

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA DEPARTMENT OF LABOR AND INDUSTRY

Gary W. Bastian, Commissioner,
Department of Labor and Industry,
State of Minnesota,

Complainant,

vs.

Final Touch Services, Inc.,

Respondent.

**ORDER DENYING
COMPLAINANT'S MOTION
FOR SUMMARY DISPOSITION**

The above matter is pending before the undersigned Administrative Law Judge pursuant to Complainant's Motion for Summary Disposition. Susan C. Gretz, Assistant Attorney General, 525 Park Street, Suite 200, St. Paul, Minnesota 55103-2106, appeared on behalf of Complainant, the Commissioner of the Department of Labor and Industry (hereinafter referred to as the "Department" or the "Complainant"). Michael R. Lange, Chief Executive Officer, appeared on behalf of Respondent, Final Touch Services, Inc., 1759 Selby Avenue, St. Paul, Minnesota 55104-6031. The record with respect to the motion closed on December 5, 1996, when the Department's Reply Memorandum was received.

Based upon all of the files, proceedings, and arguments herein, and for the reasons set forth in the Memorandum below,

IT IS HEREBY ORDERED as follows:

1. Complainant's Motion for Summary Disposition is DENIED.
2. A hearing shall be held in this matter on Thursday, January 30, 1997, at 9:30 a.m. in the courtrooms of the Office of Administrative Hearings, 100 Washington Square, Suite 1700, Minneapolis, Minnesota. The parties shall notify the Administrative Law Judge as soon as possible if this date is inconvenient for them.

Dated this _____ day of January, 1997.

BARBARA L. NEILSON
Administrative Law Judge

MEMORANDUM

Summary disposition is the administrative equivalent to summary judgment. Minn. R. 1400.5500 K. Summary judgment is appropriate where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Sauter v. Sauter, 70 N.W.2d 351, 353 (Minn. 1955); Louwagie v. Witco Chemical Corp., 378 N.W.2d 63, 66 (Minn. App. 1985); Minn. R. Civ. P. 56.03. The Office of Administrative Hearings follows the summary judgment standards developed in judicial courts in considering motions for summary disposition regarding contested cases. See Minn. R. 1400.6600.

It is well established that, in order to successfully resist a motion for summary judgment, the non-moving party must show that specific facts are in dispute which have a bearing on the outcome of the case. Hunt v. IBM Mid America Employees Federal Credit Union, 384 N.W.2d 853, 855 (Minn. 1986). The existence of a genuine issue of material fact must be established by the non-moving party by substantial evidence; general averments are not enough to meet the non-moving party's burden under Minn. R. Civ. P. 56.05. Id.; Murphy v. Country House, Inc., 307 Minn. 344, 351-52, 240 N.W.2d 507, 512 (1976); Carlisle v. City of Minneapolis, 437 N.W.2d 712, 715 (Minn. App. 1988). Summary judgment may be entered against the party who has the burden of proof as to an issue at the hearing if that party fails to make a sufficient showing of the existence of an essential element of its case after adequate time to complete discovery. Id. To meet this burden, the party must offer "significant probative evidence" tending to support its claims. A mere showing that there is some "metaphysical doubt" as to material facts does not meet this burden. Id.

For the purpose of this motion, based upon the memoranda, affidavits, and other materials filed by the parties, and construing the facts in a light most favorable to Final Touch, the facts in this case appear to be as follows. Final Touch Services, Inc., is engaged in the business of window cleaning. In February of 1996, Final Touch was hired to clean windows at the Golden Rule Building, 85 East Seventh Place, St. Paul, Minnesota. Among the tasks it was to perform was the cleaning of certain windows above the entryways. Affidavit of Michael R. Lange, Exhibit A.

On February 14, 1996, the Occupational Safety and Health Division of the Minnesota Department of Labor and Industry received a complaint indicating that workers were cleaning windows on the south side of the Golden Rule Building from a ledge thirty to forty feet off of the ground with no fall protection. Occupational Safety and Health Investigator Gary Anderson went to the site to investigate the complaint. Affidavit of Gary Anderson, ¶¶ 10-11 (attached to the Department's Motion for Summary Disposition). When Mr. Anderson arrived at the site, there were no workers on the ledge as had been reported. However, Mr. Anderson observed one of Final Touch's employees, Scott Dunkel, on top of the entryway on the first floor. Mr. Anderson at that time was on the second floor and observed Mr. Dunkel on top of the entryway on all fours. As Mr. Anderson descended the stairway to the first floor and walked toward the

