Compressor Co. v. OSHRC*, 683 F.2d 673, 677 (2d Cir. 1982)

(Secretary's proposed abatement "need not completely solve the problem as long as it reduces the danger"); *Jones & Laughlin Steel Corp.*, 10 BNA OSHC 1778, 1782 (No. 76-2636, 1982) ("An employer's duty under section 5(a)(1) is to free its workplace—*to the extent feasible*—of recognized hazards that are likely to cause death or serious injury.") (emphasis added). This approach has been justified—quite reasonably—by interpreting "free" as an aspirational goal for employers—they are charged only with taking "reasonable steps to protect [their] employees." *Beaird-Poulan*, 7 BNA OSHC 1225, 1228-29 (No. 12600, 1979) (noting general duty clause's use of "free"). *See* 29 U.S.C. § 651(b) ("The Congress declares it to be its purpose and policy . . . to assure *so far as possible* every working man and woman in the Nation safe and healthful working conditions . . . .") (emphasis added).

Reading section 5(a)(1) as limiting the jurisdictional reach of the general duty clause to only those hazards that can be completely eliminated is unreasonable—indeed, such a reading would permit an employer to do nothing in the face of a known hazard that cannot be eliminated from its workplace but could be materially reduced by 95 percent. As Judge J. Skelly Wright, in the D.C. Circuit's landmark *National Realty* decision, pronounced in interpreting the "free from" language in the general duty clause, the record must "indicate that demonstrably feasible measures would have *materially reduced* the likelihood" that hazardous conduct would have occurred. *Nat'l Realty & Constr. Co. v. OSHRC*, 489 F.2d 1257, 1267 (D.C. Cir. 1973) (emphasis added).

Commissioners Attwood and Sullivan therefore reject the Chairman's interpretation of *National Realty*. In that case the court distinguished preventable hazards from unpreventable hazards: "[a]ll preventable forms and instances of hazardous conduct must . . . be entirely excluded from the workplace," as opposed to "unpreventable instances," which, to avoid making employers strictly liable, are not covered. *Id.* at 1266-67. The court's statement that the Secretary must demonstrate that feasible measures would materially reduce the hazard, rather than stating that such measures would eliminate the hazard, shows that the court's point in distinguishing the preventable from the unpreventable was to emphasize that the alleged hazard must be one over which the employer has control:

> Though resistant to precise definition, the criterion of preventability draws content from the informed judgment of safety experts. *Hazardous conduct is not preventable if it is so idiosyncratic and implausible in motive or means that conscientious experts, familiar with the industry, would not take it into account in prescribing a safety program*. Nor is misconduct preventable if its elimination would require methods of hiring, training, monitoring, or sanctioning workers which are either so untested or so expensive that safety experts would substantially concur in thinking the methods infeasible. *All preventable forms and instances of hazardous conduct must, however, be entirely excluded from the workplace.* To establish a violation of the general duty clause, hazardous conduct need not actually have occurred, for a safety program's feasibly curable inadequacies may sometimes be demonstrated before employees have acted dangerously. At the same time, however, actual occurrence of hazardous conduct is not, by itself, sufficient evidence of a violation, even when the conduct has led to injury. The record must additionally indicate that demonstrably feasible measures would have materially reduced the likelihood that such misconduct would have occurred.

20 BNA OSHC 2001, 2007 (No. 93-0628, 2004). On review, Integra contends that the Secretary has failed to prove a violation because he has not established that either Integra or its industry recognized the cited hazard and that his proposed abatement measures would have materially reduced that hazard. As a threshold matter, Integra also argues that the hazard alleged here is beyond the scope of the Act itself—as the company puts it, "the hazards encompassed by the general duty clause [do not] include the risk of criminal assaults upon employees by third parties." Essentially, the company contends that certain hazards, even if recognized by an employer, cannot be the basis of a general duty clause violation.[4] We begin with this jurisdictional issue.

Id. (emphasis added). Numerous Commission and Court of Appeals decisions have interpreted *National Realty* in precisely this way. *See, e.g., SeaWorld of Fla. v. Perez,* 748 F.3d 1202, 1207 (D.C. Cir. 2014) ("Notwithstanding the 'unqualified and absolute' textual imperative that the workplace be 'free' of the recognized hazard, . . . the court [in *National Realty*] further observed that 'Congress quite clearly did not intend the general duty clause to impose strict liability: The duty was to be an achievable one,' . . . . So understood, the court held that '[a]ll preventable forms and instances of hazardous conduct must . . . be entirely excluded from the workplace.' ").

In short, the court's statement that an employer must "free from" its workplace all preventable instances of hazards cannot mean that the court was excluding from the general duty clause's coverage hazards that can be materially reduced. Indeed, no Commission or Court of Appeals decision has adopted the Chairman's novel theory, which would largely eliminate the applicability of the general duty clause.

As he notes in his concurring opinion, Commissioner Sullivan ascribes to a "reasonable foreseeability" test because any practice or condition which is unforeseeable cannot be prevented. An employer cannot render a workplace, therefore, "free" of a recognized hazard if the hazard is unforeseeable.

[4] Commissioner Attwood notes that the Chairman, in her concurring opinion, asserts that the general duty clause should be viewed as a " 'placeholder,' to be used only until section 6(b) rulemaking could be initiated to address hazards." The Fourth Circuit provided an apt response to such a theory forty years ago in *Bristol Steel & Iron Works, Inc. v. OSHRC*, 601 F.2d 717 (4th Cir. 1979). The court in *Bristol Steel* stated that the Act contemplates the promulgation of specific safety standards *and* the use of general safety standards and the general duty clause, "which are designed to fill those interstices necessarily remaining after the promulgation of specific safety standards." *Id.* at 721. The court added that "[i]t would be utterly unreasonable to expect the Secretary to promulgate specific safety standards which would protect employees from every conceivable hazardous condition." *Id.* n.11. And, although the Chairman dismisses the difficulties associated with modern section 6(b) rulemaking, a review of recent OSHA rulemaking efforts is instructive. Between 1981 and 2010, it took an average of 7 years to promulgate an OSHA standard. U.S. Gov't Accountability Off., GAO-12-330, Workplace Safety and Health: Multiple Challenges Lengthen OSHA's Standard Setting 7-8 (2012). And the difficulties associated with rulemaking have only increased over the ensuing years. Thus, for example, from the pre-rule phase

I. Jurisdiction

Before the judge, Integra argued that "the violent conduct of a third party is an inherently unpredictable act of a different nature than the hazards typically regulated under the general duty clause." The judge viewed this argument as a challenge to OSHA's jurisdiction—"that the violent conduct at issue is fundamentally unpredictable and therefore cannot be regulated by the OSH Act"—and rejected it, stating that "the . . . violent incident . . . was reasonably foreseeable," and "the hazard in this case [was] obvious." According to Integra, the judge's conclusion is erroneous because nothing "supports the Secretary's contention that the general duty clause imposes upon an employer a duty to anticipate and prevent criminal attacks on employees by third parties." The Secretary responds that the general duty clause does not exclude such a hazard from its coverage—he contends that, apart from having to be recognized and causing serious harm, "there is no further limitation on the scope of hazards that employers must address under section 5(a)(1)." For the reasons that follow, the allegation of workplace violence as presented in this case is a cognizable "hazard" under the Act.

"[T]he starting point for interpreting a statute is the language of the statute itself." *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). We "must assume that Congress intended the ordinary meaning of the words it used, and absent a clearly expressed legislative intent to the contrary, that language is generally dispositive." *Gonzalez v. McNary*, 980 F.2d 1418, 1420 (11th Cir. 1993); *see also Blount Int'l, Ltd.*, 15 BNA OSHC 1897, 1902 (No. 89-1394, 1992) (if provision's wording is unambiguous, plain language governs); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000) ("The meaning—or ambiguity—of certain words or phrases may only become evident when placed in context."); *Am. Fed'n of Gov't Emps., Local 2782 v. Fed. Labor Relations Auth.*, 803 F.2d 737, 740 (D.C. Cir. 1986) ("[S]tatutes . . . are to be read as a whole with each part or section . . . construed in connection with every other part or section.") (citation omitted). As noted, the general duty clause provides that "[e]ach employer . . . shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death

---

to final rule publication, two recently promulgated standards took eighteen years and twenty-one years, respectively, to complete. *See* Occupational Exposure to Respirable Crystalline Silica, 81 Fed. Reg. 16,286, 16,295 (Mar. 25, 2016) (final rule); Confined Spaces in Construction, 80 Fed. Reg. 25,366 (May 4, 2015) (final rule).

or serious physical harm to his employees." 29 U.S.C. § 654(a)(1). Thus, the jurisdictional issue presented here is whether the workplace violence alleged by the Secretary is a "hazard."

The term "hazard" is not defined in the Act, but its commonly understood meaning is "[s]omething causing danger," "peril, risk, or difficulty." RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 652 (1971); *see United States v. Sherburne*, 249 F.3d 1121, 1126 (9th Cir. 2001) ("turn[ing] to the dictionary for guidance" in absence of statutory definition); *Crawford v. Metro. Gov't of Nashville & Davidson Cty.*, 555 U.S. 271, 276 (2009) (undefined term "carries its ordinary meaning"). The context in which the term is used makes clear that in the Act, "hazard" means a danger/peril/risk *arising out of the employee's work*—in a broad sense. Specifically, the general duty clause references both "employment" and "place of employment," so the hazards addressed by this provision include not only those arising out of the physical setting of the work, but those arising out of the "employment." *See* RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE at 468 (defining "employment" as "an occupation by which a person earns a living" or "work"); *Allen v. U.S.A.A. Cas. Ins. Co.*, 790 F.3d 1274, 1284 (11th Cir. 2015) (rejecting "narrow interpretation" of undefined statutory term in light of term's "ordinary meaning"). The broad nature of this concept is echoed in the Act's findings and purpose section, which states that the statute is meant not only "to assure . . . safe and healthful *working conditions*" but also to address "personal injuries . . . arising out of *work situations.*" 29 U.S.C. § 651(a)-(b) (emphasis added).

Here, there is a direct nexus between the work being performed by Integra's employees and the alleged risk of workplace violence. Integra requires its service coordinators to meet face-to-face with members, many of whom have been diagnosed with mental illness and have criminal backgrounds as well as a history of violence and volatility.[5] Integra team supervisor Laurie Rochelle described certain members as just "getting out of jail," "drug seeking," "people with severe mental health issues," and having "a history of violence." In addition, the primary "place of employment" where the service coordinator's work is performed is the member's home, where

[5] Integra contends that it is "a disturbing line of reasoning" to conclude that service coordinators are at a heightened risk of violence because many of the individuals they serve are mentally ill, and that no scientific evidence was presented at the hearing showing that individuals with mental illness pose such a heightened risk. Our decision today makes no such conclusion about mental illness in general. Moreover, Integra's concerns are belied by its own training materials, which specifically identify "[p]aranoia," "[p]sychosis," "[a]nti-social personality," and "manic behavior" as "[r]isk [f]actors" and "[h]igh-[r]isk [b]ehaviors" tending toward violence from its members.

the service coordinator often makes unannounced visits. Service coordinators also use their own cars to drive members to medical appointments and occasionally must locate members in homeless shelters.[6] Integra's own training on "In-Home and Community Safety" assumes that providing these services to its members in these locations presents potential safety issues for service coordinators. Indeed, the training instructs service coordinators to "[k]now as much ahead of time what [you are] getting involved in," "[v]isit during normal business hours if at all possible," and "[d]on't take chances, take precautions." In short, the hazard identified by the Secretary is rooted in the very reason for Integra's services—this means the hazard arises from the employment itself. Under these circumstances, the workplace violence risk at issue here is a "hazard" that fits plainly within the text of the general duty clause.[7]

---

[6] In its amicus brief, the Chamber of Commerce suggests that these face-to-face meetings do not occur at a "place of employment," as contemplated by the Act. 29 U.S.C. § 654(a). We disagree. As noted above, "employment" means "an occupation by which a person earns a living" or "work," RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE at 468, so the plain meaning of "place of employment" is simply the location where that work occurs. Just as the "place of employment" of a construction worker is not limited to one permanent location but occurs wherever the work takes place, meeting with members at their homes and/or in their community is the foundation of Integra's business model and a required aspect of the service coordinator's employment. Integra's lack of control over these locations may bear on what abatement measures are feasible, but it is undisputed that those locations are where the work at issue is performed. *Cf. Capform, Inc.*, 13 BNA OSHC 2219, 2222 (No. 84-556, 1989) (explaining the multi-employer worksite defense as predicated on an employer's lack of "control [over] the violative condition such that it could [not] have abated the condition in the manner required by the standard," but "not alter[ing] the general rule that each employer is responsible for the safety of its own employees"), *aff'd*, 901 F.2d 1112 (5th Cir. 1990).

[7] Integra notes that the D.C. Circuit found in *Oil, Chem. & Atomic Workers Int'l Union v. Am. Cyanamid Co.*, 741 F.2d 444 (D.C. Cir. 1984), that "[t]he words of the [Act]—in particular, the terms 'working conditions' and 'hazards'—are not so plain that they foreclose all interpretation." *Id.* at 448. *American Cyanamid*, however, did not find the term "hazard" ambiguous on its face. Instead, the court simply found an ambiguity *as applied to the unusual facts of the case* before it, and then concluded that a "*policy* which required women employees to be sterilized in order to be eligible to work in the areas of [the employer's] plant where they would be exposed to certain toxic substances" was not a hazard cognizable under the Act. *Id.* at 446-47 (emphasis added). Here, by contrast, being physically assaulted by members is a risk in the ordinarily understood sense; it is not a direct and certain result of an employer's policy, but rather arises directly out of the very duties a service coordinator is required to perform. As a result, in these factual circumstances, the term "hazard" is not ambiguous. *See PGA Tour, Inc. v. Martin*, 532 U.S. 661, 689 (2001) ("[T]he fact that a statute can be applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.").

Notwithstanding the general duty clause's plain language, Integra makes essentially three arguments as to why the provision cannot be invoked here. First, citing to the Commission's decision in *Pelron Corp.*, 12 BNA OSHC 1833 (No. 82-388, 1986), the company claims that "the decision of a human, imbued with free will, to engage in a violent attack on another person is inherently resistant to prediction," so using the general duty clause to regulate such a hazard "is directly contrary to the principle that the clause . . . encompass[es] only those risks which an employer can reasonably be expected to prevent."[8] This concern, however, is addressed by the Act itself through the proof required to establish a general duty clause violation—the existence of a hazard, hazard recognition, feasibility of abatement, and material reduction of the hazard. It is also addressed, as discussed above, by the Act's use of "hazard" in the context of "employment" and "place of employment"—in other words, the provision encompasses only hazards that arise out of (that is, have a sufficient nexus with) the work at issue. There is no basis for Integra's implication that, beyond these express criteria, there are other, implicit jurisdictional limitations that exclude certain types of workplace hazards, particularly in light of the broad language of the

[8] Similarly, the Chamber of Commerce, in its amicus brief, cites *Pelron* for the proposition that "the normal activities of a business do not represent the *types* of 'hazards' that the general duty clause was intended to regulate"—specifically, the Chamber contends that the general duty clause has no application here because "[h]uman interaction . . . is an essential component of" Integra's business. (Emphasis added.) *Pelron*, however, neither holds nor suggests that certain types of workplace hazards are beyond the Act's coverage. Rather, the Commission in *Pelron* held that, in defining the hazard in a general duty clause case, the Secretary must specify "conditions or practices over which [an employer] can exercise control, which is the basis for [the employer's] duty under section 5(a)(1)." 12 BNA OSHC at 1835; *see SeaWorld of Fla. v. Perez*, 748 F.3d 1202, 1212 (D.C. Cir. 2014) ("Nothing . . . in *Pelron* immunizes a workplace's dangerous 'normal activities' from oversight; the Commission simply applied well-established law that only 'preventable' hazards can be considered as recognized."); *Beverly Enters., Inc.*, 19 BNA OSHC 1161, 1187 n.58 (No. 91-3344, 2000) (consolidated) ("*Pelron* does not stand for the proposition that customary work activities cannot be a recognized hazard . . . [but rather] addresses . . . the preliminary question of how the hazard is to be defined . . . ."). Here, the alleged hazard goes beyond the omnipresent, background risk of violence; the Secretary specifically alleges the presence of an enhanced risk of violence arising from the nature of Integra's work with a particular, high-risk group, and has specified conditions and practices (such as the circumstances under which service coordinators meet with members) over which Integra has control. Therefore, *Pelron* does not support the contention that workplace violence hazards are per se excluded from the general duty clause's coverage, nor does it compel a ruling that the particular workplace violence hazard alleged in the instant case is excluded.

general duty clause.[9] *See Allen*, 790 F.3d at 1284 (applying "broad" ordinary meaning of pertinent term); *GTE Sylvania*, 447 U.S. at 108 (declining to limit meaning of ordinarily broad phrase in Consumer Product Safety Act); *Gonzalez,* 980 F.2d at 1421 ("Absent a clearly expressed legislative intent to the contrary, the plain and unambiguous language of the statute must prevail."); *see also Brown & Williamson Tobacco*, 529 U.S. at 132 (statutory words and phrases are to be read in context).

Second, Integra contends that invoking the general duty clause here raises public policy concerns. Specifically, the company contends that it would be inappropriate to deny its services to "uniquely vulnerable persons" with a history of violence, "notwithstanding the fact that such individuals are not presently under any restriction by the police or civil authorities." Additionally, Integra claims that "given the racial disparities in criminal prosecutions in this country, any policy that an employer may enact to screen out individuals from receiving services based on their criminal histories would raise troubling concerns of discrimination." These arguments, however, presuppose that the sole means of abating the alleged hazard is for Integra to refuse to serve certain individuals, a measure the Secretary has not proposed—in fact, he makes clear that his proposed abatement measures "are primarily designed to make such . . . interactions safer." Moreover, even if such screening were the only means of abatement sought by the Secretary and doing so would violate anti-discrimination laws, the citation would necessarily fail under the feasibility of abatement element of the Secretary's burden of proof, so there is no need to account for this "public policy" concern by narrowing the jurisdictional reach of the general duty clause.

Finally, Integra asserts that "there is no rational way to define th[e] obligation [to screen its members] in such a way that it would not also apply to a range of employers whose workers perform work in the homes of their customers." This claim lacks merit given the facts of this case. The danger or risk of workplace violence arises from the nature of both the "employment" and "place of employment" of Integra's service coordinators. This renders the service coordinator position distinct from that of a generic service employee (such as a cable television or appliance technician); the latter interacts with the general population, while service coordinators assist a

[9] Indeed, counsel for the Secretary asserted at oral argument that it would be "extreme" to conclude that this hazard is outside the limit of the broadly-worded general duty clause given that, according to the Bureau of Labor Statistics, "[w]orkplace homicides remained the number one cause of workplace death for women in 2009." OSHA Directive No. CPL 02-01-052, at 4 (Sept. 8, 2011).

specific group of people with particular mental health conditions and criminal and/or violent backgrounds that create an enhanced potential for aggression and hostility.[10] Accordingly, Integra's jurisdictional argument is rejected.

II. Hazard Recognition

Hazard recognition "may be shown by proof that 'a hazard . . . is recognized as such by the employer' or by 'general understanding in the [employer's] industry.' " *Otis Elevator Co.*, 21 BNA OSHC 2204, 2207 (No. 03-1344, 2007) (quoting *Kokosing Constr. Co.*, 17 BNA OSHC 1869, 1873 (No. 92-2596, 1996)); *see Kelly Springfield Tire Co. v. Donovan*, 729 F.2d 317, 321 (5th Cir. 1984) ("Establishing that a hazard was recognized requires proof that the employer had actual knowledge that the condition was hazardous or proof that the condition is generally known to be hazardous in the industry."). The judge concluded that recognition was established here, based in part on "Integra's own training, handbook, and existing policies." The record supports concluding that the hazard of a service coordinator being physically assaulted during a face-to-face meeting by a member with a history of violent behavior was clearly recognized by Integra.

Work rules addressing a hazard have been found to establish recognition of that hazard. *See Otis Elevator*, 21 BNA OSHC at 2207 (recognition established by work rules and safety protocols); *Gen. Elec. Co.*, 10 BNA OSHC 2034, 2035 (No. 79-0504, 1982) (recognition established by safety "precautions [employer] has taken"); *Wheeling-Pittsburgh Steel Corp.*, 10 BNA OSHC 1242, 1246 (No. 76-4807, 1981) (consolidated) ("That [the employer] took some [safety] measures . . . to protect against this hazard, demonstrates that the hazard was recognized within the meaning of Section 5(a)(1)."); *Ted Wilkerson, Inc.*, 9 BNA OSHC 2012, 2016 (No. 13390, 1981) ("That Respondent . . . required the use of personal protective equipment . . . indicates that [Respondent] recognized the existence of a hazard . . . ."). While the

[10] Integra maintains that a decision finding the cited workplace violence hazard covered under the general duty clause will necessarily mean that all employers that provide in-home services—including services in the homes of the general population, such as cable TV installation—must screen their customers. Our decision today carries no such implication because, as explained, the requisite nexus between the risk of violence and the work involved must be present, as it is here. Nonetheless, Integra's speculation in this regard highlights the benefits of addressing the hazard of workplace violence through notice-and-comment rulemaking. In a rulemaking proceeding, all interested persons would have the opportunity to be heard, and the Secretary would give clear notice of what is required of the regulated community. Indeed, the California Division of Occupational Safety and Health has promulgated a Workplace Violence Prevention in Health Care standard that went into effect in April 2017. Cal. Code Regs. tit. 8, § 3342.

Commission has been "reluctant to rely solely on an employer's safety precautions to find hazard recognition absent other 'independent evidence,' " *Mid South Waffles, Inc.*, No. 13-1022, slip op. at 8 (OSHRC Feb. 15, 2019) (citing *Pepperidge Farm, Inc.*, 17 BNA OSHC 1993, 2007 (No. 89-0265, 1997)), the record here establishes both that Integra had work rules addressing the hazard of workplace violence and that the company, through its supervisory personnel, otherwise recognized this hazard.

As to work rules, the company's training materials cover two topics addressing dangerous behavior from members—"Screening the Dangerous Member" and "Safety in the Community," the latter of which included instruction on "[o]btaining critical history about previous unsafe behaviors," "[o]bserving for . . . threats," and identifying "[h]igh-[r]isk [b]ehaviors." Dr. Melissa Arnott, Integra's Vice President of Community Programs and co-developer of this training, "felt it was necessary to instruct [s]ervice [c]oordinators on how to identify and assess dangerous members, because [the service coordinators] would work directly with persons who were mentally ill," and she conceded that she "recognize[d] . . . certain members might be dangerous" and might have had criminal histories.[11] *See Coleco Indus., Inc.*, 14 BNA OSHC 1961, 1966 (No. 84-546, 1991) (hazard recognition established through actual knowledge of supervisor). Additionally, the OSHA compliance officer who conducted the inspection here testified that two other Integra supervisory employees told him that they were aware that members had criminal and violent

[11] Integra contends that the judge erred in considering evidence outside the record in evaluating Dr. Arnott's credibility, and that his error warrants a remand for a new hearing. While summarizing Dr. Arnott's testimony, the judge questioned the quality of the school from which she obtained her doctoral degree, relying on information that appears to be the product of his own research. For instance, the judge pointed out that the school filed a bankruptcy petition in 1991 and had been described in some court filings as "a non-traditional university." This led the judge to give Dr. Arnott's degree less weight "than that [which would be] accorded a similar degree awarded following completion of a full-time, resident study program taken over the course of several years at a traditional university with a suitable accredited program." The judge's analysis and his reliance on information outside the record here is inappropriate. Nevertheless, it constitutes harmless error because Dr. Arnott's testimony focused primarily on the various forms of training Integra provides its service coordinators, and the company does not challenge the judge's finding that this training, along with the company's other abatement measures, was inadequate. Indeed, as noted below, Integra's only abatement argument concerns the efficacy of the Secretary's proposed abatement measures. In short, while Integra describes Dr. Arnott as its "chief witness . . . concerning the nature of the Service Coordinator position and [the sufficiency of] Integra's training programs," her opinion regarding these issues is of little significance to the issues in dispute here.

histories. *See Caterpillar, Inc. v. OSHRC*, 122 F.3d 437, 440 (7th Cir. 1997) (imputing supervisor's recognition of hazard to employer). Finally, the record shows that threatening incidents were previously reported to Integra supervisors by several service coordinators, both in person and in the Reports they submitted. *See Pepperidge Farm*, 17 BNA OSHC at 2007, 2030-31 (using employer's knowledge of prior accidents and injuries as basis for recognition). Taken together, this evidence shows that before the alleged violation, Integra was aware that training its service coordinators to deal with violence from members was necessary, and therefore recognition of the hazard has been established. *Id.* at 2007 (voluntary safety efforts may be considered in conjunction with other, "independent evidence" to establish recognition element).

On review, Integra relies on *Megawest Financial, Inc.*, No. 93-2879, 1995 WL 383233 (OSHRC May 8, 1995) (ALJ)—an unreviewed judge's decision that is not binding Commission precedent—as support for its contention that recognition has not been proven. *See Leone Constr. Co.*, 3 BNA OSHC 1979, 1981 (No. 4090, 1976) ("[A] Judge's opinion . . . lacking full Commission review does not constitute precedent binding upon us."). In that case, former Administrative Law Judge Nancy Spies found that what would suffice for recognition in "the typical [general duty clause] case" is insufficient with regard to a workplace violence hazard. *Megawest*, 1995 WL 383233, at *8. According to Judge Spies, "[i]t is not enough that an employee may fear that he or she is subject to violent attacks, even if that fear is communicated to the employer, . . . [n]or is it sufficient that there has been a previous injury from a violent incident." *Id.* at *9. There is simply no need for "a high[er] standard of proof . . . to show that the employer itself recognized the hazard of workplace violence" than for employer recognition of other hazards alleged under the general duty clause. *Id.* Putting aside that Judge Spies cited no precedent in support of imposing this higher burden, her three-part rationale for reaching this conclusion is unconvincing.

First, Judge Spies noted that the typical workplace hazard involves "inanimate objects . . . over which [an employer] can exercise . . . control," not "people, capable of volitional acts." *Id.* Control over employees, however, has long been required in the context of compliance with the Act—for example, employers must ensure that employees use ladders correctly, 29 C.F.R. § 1926.1053(b); maintain proper clearance distances from electrical lines, 29 C.F.R. § 1926.955(e)(15); use eye protection when welding, 29 C.F.R. § 1910.252(b)(2)(C); take certain actions when working in a confined space, 29 C.F.R. § 1910.146(h); and verify isolation and

deenergization of equipment that is subject to lockout/tagout requirements, 29 C.F.R. 1910.147(d)(6). *See also Morrison-Knudsen Co.*, 16 BNA OSHC 1105, 1120-21 (No. 88-0572, 1993) (noting Commission precedent holding that "the general duty clause is applicable to require a particular form of personal protective equipment . . . where . . . there is no [applicable] standard"); *PSP Monotech Indus.*, 22 BNA OSHC 1303, 1307 (No. 06-1201, 2008) (affirming § 5(a)(1) violation based on employer's failure to keep employees clear of suspended loads). Even compliance with OSHA requirements that are not specifically directed at the actions of employees typically depends on employees properly executing assigned tasks that are necessary for compliance. *See, e.g.*, 29 C.F.R. §§ 1926.652(b)(1)(i) ("Excavations shall be sloped at an angle not steeper than one and one-half horizontal to one vertical . . . ."), 1926.502(b)(1)-(b)(15) (criteria for "[g]uardrail systems" used as fall protection), 1926.451(f)(3) ("Scaffolds . . . shall be inspected for visible defects by a competent person . . . ."). Indeed, the expectation that employees will complete such tasks is the underlying basis for the unpreventable employee misconduct defense. *See L.E. Myers Co.*, 16 BNA OSHC 1037, 1042 (No. 90-945, 1993) (concept underlying UEM defense is that employee "failures . . . to comply with the applicable standards [have] occurred despite a vigorous program of safety education and enforcement").

In Commissioner Attwood's view, the judge's second rationale—that an "employer has even less control over . . . third parties not in its employ"—ignores a number of OSHA standards that address the "third-party" hazards posed by vehicular traffic. *Megawest*, 1995 WL 383233, at *9. *See* 29 C.F.R. §§ 1926.200(g) (requiring traffic signs), 1926.201(a) (criteria for flaggers), 1926.202 (requiring traffic barricades), 1926.651(d) (excavation requirement regarding "[e]xposure to vehicular traffic"), 1910.269(e)(7) (regarding electrical work in enclosed spaces, and requiring "an attendant with first-aid training . . . to provide assistance if a hazard exists because of traffic patterns in the area of the opening used for entry"). *Cf. Summit Contractors, Inc.*, 23 BNA OSHC 1196, 1206 (No. 05-0839, 2010) (affirming § 1926.404(b)(1)(ii) violation against controlling employer for defective electrical box supplied by third party), *aff'd*, 442 F. App'x 570 (D.C. Cir. 2011). Several of these requirements predate the Act and remain largely unchanged today. *See* Safety and Health Regulations for Construction, 36 Fed. Reg. 7,340, 7,356-57 (Apr. 17, 1971) (promulgating predecessor traffic safety standards under Construction Safety Act, 29 C.F.R. §§ 1518.200, 1518.201, 1518.202). Thus, Commissioner Attwood finds no basis

for viewing this "third-party" consideration as justification for a higher standard of proof for employer recognition.[12]

Finally, the judge noted that "violence exists in society [at large]," which has "empower[ed] the police," and not employers, "to control [violent] conduct." *Megawest*, 1995 WL 383233, at *9. The ubiquity of violence in society, however, is not an indicator of the *difficulty* of recognizing a workplace hazard. For example, medical emergencies and fire hazards are quite common, and emergency medical personnel and fire departments have traditionally been relied upon to address such hazards, but these are not grounds to conclude that they are less easily recognized as workplace hazards. *Cf.* 29 C.F.R. §§ 1910.151 (medical and first aid standard), 1910.155 through 165 (fire protection), 1926.24 (fire protection and prevention in construction).[13] As discussed, a more relevant factor in assessing whether a workplace violence hazard is recognized by an employer is the extent to which there is a nexus between the nature of that hazard and the work being performed, which is clearly the case here.

Two circuit court cases have addressed the *Megawest* decision, but neither dictates reaching a different conclusion on the issue of hazard recognition. In *SeaWorld of Fla. v. Perez*, 748 F.3d 1202 (D.C. Cir. 2014), the court affirmed a general duty clause violation based on the hazard of "drowning or injury when working with killer whales during performances" and rejected the employer's contention that, pursuant to *Pelron*, the hazard posed by the whales was not covered by the Act because it was so "idiosyncratic and implausible that it cannot be considered preventable." *Id.* at 1205, 1210. Without elaboration, the court noted that the facts in *SeaWorld* were distinguishable from those in *Megawest*: "SeaWorld controls its employees' access to and contact with its killer whales, unlike the employer in *Megawest* . . . , who could not prevent the potentially criminal, violent actions of third parties residing in the apartment buildings it managed." *Id.* at 1210. In making this distinction, the court relied on what it assumed was Megawest's inability to *abate* ("could not *prevent*") the workplace violence hazard, not its inability to *recognize* it; indeed, Judge Spies never addressed in her *Megawest* decision whether any proposed abatement measure would have been feasible or effective, given that she vacated the

[12] Commissioner Sullivan would find that there is no need for a higher standard of proof for employer recognition in cases like *Megawest* so long as the Secretary is able to prove that the hazard in question is reasonably foreseeable by the employer. He is not relying, therefore, on OSHA standards addressing third-party behavior in arriving at this determination.

[13] These particular OSHA standards have been in place since the 1970s.

citation for lack of hazard recognition. *See Megawest*, 1995 WL 383233, at *11 ("[W]hether the Secretary's suggested means of abatement would eliminate or materially reduce the hazard need not be addressed."). Accordingly, the *SeaWorld* court's reference to *Megawest* is not an endorsement of that decision's unsupported analysis regarding hazard recognition.

The other circuit case addressing the *Megawest* decision, *Ramsey Winch, Inc. v. Henry*, 555 F.3d 1199 (10th Cir. 2009), is cited by the Chamber of Commerce in its amicus brief. In that case, several businesses seeking to enjoin enforcement of an Oklahoma law requiring employers to allow employees to store firearms in locked vehicles on company property argued that the state law was preempted by the Act's general duty clause. *Id.* at 1202. The court disagreed, concluding that the presence of the stored firearms is "too speculative" a danger to be a "recognized hazard" under the general duty clause—accordingly, an employer's general duty clause obligation would not conflict with its ability to comply with the state law. 555 F.3d at 1207; *see also id.* at 1206 (describing hazard in *Megawest* as "*random* physical violence") (emphasis added). The Chamber, in arguing that the workplace violence hazard cited here is not "recognized," attempts to analogize it to this "speculative" firearm hazard. The court in *Ramsey Winch*, however, expressly distinguished the firearm hazard from a circumstance "in which a psychiatric hospital . . . fail[ed] to protect its workers from patients' violent behavior," stating that "[a] primary function of a psychiatric hospital's work is to manage unstable and often violent behavior . . . *arising out of work situations*." 555 F.3d at 1207 n.8 (emphasis added) (citation omitted). In other words, the court acknowledged that such violence at a psychiatric hospital could be a recognized hazard, given the nexus between it and the employment at issue. That is precisely the case here. Accordingly, Integra's reliance on *Megawest* is misplaced. The Secretary, therefore, has proven employer recognition.

III. Feasibility of Abatement

The final issue is whether the Secretary has established "that the [proposed abatement] measures are capable of being put into effect and that they would be effective in materially reducing the incidence of the hazard."[14] *Beverly Enters., Inc.*, 19 BNA OSHC 1161, 1190 (No.

[14] The Secretary must also show, "as a threshold matter, that the methods undertaken by the employer to address the alleged hazard were inadequate." *U.S. Postal Serv.*, 21 BNA OSHC 1767, 1773-74 (No. 04-0316, 2006). The judge concluded that the Secretary carried this burden and Integra does not challenge the judge's ruling.

91-3344, 2000) (consolidated). The Secretary asserts in the citation that "[a]mong other methods, feasible means to abate this hazard include" the following:

- Creat[ing] a stand-alone written Workplace Violence Prevention Program for all the service programs[,] . . . includ[ing] . . . a policy that workplace violence will not be tolerated and every incident will be investigated[,] . . . [t]raining and education of all staff[,] . . . [i]ncident reporting and investigation[,] . . . [and] [a] system for reporting safety concerns internally.
- Determin[ing] the behavioral history of new/transferred member[s]; . . . identify[ing] members with assaultive behavior problems . . . and . . . communicat[ing] such pertinent information to all potentially exposed employees; . . . and hav[ing] a system for holding members accountable for violent behavior through consequences or interventions.
- Put[ting] procedures in place that would communicate any incident of workplace violence to all staff who could potentially be exposed to the member(s) involved in the violent incident in a timely manner . . . .
- Training all employees on effective methods for responding during a workplace violence incident[,] . . . [including] recognizing aggressive behavior exhibited by members or others, and . . . techniques for timely de-escalating the behavior.
- Implement[ing] and maintain[ing] a buddy system as appropriate based on a complete hazard assessment which includes procedures for all staff to request and obtain double coverage when necessary, including but not limited to situations where an employee communicates that he or she feels unsafe being alone with a particular member.
- Provid[ing] all staff with a reliable way to summon assistance when needed, . . . including when an employee is with a member . . . .
- Establish[ing] a liaison with law enforcement representatives.

The judge noted that Integra did not claim that the Secretary's proposed abatement methods were infeasible—indeed, he found that the company had since implemented some of these methods, such as regularly performing background checks on members before assigning them to service coordinators; initiating "red flags" on those members with criminal histories, so that employees are notified; and instituting a written workplace violence prevention program with mandatory reporting requirements.

The only abatement argument Integra made to the judge, and the only one the company now makes on review, is that the Secretary failed to establish that the proposed abatement measures would materially reduce the incidence of the workplace violence hazard. The judge rejected this contention largely based on the testimony of Janet Nelson, the Secretary's expert in clinical social work, personal safety awareness, and personal safety skills and safety programs for health and

human service workers. On review, Integra contends that Nelson was "noncommittal" on the issue of abatement efficacy and that her testimony was therefore insufficient to establish that the methods would materially reduce the incidence of the hazard. Specifically, Integra focuses on three aspects of Nelson's testimony in which, the company contends, she was equivocal on this element of the Secretary's burden.

Integra first points to an exchange between Nelson and the Secretary's counsel concerning safety training:

> Q. In your opinion, even though Service Coordinators are not clinicians, would more – more adequate, more . . . appropriate safety training have made them less exposed to the workplace violence, risk of workplace violence?
>
> A. I don't know if they would be less exposed. They may be better able to assess . . . red flags . . . .

Nelson was not equivocating here. She was simply distinguishing between the extent of exposure (that is, the number of potentially violent members with whom the service coordinator may work)—a factor that would be unaffected by training—and training service coordinators as to how to respond when encountering such members. In any event, Nelson later explained how and why training in de-escalation and self-defense techniques would be effective—it would allow service coordinators "to move [their] bod[ies] in a certain way so that [they] can escape without actually ever even touching the person," and would be "useful to [them] in the type of work that they were doing."

Integra next claims that Nelson conceded in the following exchange that violent incidents could still occur even if a buddy system were made into a mandatory, formalized program:

> Q. Are you saying that . . . Integra should have required its Service Coordinators to always be partnered?
>
> A. No, no. [] I think given the population they're dealing with and because they have a paucity of information, that double teaming on an initial . . . helps. Does that mean violence won't happen? It still could. It still could.

Again, this testimony is not equivocal, particularly in light of Nelson's testimony immediately following that "the likelihood [of violence] is less because you have two people," and that using a buddy system for "at least the first few visits where you're familiarizing yourself with the client and establishing the relationship" would help "the worker feel safe," and "through that, the client feels safe."

The final exchange upon which Integra relies shows, according to the company, that Nelson "could offer only a guess" regarding the effectiveness of member background checks:

> Q. In your opinion, does a risk – violence risk assessment . . . does that decrease the incidence of workplace violence?
>
> A. I don't know statistics on that, but yes, the more information you have on what you're walking into, the better off you are.
>
> Q. (Nodding affirmatively.)
>
> A. So I guess I would say yes.

In the context of the rest of her testimony, however, Nelson's use of the word "guess" does not weaken her expert opinion on this issue. As a whole, her expert testimony is sufficient to establish the feasibility and efficacy of the Secretary's proposed abatement measures. *Beverly Enters., Inc.*, 19 BNA OSHC at 1190.[15] Therefore, the Secretary has established the feasibility of abatement element of his case.

---

[15] Integra contends that the general duty clause is unconstitutionally vague as applied here because the Secretary has failed to show that a reasonably prudent employer would have known that it was required to implement the proposed methods of abatement. Specifically, the company cites *Donovan v. Royal Logging*, 645 F.2d 822 (9th Cir. 1981), which states that "problems of fair notice [posed by general duty clause citations] . . . dissipate when we read the clause as applying when a reasonably prudent employer in the industry would have known that the proposed method of abatement was required." *Id.* at 831. *Royal Logging*, however, is not relevant precedent in this case, which could be appealed to the Fourth Circuit (Integra is headquartered in Maryland), the Eleventh Circuit (the events giving rise to the citation were in Florida), or the D.C. Circuit. *See* 29 U.S.C. § 660(a) ("Any person adversely affected or aggrieved by an order of the Commission . . . may obtain . . . review . . . in any United States court of appeals for the circuit in which the violation is alleged to have occurred or where the employer has its principal office, or in the Court of Appeals for the District of Columbia Circuit . . . ."); *Kerns Bros. Tree Serv.*, 18 BNA OSHC 2064, 2067 (No. 96-1719, 2000) (Commission generally applies law of circuit where it is probable case will be appealed).

In any event, Commission precedent states that "[t]he question is whether a precaution is recognized by safety experts as feasible, and not whether the precaution's use has become customary." *Beverly Enters.*, 19 BNA OSHC at 1191. Also, Integra's constitutional vagueness challenge fails because the proposed abatement measures here were available to, and readily knowable by, the industry—indeed, as the CO testified, they were derived from OSHA's workplace violence directive, which was issued in September 2011, more than a year prior to the inspection. OSHA Directive No. CPL 02-01-052 (Sept. 8, 2011); *see Pegasus Tower*, 21 BNA OSHC 1190, 1191 (No. 01-0547, 2005) (affirming judge's finding that feasibility-of-abatement element was satisfied by means "set forth in OSHA Instruction Compliance Directive 2-1.29" regarding fall hazards).

For all of these reasons, we conclude that a violation of the general duty clause has been proven and therefore affirm the citation.[16]

SO ORDERED.

3/4/2019

X

Cynthia L. Attwood
Commissioner
Signed by: Occupational Safety and Health Review Commission

3/4/2019

X

James J. Sullivan, Jr.
Commissioner
Signed by: JAMES SULLIVAN

[16] Integra contends that the violation should not be characterized as serious because the company did not know, and could not reasonably be expected to know, that it was in violation of the Act. To avoid a serious characterization, the record must show that "the employer did not, and could not with the exercise of reasonable diligence, know of *the presence of the violation*." 29 U.S.C. § 666(k) (emphasis added). Here, the Secretary has established Integra's actual knowledge of the violative condition, based on testimony showing supervisor awareness that service coordinators were interacting with potentially dangerous members. *See Trumid Constr. Co.*, 14 BNA OSHC 1784, 1788-89 (No. 86-1139, 1990) (equating knowledge element of Secretary's prima facie case with knowledge necessary to establish serious violation under 29 U.S.C. § 666(k)). As such, and in light of the fact that Integra challenges no other aspect of characterization, nor does the company contest the amount of the penalty, we affirm this violation as serious and assess the Secretary's $7,000 proposed penalty.

SULLIVAN, Commissioner, concurring:

I am in agreement with Commissioner Attwood for the reasons stated in our opinion. I write separately to expand on several aspects of that opinion. I believe that Congress did not contemplate that the Secretary would apply the general duty clause to workplace violence hazards. Nevertheless, I agree that the general duty clause does cover the hazard alleged in this specific case, but I arrive at this conclusion because, in addition to the conclusions I reach with Commissioner Attwood regarding hazard recognition and feasible abatement, I find that the Secretary established that the hazard cited here was reasonably foreseeable to a "reasonable employer" presented with the specific facts and circumstances in this case.

The general duty clause was "designed to fill those interstices necessarily remaining after the promulgation," through notice-and-comment rulemaking, "of specific safety standards." *Bristol Steel & Iron Works, Inc. v. OSHRC*, 601 F.2d 717, 721 (4th Cir. 1979). Although specific obligations under the general duty clause are not subject to notice-and-comment, they are as subject to the constitutional requirement of fair notice as any other law. *See, e.g., Otis Elevator Co.*, 21 BNA OSHC 2204, 2206 (No. 03-1344, 2007) ("[T]he Secretary must define the cited hazard [in a general duty clause case] in a manner that gives the employer fair notice of its obligations . . . ."). Because of section 5(a)(1)'s broad language, meeting the fair notice requirement in a general duty clause case is, however, inherently problematic—employers cannot be left only to guess at their legal obligations. When it comes to hazards that are also of a broad nature, such as workplace violence, this notice problem is further compounded, so employers need some way of evaluating whether they could be held in violation of the general duty clause in the event of a violent incident at the workplace. Unsurprisingly, in such situations OSHA often proffers guidance to the regulated community, as it has done here, to establish the requisite notice. *See, e.g., Reflections Tower Serv., Inc.*, No. 00-1201, 2001 WL 777056, at *4 (OSHRC July 2, 2001) (ALJ) ("In [attempting to] prov[e] the alleged violation, the Secretary is relying on OSHA Instruction CPL 2-1.29 . . . ."). This practice is troubling because such guidance, which is an obvious attempt to provide the specificity lacking in the general duty clause itself, effectively becomes a mandatory compliance requirement that was neither contemplated by Congress nor

subjected to notice-and-comment rulemaking.[1] Accordingly, especially when dealing with a broad hazard such as workplace violence, a check on the application of the general duty clause is necessary.

In a case involving workplace violence, proof of reasonable foreseeability is the only way, in my view, that the Secretary can prove that a hazard "exists" or is "cognizable" under the general duty clause. "Congress quite clearly did not intend the general duty clause to impose strict liability: The duty was to be an achievable one." *Nat'l Realty & Constr. Co. v. OSHRC*, 489 F.2d 1257, 1265-66 (D.C. Cir. 1973). As such, the intent was "to limit the general duty imposed by section 5(a)(1) to preventable hazards." *Pelron Corp.*, 12 BNA OSHC 1833, 1835 (No. 82-0388, 1986). Preventability, in my view, must include some element of foreseeability—indeed, any hazard that is unforeseeable cannot meaningfully be prevented, nor can it be truly "recognized." 29 U.S.C. § 654(a)(1). In other words, an employer cannot be held responsible for a hazard over which it has no control, and the occurrence of which it cannot predict. *See Pratt & Whitney Aircraft v. Sec'y of Labor*, 649 F.2d 96, 101 n.2 (2d Cir. 1981) (violation must, at a minimum, be reasonably foreseeable to be deemed a serious violation). Put another way, "[i]f an employer, in the exercise of reasonable diligence cannot foresee that a hazardous incident will occur, the employer cannot be found in violation of the Act." *U.S. Steel Corp.*, 10 BNA OSHC 1752, 1760 (No. 77-1796, 1982) (Cottine, Comm'r, concurring) (citing *Gen. Elec. Corp.*, 9 BNA OSHC 1722, 1733 (No. 13732, 1981)).

---

[1] The Department of Justice has recently emphasized that "[g]uidance documents cannot create binding requirements that do not already exist by statute or regulation." Justice Manual, Title 1-20.000 (Dec. 2018) (adopting Memorandum from Assoc. Att'y Gen. to Heads of Civil Litigating Components and U.S. Attorneys, "Limiting Use of Agency Guidance Documents in Affirmative Civil Enforcement Cases" (Jan. 25, 2018)). The Justice Manual instructs Justice Department attorneys to "not treat a party's noncompliance with a guidance document as itself a violation of applicable statutes or regulations," but instead to "establish a violation by reference to [the] statutes and regulations" themselves. *Id.* Although this Manual is inapplicable to agencies outside the Justice Department, OSHA guidance documents do typically contain disclaimers asserting that the guidance does not create any legal obligations. *See, e.g.,* "Guidelines for Preventing Workplace Violence for Health Care and Social Service Workers," OSHA Publication 3148-01R (2004) ("This informational booklet . . . does not alter or determine compliance responsibilities in OSHA standards or the Occupational Safety and Health Act of 1970."). These disclaimers, however, are rendered meaningless when the agency uses its guidance in enforcement actions to compensate for the lack of specificity in the general duty clause.

This is especially relevant in the workplace violence context—one cannot just rely on broad assumptions concerning the potentially violent behavior of a whole population. Moreover, such violence is in many cases inherently unpredictable, as it is the result of an individual's affirmative, volitional, and deliberate choice. We should not, therefore, adopt a broad reading of the Act that would make an employer liable for every violent act committed against the employer's employees. OSHA itself has acknowledged as much, instructing its personnel to gather specific documentation when "conducting a programmed inspection where a *reasonably foreseeable* workplace violence hazard has been identified." OSHA Directive, Enforcement Procedures and Scheduling for Occupational Exposure to Workplace Violence, CPL 02-01-058, at 4 (Jan. 10. 2017). Indeed, OSHA instructs its personnel that, in analyzing whether a workplace violence hazard exists in a given case, the question is, "Were the employer's own employees exposed to a *foreseeable*, hazardous workplace condition or practice?" *Id.* at 8 (emphasis added). Accordingly, in my view, a workplace violence "hazard" exists, and may be citable under the general duty clause, only when the hazard was reasonably foreseeable based on facts that would lead a "reasonable employer" to conclude that a violent incident could occur in its workplace.

I join with Commissioner Attwood in recognizing that foreseeability (though described differently in that opinion) is an important consideration with regard to both the existence of the hazard and the "hazard recognition" elements in a case alleging a workplace violence hazard under the general duty clause. Specifically, our opinion applies the "nexus" concept in finding both the "existence" of a hazard in this case and, in part, in finding "hazard recognition." For example, in discussing the required proof of the "existence" of a hazard that is "cognizable" under the general duty clause in this case, the opinion states that "there is a direct nexus between the work being performed and the alleged risk of workplace violence."[2] The opinion also states that "the requisite nexus between the risk of violence and the work involved must be present." At the same time, when discussing the second step of "hazard recognition" the opinion states that the *more relevant* factor in assessing whether a workplace violence hazard is recognized by an employer is the extent to which there is a nexus between the nature of that hazard and the work being performed, which is clearly the case here.

[2] Our opinion states: "In short, the hazard identified by the Secretary is rooted in the very reasons for Integra's services—this means the hazard arises from the employment itself."

I believe this is no coincidence, as the examination of "cognizable hazard" and "hazard recognition" necessarily implicates the question of whether it was reasonably foreseeable to a "reasonable employer" presented with the same set of facts. For example, the "nexus" discussed in our opinion may be readily apparent in the case of a psychiatric hospital, but what are the factors to consider when examining the nexus question when it is not so obvious? If such a nexus is not so apparent, how will an employer know whether the "nexus" applies where its employees work?

For instance, if a "security company" employee in the lobby of a downtown office building is murdered by a mentally disturbed law firm client, is there a sufficient nexus between the homicide and the specific work duties of that employee—i.e., checking identifications of those wishing to enter the building? Is the fact that the employer calls its employees "security guards" sufficient to prove the "nexus"? What other factors does an employer need to examine in advance to determine whether it may be subject to a citation under section 5(a)(1) in these hypothetical circumstances? Does it matter that the employer's "security" personnel are neither expected nor trained to confront a "dangerous" visitor, but only are expected to call law enforcement? What if no other security employee of this company has ever been confronted by any act of violence in this workplace, or at any of its other sites of employment? What if these security guards do receive some limited training by their employer in "handling" angry or upset visitors? Consequently, the "nexus" question must necessarily include an examination of reasonable foreseeability, which involves facts such as a prior history of any exposure to violence. Without the express incorporation of such a reasonable foreseeability inquiry, the "nexus" test alone will not provide an employer with fair notice that a workplace violence hazard exists or is "cognizable" at a specific workplace.

In *Bomac Drilling*, 9 BNA OSHC 1681 (No. 76-0450, 1981) (consolidated), *overruled by U.S. Steel Corp.*, 10 BNA OSHC 1752 (No. 77-1796, 1982), the Commission held that "to establish a section 5(a)(1) violation, the Secretary must show that . . . the occurrence of an incident [of the hazard] was *reasonably foreseeable*." *Id.* at 1691 (emphasis added). The Commission overruled *Bomac* because it concluded that the "reasonable foreseeability" element is the "same as [whether] the employer had failed to free its workplace from a recognized hazard," and because it found that the reasonable foreseeability concept "simply added an unnecessary complication to the analysis of section 5(a)(1) cases." *See U.S. Steel*, 10 BNA OSHC at 1756-57; *see also Bomac*, 9 BNA OSHC at 1700-01 (Cleary, Comm'r, concurring) ("[R]easonable foreseeability . . .

unnecessarily complicates the analysis of section 5(a)(1) violations while serving no useful purpose in that analysis."). In my view, the Commission got it wrong in *U.S. Steel*. I agree with Commissioner Cottine's concurrence in *U.S. Steel* in which he cites *National Realty* and emphasizes that "requiring . . . an incident to be reasonably foreseeable is necessary to assure that the employer is not held to a standard of strict liability under section 5(a)(1)." *U.S. Steel*, 10 BNA OSHC at 1760. Indeed, the Commission in *Bomac*, in a decision written by Commissioner Cottine, held that the Secretary had to prove four elements: (1) the Respondent failed to render the workplace free from a hazard that is recognized; (2) the occurrence of an incident was reasonably foreseeable; (3) the likely consequence in the event of an accident was death or serious physical harm to its employees; and, (4) there were feasible means available to abate the hazard. *Bomac*, 9 BNA OSHC at 1691.

Since it is clear that reasonable foreseeability is a necessary element in both (1) cognizable hazard and (2) hazard recognition, I view the test set forth by Commissioner Cottine in the majority opinion in *Bomac* as the more accurate reading of what the Act requires the Secretary to prove in a general duty clause case. In short, I do not believe a workplace violence "hazard" can exist, nor can it be truly "recognized," if the violence at issue cannot be reasonably foreseen. Therefore, I would require the Secretary to show that an incident of violence (for example, an assault, battery, or homicide) was reasonably foreseeable. As the Commission ruled in *Bomac*, this *does not* mean that the occurrence of an incident of violence need be likely, only that it is foreseeable. While I concur in the result here, and therefore find a recognized workplace violence hazard, it is only because the record establishes the reasonable foreseeability of Integra's service coordinators being physically assaulted by members with a history of violent behavior.[3]

In sum, I believe that requiring the Secretary to demonstrate that it was "reasonably foreseeable" to a "reasonable employer" that the employer's employees would be subject to an alleged workplace violence hazard is the only way to provide fair notice to an employer that a "hazard" of workplace violence "exists" and is "cognizable" for purposes of the general duty clause. Facts that would be considered in finding such a "cognizable" hazard in such a case would

[3] This test does not use the word "reasonable" in the context of a standard of care an employer owes to its employees, but rather it distinguishes a preventable danger from an unpreventable one. An employer cannot be held responsible for not taking feasible precautions to prevent a hazard over which it has no control or means to anticipate its occurrence.

be the objective facts that were available to a "reasonable employer," which would inform the employer of the risks of violence to which its employees may be exposed, i.e., whether it was "reasonably foreseeable" for the employer to anticipate such exposure.

Therefore, to establish a violation of the general duty clause in a workplace violence case, I believe the Secretary must show that at the time of the incident:

- there was a recognized hazard because the Secretary has shown (a) there was "a tangible and appreciable risk," *Beverly Enters., Inc.*, 19 BNA OSHC 1161, 1172 (No. 91-3144, 2000) (consolidated), of the act of violence coming to fruition—that is, employees were faced with something more than the risk of violence to which the public at large is subject—and (b) the occurrence of a violent incident was reasonably foreseeable in the circumstances presented by the case;[4]
- the violence was likely to cause death or serious physical harm; and
- there were feasible means of abating the hazard by preventing employees from being exposed to the violence.

I join with Commissioner Attwood in our analysis of the latter two elements, and I therefore agree that those elements have been established. As to the first element, I find that Integra clearly recognized the hazard cited here. Its supervisors were well aware that service coordinators were being sent, in many cases unannounced, to meet face-to-face with members with a history of violent behavior. Additionally, in Employee-A's case, Integra's supervisors ignored several warning signs in the reports she submitted concerning her visits to Member-L's home and allowed her to continue those visits by herself. I find that in the circumstances presented here, an incident involving an act of violence was reasonably foreseeable and that was likely to cause death or serious physical harm. Furthermore, I find that Integra had knowledge that the hazard of violence posed by its members existed at its service coordinators place of employment, such that they were

[4] In my view, the "jurisdictional" argument presented by Integra concerning "hazard" under the general duty clause is a red herring. The question of whether any allegation of a workplace hazard in a particular case "exists," or is "cognizable" under the general duty clause is, in my opinion and as discussed above, answered by whether it is foreseeable by a "reasonable" employer that employees are presented with a risk of violence at work that is "preventable." In other words, the nexus between the risk of violence and the work involved is part of the foreseeability question. If such a hazard is not "preventable" and thus not foreseeable, the violence hazard is not "related" to the workplace, but is simply the same risk of violence to the general public in the same area.

exposed to it, and that there were feasible means of abatement to materially reduce or eliminate the hazard. Accordingly, I concur in affirming the citation item at issue.

3/4/2019

X 

James J. Sullivan, Jr.
Commissioner
Signed by: JAMES SULLIVAN

MACDOUGALL, Chairman, concurring:

Today, for the first time, the Commission is faced with deciding whether an alleged workplace violence hazard—specifically, one posed by a schizophrenic client of an employer in the social services industry—is a recognized hazard that the employer must "free" from its workplace.[1] One aspect of this question is not difficult: there is no doubt that Integra's service coordinators were vulnerable employees and the tragedy in this case was foreseeable. Indeed, the hazard of workplace violence could be said to not only be known by Integra's industry but by anyone paying attention to the news media today. The other aspect of this question is more challenging: it is the broader issue of whether in 1970, when Congress enacted the Occupational Safety and Health Act, it intended for workplace violence to be covered as a hazard under section 5(a)(1).

In assessing Congress' intent and addressing the scope of the general duty clause as it applies in this case, I am mindful of two essential touchstones—an employer's constitutional right to fair notice and the fact that an employer's liability under the general duty clause is limited to conditions and practices that it can control. When a hazard alleged under section 5(a)(1) is defined in a way that is overly broad, it deprives the employer of the requisite notice and often invokes a risk that is inherent (and thus unpreventable) in the workplace. *Pelron Corp.*, 12 BNA OSHC 1833, 1835 (No. 82-0388, 1986) ("To permit the normal activities in . . . an industry to be defined as a 'recognized hazard' within the meaning of section 5(a)(1) is to eliminate an element of the Secretary's burden of proof and, in fact, almost to prove the Secretary's case by definition, since under such a formula the employer can *never* free the workplace of inherent risks incident to the business.") (underline emphasis added). *See also Mid South Waffles, Inc.*, No. 13-1022, slip op. at 22-23 (OSHRC Feb. 15, 2019) ("*Waffle House*") (MacDougall, Chairman, concurring) (Secretary's overly broad hazard definition—risk of burns from failing to properly maintain grease drawer to prevent grease fire—fails to provide adequate notice of protective measures employer could implement); *Mo. Basin Well Serv., Inc.*, 26 BNA OSHC 2314, 2316 n.5 (No. 13-1817, 2018) (MacDougall, Chairman, concurring) (alleged hazard—unsafe distance between pump and discharges of oil and gas from tank—was too broadly defined to give employer fair notice).

[1] The Secretary alleges a violation of the general duty clause for exposing employees "to the hazard of being physically assaulted by [clients] with a history of violent behavior."

I wrote separately in *A.H. Sturgill*, and do so again here, to highlight these fundamental limitations on enforcement and to express my concern about the Secretary's invocation of the general duty clause in circumstances Congress likely never contemplated. Recent cases like *A.H. Sturgill*—where the Secretary alleged that an excessive heat hazard existed at an Ohio roofing worksite in August—demonstrate that the Secretary has failed to give these considerations sufficient regard. *A.H. Sturgill Roofing, Inc.*, No. 13-0224, slip op. at 2 (OSHRC Feb. 28, 2019). These cases include allegations of a fire hazard the Secretary claims was posed by a restaurant grill's grease drawer that employees were required to clean three times per day and three times as often as the grill manufacturer recommends, as well as an explosion hazard the Secretary claims was posed by a pump placed less than 100 feet from a water tank used in a fracking operation. *See Waffle House*, slip op. at 22 (MacDougall, Chairman, concurring); *Mo. Basin Well Serv.*, 26 BNA OSHC at 2316 n.5 (MacDougall, Chairman, concurring). As I stated in *A.H. Sturgill*:

> To implicate the general duty clause, a work situation must present a "hazard." The term "hazard" refers to a concrete condition that poses a risk of harm. Longstanding Commission and court of appeals precedent requires that to constitute a cognizable hazard under the general duty clause, a worksite condition must pose more than the mere possibility of harm. *See Pelron Corp.*, 12 BNA OSHC at 1835 ("Defining the hazard as the 'possibility' that a condition will occur defines not a hazard but a potential hazard."); *Pratt & Whitney Aircraft v. Donovan*, 715 F.2d 57, 64 (2d Cir. 1983) ("[T]he Secretary must show more than the mere possibility of injury; he must show that the potential hazard presents a significant risk of harm.") In addition, to comport with due process, the Secretary must define the hazard that he charges an employer with allowing to exist at its worksite in a manner that "apprise[s] [the employer] of its obligations and identif[ies] conditions or practices over which the employer can reasonably be expected to exercise control." *Davey Tree Expert Co.*, 11 BNA OSHC 1898, 1899 (No. 77-2350, 1984).

A.H. Sturgill, slip op. at 23 (MacDougall, Chairman, concurring).

The Secretary's proclivity to overreach in his application of the general duty clause not only runs afoul of the prohibitions against holding employers liable for ill-defined hazards that cannot be controlled, it also stands in stark contrast to the unmistakable Congressional preference in the overall structure of the Act for specific standards. *See Reich v. Arcadian Corp.*, 110 F.3d 1192, 1196 (5th Cir. 1997) ("Courts have held that enforcement through the application of standards is preferred because standards provide employers notice of what is required under the OSH Act.") Section 6(a) of the Act directed the Secretary to promulgate "any national consensus standard, and any established Federal standard" as an OSHA standard for a two-year period after the effective date of the Act; while section 6(b) set forth a rigorous process for the promulgation

of hazard-specific standards through the Administrative Procedure Act's notice-and-comment rulemaking process. 29 U.S.C. § 655(a)-(b). As such, instead of viewing the general duty clause as a catch-all provision that Congress intended to be used indefinitely, it is more reasonable to view the clause as a "placeholder," to be used only until section 6(b) rulemaking could be initiated to address hazards. *See* S. Rep. No. 91-1282 (1970), *reprinted in* 1970 U.S.C.C.A.N. 5185-86 (stating the Act's general duty clause would not be "a general substitute for reliance on standards"). In other words, Congress intended the general duty clause to facilitate the Secretary's duty to "insure protection of employees who are working under special circumstances for which no standard has yet been adopted."[2] *Id.* at 5186. *See also* Donald L. Morgan and Mark N. Duvall, *OSHA's General Duty Clause: An Analysis of Its Use and Abuse*, 5 BERKELEY J. EMP. & LAB. L. 283 (1983); *Teal v. E.I. DuPont de Nemours and Co.*, 728 F.2d 799, 804 (6th Cir. 1984) (purpose of general duty clause was to cover unanticipated hazards not covered by a specific regulation).

Another limitation on the reach of the general duty clause that bears noting—one which has been almost entirely ignored—is that Congress intended section 5(a)(1) to be restricted to recognized hazards that can be made, in the words of the statutory clause itself, "free" from the workplace. 29 U.S.C. §654(a)(1). As I discuss in detail below, were we writing on a clean slate, I would have found this to be a controlling issue in this case.

It is against this backdrop, with these concerns in mind, that I consider the question of Congress' intent regarding the Act's coverage of the hazard alleged here. I have no doubt that as

---

[2] The Secretary's expanded use of the general duty clause in recent years under the guise that he does not have sufficient resources to engage in difficult rulemaking disrupts the split enforcement model Congress enacted whereby the Secretary of Labor was delegated authority for rulemaking and the Commission responsibility for adjudication. *See Cuyahoga Valley Ry. Co. v. United Transp. Union*, 474 U.S. 3, 6-7 (1985) ("It is the Secretary . . . who sets the substantive standards for the work place, [while] . . . [t]he Commission's function is to act as a neutral arbiter and determine whether the Secretary's citations should be enforced . . . ."). In cases such as the one before us, the Commission essentially engages in adjudicative lawmaking—without notice and comment. Thus, while I am sympathetic to the Secretary's and Commissioner Attwood's concerns that rulemaking has become too difficult, even on important issues such as workplace violence, this does not allow the Commission to circumvent Congress' intent. Nor can it be said that workplace violence, which has been a serious concern of OSHA, *see* Prevention of Workplace Violence in Healthcare and Social Assistance, 81 Fed. Reg. 88,147, 88,150 (Dec. 7, 2016) (OSHA request for information noting that since September 2011, OSHA has taken "important step[s] toward . . . address[ing] workplace violence in healthcare and other high-risk settings"), falls into unchartered seas where the Secretary cannot be expected to think to promulgate a standard on "every conceivable hazardous condition."

an historical matter, the 91st Congress never contemplated covering the hazard alleged here under the Act; violence as a workplace safety issue simply did not have the national attention then that it does now. I am constrained, however, by the silence of the Act's legislative history. While there is nothing in the statute or its legislative history to show that workplace violence was contemplated as a hazard in 1970 by Senator Harrison Williams, Congressman William Steiger, or the collective mind of the 91st Congress, thereby allowing it to be swept into the scope of section 5(a)(1), neither does the legislative history evidence an intent to exclude it.

Given that the plain meaning of the term "hazard" as used in the statute is, as my colleagues discuss, broad enough on its face to include the hazard presented by the specific facts of this case, Congress' use of that term in such a circumstance is determinative here. *United States v. Mitchell*, 39 F.3d 465, 468-69 (4th Cir. 1994) ("The plain language of the statute will control unless the history demonstrates that Congress clearly intended a contrary meaning.") (citing *Reves v. Ernst & Young*, 507 U.S. 170, 177 (1993)). As to the other elements of the Secretary's burden of proving a general duty clause violation, as discussed below, I join with my colleagues in finding that they have been established in this case.

DISCUSSION

I. The Threshold Issue: Employer's Duty to Provide a Workplace "Free" from Recognized Hazards

When interpreting a statute, "the beginning point must be the language of the [provision], and when a statute speaks with clarity to an issue[,] judicial inquiry into the statute's meaning, in all but the most extraordinary circumstances, is finished." *Arcadian Corp.*, 17 BNA OSHC 1345, 1347 (No. 93-3270, 1995) (quoting *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992)), *aff'd*, 110 F.3d 1192 (5th Cir. 1997). *See Sharon & Walter Constr., Inc.*, 23 BNA OSHC 1286, 1293 (No. 00-1402, 2010) ("[T]he first step in our analysis is to determine whether the [statutory] language at issue has a plain meaning with regard to the particular dispute before us, or whether it is ambiguous.") (citing *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997)). The "plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Shell Oil*, 519 U.S. at 341. The remedial purpose of the Act—"[t]o assure so far as possible every working man and woman in the Nation safe and healthful working conditions," 29 U.S.C. § 651(b)—"does not give license to disregard the plain meaning of" one of its provisions. *Arcadian*, 17 BNA OSHC at 1348 (citing *Kiewit Western Co.*, 16 BNA OSHC 1689, 1694 (No.

91-2578, 1994); *Symons v. Chrysler Corp. Loan Guarantee Bd.*, 670 F.2d 238, 241 (D.C. Cir. 1981)). "We should prefer the plain meaning since that approach respects the words of Congress." *Lamie v. U.S. Trustee*, 540 U.S. 526, 536 (2004).

The general duty clause states that "[e]ach employer . . . shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." 29 U.S.C. § 654(a)(1). From this language, the courts and the Commission have derived the four traditional elements of a general duty clause violation—(1) a workplace condition or activity that presents a hazard; (2) recognition of that hazard by the employer or its industry; (3) a likelihood that the hazard will cause serious physical harm; and (4) a feasible method of materially reducing the hazard. *See, e.g., Nat'l Realty & Constr. Co. v. OSHRC*, 489 F.2d 1257, 1265 (D.C. Cir. 1973); *Kokosing Constr. Co.*, 17 BNA OSHC 1869, 1872 (No. 92-2596, 1996). There is a flaw in this existing framework, however, because nowhere does it address the ability of an employer to "*free*" a workplace of a recognized hazard—an express requirement of section 5(a)(1). While my colleagues have apparently not been troubled by this restriction on the hazards that may be addressed by a general duty clause citation, I remain so.

"Free" is defined as "clear, exempt, relieved," "not obstructed or impeded," "open," and "not subject to a particular ruling, authority, or obligation." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 904-05 (1971); *see United States v. Sherburne*, 249 F.3d 1121, 1126 (9th Cir. 2001) ("turn[ing] to the dictionary for guidance" in absence of statutory definition); *Crawford v. Metro. Gov't of Nashville & Davidson Cty.*, 555 U.S. 271, 276 (2009) (undefined term "carries its ordinary meaning"). These definitions suggest that a hazard must not only be recognized, but also be of the type over which an employer can exercise control such that it can be removed from the workplace entirely.

Indeed, in looking at the broader context of the Act, a significant distinction between the language of sections 5(a)(1) and 5(a)(2) supports this reading. An employer's duty under section 5(a)(2) is unconditional: employers "shall comply with occupational safety and health standards promulgated under this Act." 29 U.S.C. § 654(a)(2). This is because the "standards promulgated under this Act" are the result of notice-and-comment rulemaking, are typically directed at

particular hazards, and ordinarily proscribe specific means of abatement.[3] *See Pratt & Whitney Aircraft v. Sec'y of Labor*, 649 F.2d 96, 104 (2d Cir. 1981) ("[B]efore [the Secretary] can promulgate any permanent health or safety standard, [he] is required to make a threshold finding that a place of employment is unsafe in the sense that significant risks are present and can be eliminated or lessened by a change in practice.") (quoting *Indus. Union Dep't, AFL-CIO v.* Am. *Petroleum Inst.*, 448 U.S. 607, 642 (1980)). By contrast, an employer's duty under section 5(a)(1) is conditional and by no means absolute: the broad obligation to protect the safety and health of employees applies only to those hazards from which an employer can "free" its workplace. *See Nat'l Realty*, 489 F.2d at 1266 ("Congress' language is consonant with its intent only where the 'recognized' hazard in question can be totally eliminated from a workplace."). This more limited obligation makes sense when one considers that the duty under section 5(a)(1) "was [meant] to be an achievable one." *SeaWorld of Fla., LLC v. Perez*, 748 F.3d 1202, 1207 (D.C. Cir. 2014) (quoting *Nat'l Realty*, 489 F.2d at 1265-66).[4]

Additionally, Commission case law has recognized the significance of the general duty clause's inclusion of the word "free." In *Pelron*, the hazard at issue was an explosion caused by a build-up of ethylene oxide at the company's workplace, but because the accumulation of ethylene oxide was a possibility that could never be entirely prevented—in other words, the workplace could never be "free" of it—the Commission rejected the judge's finding that it was the type of hazard to which Congress intended the general duty clause to apply. In other words, "[t]o respect Congress' intent, hazards must be defined in a way that apprises the employer of its obligations, and identifies conditions or practices over which the employer can reasonably be expected to

[3] As a result, Commissioner Attwood's reliance on OSHA standards addressing third-party behavior seems misplaced. All of those standards (e.g., 29 C.F.R. §§ 1926.200(g), 1926.651(d), and 1910.269(e)(7)) were promulgated under section 5(a)(2) pursuant to notice-and-comment rulemaking. As such, they would have no bearing on whether OSHA may address a third-party hazard under the general duty clause.

[4] To be clear, I find the dissent in *SeaWorld* to be more instructive than the majority's decision in that case regarding the meaning of the general duty clause for purposes of the issue before us. *See SeaWorld*, 748 F.3d at 1218-19 (Kavanaugh, J., dissenting) ("The courts and the Department of Labor have recognized that the broad terms of the General Duty Clause must be applied reasonably lest the Clause morph into a blunt instrument by which absolute workers'-compensation-like liability is imposed on employers for all workplace injuries."). Nevertheless, the *SeaWorld* majority's decision itself was based on the reasonable ability of the employer to *control* the cited conditions—it was able to eliminate direct interactions with a killer whale on its property. *Id.* at 1212.

exercise control." *Pelron Corp.*, 12 BNA OSHC at 1835. Court precedent has made similar points. *See Pratt & Whitney*, 649 F.2d at 104 ("Section 5(a)(1) . . . obligates employers to rid their workplaces not of possible or reasonably foreseeable hazards, but [only] of recognized hazards.); *Nat'l Realty*, 489 F.2d at 1266 (noting that some "hazard[s] . . . cannot . . . be totally eliminated," because a "demented, suicidal, or willfully reckless employee may on occasion circumvent the best conceived and most vigorously enforced safety regime"). These same considerations hold true for workplace violence, which is a condition that results from the acts of third parties, engaged in unpredictable human behavior, and outside of the employer's control; no matter how sound an employer's safety program might be for the particular circumstances at its workplace, it is possible the employer cannot free the workplace of the hazard.

Moreover, even if "free" could be considered an ambiguous term such that resort to the Act's legislative history would be necessary, that history, although extensive, offers nothing to refute the foregoing. As might be expected, much of the discussion over the general duty clause involves how to define the limitations on an employer's obligation. Many legislators voiced concern that the enforcement agency would unfairly hold employers to a vague standard or cite them for hazards of which they were unaware. *See, e.g.*, 116 Cong. Rec. 38,713 (1970) (comments of Rep. Robison), *reprinted in* Senate Committee on Labor & Public Welfare, Legislative History of the Occupational Safety & Health Act of 1970, at 1087-88 (June 1971) ("Legislative History") (employers should furnish safe jobs and places of employment, but vague duty provision of Act imposes impossible burden); 116 Cong. Rec. 38,368 (1970) (comments of Rep. Anderson), *reprinted in* Legislative History at 982 (broad, general, and vague duty provision defies practical interpretation and responsible enforcement); H.R. Rep. No. 91-1291, at 51 (1970), *reprinted in* Legislative History at 881 (unfair to require employers to comply with vague mandate in highly complex industrial circumstances). Legislators eventually deemed the change in language from "readily apparent" to "recognized" hazards in the final draft sufficient to address these concerns. *See* S. Rep. No. 91-1282, at 57 (1970) (Javits Amendments), *reprinted in* Legislative History at 197 (general duty clause changed from applying to "readily apparent" to "recognized" hazards); 116 Cong. Rec. 42,206 (1970) (comments of Rep. Steiger), *reprinted in* Legislative History at 1217 (conference bill general duty clause provision made realistic by application to only "recognized hazards" likely to cause serious injury or death); 116 Cong. Rec. at 38,367 (1970) (comments of Rep. Smith), *reprinted in* Legislative History at 980 (limited duty more reasonably

enforceable and more fair); 116 Cong. Rec. 37,326 (1970) (comments of Sen. Williams), *reprinted in* Legislative History at 416 (vagueness and broadness of duty clause corrected by restricting liability to "recognized hazards"). Because much of the debate in Congress centered on whether to include a general duty requirement in the statute at all, *see* H.R. Rep. No. 91-1291, at 21-22, 50-51, 54 (1970); S. Rep. No. 91-1282, at 9-10, 58 (1970), many particular questions relating to the meaning of the requirement were never considered.[5] Thus, the legislative history provides no basis to disregard the plain meaning of "free" in section 5(a)(1).[6]

In sum, I am compelled by longstanding precedent outlining the elements of a general duty clause violation, as well as the lack of briefing on this issue and its impact on our precedent, to affirm the citation item at issue here. Nevertheless, unlike my colleagues, I find that a valid question remains regarding whether Congress intended the Secretary to address workplace violence hazards pursuant to the general duty clause.[7] There is no question that the better course

---

[5] To complicate matters, coverage of the general duty clause was narrowed somewhat as the provision passed through several versions during its consideration; the original bills with the "broader" general duty requirements provided no penalties for violation. Hence, a number of the explanations that do appear in the legislative record with regard to the precise scope of the clause, in addition to reflecting the usual degree of inconsistency among themselves, refer to earlier versions of the provision, which were quite different in concept from the final version.

[6] Furthermore, an interpretation that is inconsistent with the plain meaning of a statute is not entitled to deference. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984). *See also INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 n.12 (1987) (if the plain meaning of the statutory language is clear, the legislative history is reviewed only to determine whether there is "clearly expressed legislative intention" contrary to that language "which would require us to question the strong presumption that Congress expresses its intent through the language it chooses").

[7] In a footnote, my colleagues take issue with this observation. In doing so, they disregard the plain meaning of the statutory term "free" by suggesting that it should not be read literally but instead as "aspirational" in nature and interpret it to require that the Secretary show only that feasible measures would have *materially reduced* the likelihood that hazardous conduct would have occurred. This allows them to jump all the way to the end of the general duty clause analysis rather than grapple with its first step—that the hazard must be defined a way that comports with the Act's plain language. While my colleagues claim that no court of appeals has adopted my theory and in support of their arguments they cite and quote Judge J. Skelly Wright's opinion for the D.C. Circuit in *National Realty*, a fuller reading of that case undercuts their view here and indeed supports my interpretation of the general duty clause:

> A workplace cannot be just "reasonably free" of a hazard, or merely as free as the average workplace in the industry. On the other hand, Congress quite clearly did

would be for the Secretary to promulgate, pursuant to notice-and-comment rulemaking, a specific standard addressing such hazards under section 5(a)(2).

II. Beyond the Threshold Issue: The Elements of the Alleged General Duty Clause Violation

As noted, despite the concerns I raise here, I join my colleagues in their conclusion that the Secretary has established a violation of the general duty clause. I do so with the understanding that the citation is affirmed in accordance with Commission precedent regarding the elements of a

---

> not intend the general duty clause to impose strict liability: The duty was to be an achievable one. Congress' language is consonant with its intent only where the "recognized" hazard in question *can be totally eliminated from a workplace*. A hazard consisting of conduct by employees, such as equipment riding, cannot, however, be totally eliminated. A demented, suicidal, or willfully reckless employee may on occasion circumvent the best conceived and most vigorously enforced safety regime. This seeming dilemma is, however, soluble within the literal structure of the general duty clause. Congress intended to require elimination only of preventable hazards. It follows, we think, that Congress did not intend unpreventable hazards to be considered "recognized" under the clause. Though a generic form of hazardous conduct, such as equipment riding, may be "recognized," unpreventable instances of it are not, and thus the possibility of their occurrence at a workplace is not inconsistent with the workplace being "free" of recognized hazards.

489 F.2d at 1265 (emphasis added) (footnotes omitted). Thus, the D.C. Circuit declined to impose a general duty clause test requiring an employer to "reasonably free" a workplace of a hazard.

I also note that violations of the general duty clause have been found in a variety of cases where the hazards were ones that the employer could control. *See, e.g., Noble Drilling Servs., Inc.*, No. 00-0462, 2002 WL 538935, at *5-7 (OSHRC Apr. 3, 2002) (ALJ) (fall hazard from crane-hoisted personnel baskets could be controlled by installation of inside grab rails); *Wiley Organics, Inc.*, 17 BNA OSHC 1586, 1593 & n.7 (No. 91-3275, 1996) (hazard of "valves and vents of the reactor . . . not [being] configured so as to discharge to a safe location away from employee work areas" could be eliminated by "diverting the vent to a catch tank, header pipe, or similar safe location"); *Waste Mgmt. of Palm Beach*, 17 BNA OSHC 1308, 1309, 1311 (No. 93-0138, 1995) (hazard of collapse of trash loader boom, exacerbated by employer's unauthorized reinforcement of boom, could be eliminated by replacing boom entirely); *Anoplate Corp.*, 12 BNA OSHC 1678, 1686-87 (No. 80-4109, 1986) (hazard of common storage of cyanide and acid containers could be eliminated by separate storage); *Safeway, Inc.*, 382 F.3d 1189, 1195 (10th Cir. 2004) (employer "could have eliminated the hazard of using a forty-pound tank with the grill by simply using a twenty-pound tank"); *St. Joe Minerals Corp.*, 647 F.2d 840, 844 (8th Cir. 1981) (employer did not "render its workplace 'free' of hazard" when it bypassed broken interlock system on freight elevator by having employee operate elevator manually; employer could have eliminated hazard by "fully repair[ing] or replac[ing] malfunctioning equipment"). Thus, my colleagues' fear for the virtual elimination of this statutory provision is unfounded.

general duty clause violation. I am also mindful that the parties in this case were not asked to brief the issue of whether this, admittedly long-standing, precedent should be revisited. In joining my colleagues, I note that our ruling today is a narrow one limited to the facts before us in that there was much Integra could have done to implement a sound safety program in the particular circumstances that exist at its workplace.

A. Nexus Between the Work Being Performed and the Alleged Risk at a "Place of Employment"

I join my colleagues in their conclusion that the interactions between the service coordinators and clients occur at a "place of employment." 29 U.S.C. § 654(a)(1) ("Each employer . . . shall furnish to each of his employees employment and a *place of employment* which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.") (emphasis added). Although the terms "employment" and "place of employment" are not defined in the Act, I agree that for purposes of the general duty clause, these terms have been construed liberally, and the broad definition of "workplace" can include customers' homes, hospitals, restaurants, and public spaces extending beyond the walls of an employer's physical office or plant. *See Usery v. Marquette Cement Mfg.*, 568 F.2d 902, 904-05 (2d Cir. 1977) (employer violated Act although employee injured in alley between employer's buildings); *Clarkson Constr. Co. v. OSHRC*, 531 F.2d 451, 458 (10th Cir. 1976) (employer liable for unsafe conditions on public highway); *Anning-Johnson Co. v. OSHRC*, 516 F.2d 1081, 1085 (7th Cir. 1975) (Act places primary responsibility on employers because they have control); *see also* S. Rep. No. 91-1282, at 9 (1970), *reprinted in* Legislative History at 149-50 (employers have primary control of work environment and should insure that it is safe and healthful); H.R. Rep. No. 91-1291, at 21 (1970), *reprinted in* Legislative History at 851 (employers bound by common duty to bring no adverse effects to employees because they have primary control over work environment). In *Clarkson*, the court noted that the broad construction of "employment" and "place of employment" is consistent with the broad remedial purposes of the Act. 531 F.2d at 458 (drawing narrow boundaries on worksite would defeat purpose of Act).

I also agree with my colleagues that a sufficient nexus between the risk of violence and the work involved is required and that a direct nexus exists here—Integra requires its service coordinators to meet face-to-face with members, many of whom have been diagnosed with mental illness and have criminal backgrounds as well as a history of violence and volatility. I find this nexus distinguishable from generic service providers because Integra's service coordinators' place

of work has an enhanced potential for aggression and hostility. Consequently, I do not view our decision today as creating an employer's open-ended obligation under the Act to address potential workplace violence. In future cases, in my view of our holding today, it will remain the Secretary's burden to establish a sufficient, direct nexus between the work being performed and the alleged risk of workplace violence.

B. Hazard Recognition

In addition, I would find the hazard of being physically assaulted by members with a history of violent behavior to be a "recognized hazard" in the circumstances present here—both on the basis that Integra had actual knowledge of this hazard, for the reasons discussed by my colleagues, and because the hazardous condition is generally recognized in the social services industry.[8] *See Duriron Co.*, 11 BNA OSHC 1405, 1407 n.2 (No. 77-2847, 1983) (using standard proposed by National Institute for Occupational Safety and Health as evidence of industry recognition of hazard); *Beverly Enters., Inc.*, 19 BNA OSHC 1161, 1188 (No. 91-3144, 2000) (consolidated) (rejecting employer's "criticisms of the NIOSH Lifting Equation as evidence of industry recognition," even where equation was advisory, because of general acceptance in scientific community of methodology upon which it was based). *See also* OSHA Directive, Enforcement Procedures for Investigating or Inspecting Workplace Violence Incidents, CPL 02-01-052 (Sept. 8, 2011); OSHA's Guidelines for Preventing Workplace Violence for Health Care and Social Service Workers, OSHA 3148-01R (2004). Indeed, there are numerous publications and studies within the social services and healthcare industry addressing workplace violence such as the National Association of Social Workers' Guidelines for Social Worker Safety in the Workplace and several NIOSH publications.[9]

---

[8] I reach this conclusion without the need to reference either *Megawest Financial, Inc.*, No. 93-2879, 1995 WL 383233 (OSHRC May 8, 1995) (ALJ), a nonprecedential, unreviewed administrative law judge decision, or the D.C. Circuit's decision in *SeaWorld*, which as previously noted addressed the employer's ability to recognize the hazard of a killer whale, a hazard the court determined was one over which the employer could "reasonably be expected to exercise control." *SeaWorld*, 748 F.3d at 1212.

[9] Further, the record shows that Integra relied upon these guidelines in designing training for its service coordinators.

C. Feasibility of Abatement

I find no need to repeat my colleagues' discussion on the feasibility of the Secretary's proposed abatement measures. I agree with their determination that the Secretary has met his burden to establish the feasibility of abatement element in this case.

CONCLUSION

In line with the adage that "bad facts make bad law," *Tharpe v. Sellers*, 138 S.Ct. 545, 547 (2018) (Thomas, J., dissenting), we establish precedent today that the workplace violence hazard alleged here is a hazard covered by the general duty clause. *See also Sucic v. McDonald*, 640 F. App'x. 901 (Fed. Cir. 2016) (Wallach, J., dissenting) ("[H]ard cases[ ] make bad law. So do bad facts.")).) (citations omitted). I recognize that it is easier to fit a decision within the safe haven of stare decisis than to boldly overrule precedent, even where the precedent may have failed to account for a key term in a statute. My hope is that this precedent will be revisited in a future decision and, even better, that OSHA will continue in its effort to promulgate a standard that addresses workplace violence. My concurring opinion today should not be construed as a failure to acknowledge that workplace violence is a serious employee safety concern, particularly in healthcare and social service settings where employees are at the greatest risk of violent events. However, while the desire to address workplace violence is admirable, the result cannot be reached at the expense of the law that binds us.

3/4/2019

X Heather L. MacDougall

Heather L. MacDougall
Chairman
Signed by: HEATHER MACDOUGALL