entryway, he observed Mr. Dunkel lie on his stomach and "shimmy" down off the enclosure, dangling over the edge of it until his feet met the top of a stepladder positioned in front of the entryway doors. The stepladder was approximately five and one-half feet tall. Anderson Affidavit, ¶ 13. It was 48 inches from the top of the enclosure to the top of the ladder. Anderson Affidavit, Ex. D. At that point, Mr. Anderson took a photograph of Mr. Dunkel standing on the ladder. Anderson Affidavit, ¶¶ 13-14 and Ex. B. Mr. Dunkel stood on the top step of the ladder, then descended the ladder to the floor and was standing there when Mr. Anderson reached the entryway. Anderson Affidavit, ¶ 13.

Mr. Anderson conducted a conference with Mr. Dunkel and with another Final Touch employee who came into the building from the outside and joined the conference. Mr. Anderson explained that Mr. Dunkel standing on the top step of the ladder constituted an OSHA violation and that a citation would be issued. *Id.*, ¶¶ 15-16. Mr. Dunkel stated that he could probably get a taller ladder to use for the job and radioed for one. *Id.*, ¶ 17. Mr. Anderson held a closing conference with Bob Bjorn, Final Touch supervisor, by telephone later on February 14, 1996. He discussed the hazards of standing on the top step of a ladder, explained that a citation would be issued for the violation, and established a one-day abatement period. Mr. Bjorn agreed that the employees would not continue to use the top step of the ladder. *Id.*, ¶ 18.

Mr. Anderson recommended the issuance of a citation for violation of 29 C.F.R. § 1910.25(d)(2)(xii) and a proposed adjusted penalty of \$300.00. Anderson Affidavit, ¶¶ 20-27 and Ex. D. Such a Citation and Notification of Penalty was issued by the Department on April 3, 1996. Complaint, Ex. A. Respondent filed a Notice of Contest to the citation, but left blank the space designated "Reasons for Contest." Anderson Affidavit, Ex. A. On June 11, 1996, the Department issued the Complaint in this matter. The Complaint amended the citation to allege a violation of Minn. Stat. § 182.653, subd. 2 (1994). As explained in the Department's memorandum in support of its motion, the amendment was made because 29 C.F.R. § 1910.25(d)(2)(xii) applies only to wooden ladders, not metal ladders of the type on which Mr. Dunkel was standing in this case. Minn. Stat. § 182.653, subd. 2, is the so-called "general duty clause" which imposes an affirmative duty on employers to provide a workplace free of recognized hazards and applies where no specific safety standard addresses the observed hazard. Final Touch was required by the Summons and Notice to Respondent accompanying the Complaint to file an answer within 20 days of service. By letter of June 13, 1996, Final Touch answered the Complaint. In the letter, Final Touch, by Michael R. Lange, its CEO, merely indicated that it had conducted a "thorough internal investigation about the incident. The workers have stated that they were performing the work within the rules. Therefore, we contest the citation and respectfully ask the department that the violation be eliminated from the record." In response to interrogatories from the Department requesting the factual and legal bases for any contention by Final Touch that the alleged violation did not occur, the penalty was excessive or improper, or the classification of the violation as "serious" was improper, Final Touch merely responded that it "[s]eriously question[ed] the validity of the citation in its content and severity."

The Department filed its Motion for Summary Judgment on October 16, 1996. The Administrative Law Judge sent the parties a letter on October 22, 1996, which, among other things, attempted to explain the nature of a motion for summary judgment and the type of information that Final Touch should include in its response if it desired to oppose the motion. Mr. Lange of Final Touch filed a letter response on November 6, 1996, which, in essence, requested that the Department prove that Final Touch was negligent and noted that Final Touch disputed the citation. A telephone conference call was held with Mr. Lange and counsel for the Department on November 7, 1996, during which the Administrative Law Judge again attempted to explain the summary judgment requirements, afforded Final Touch additional time to respond, and permitted the Department to file a reply brief. During the conference call, Mr. Lange asserted that the citation resulted from unpreventable employee misconduct which was contrary to training afforded by the company. Final Touch filed a further response on November 21, 1996, and the Department filed a reply brief on December 5, 1996.

Although the submissions by Final Touch are not of the nature and quality that would be expected if the company were represented by an attorney in this matter, they are marginally sufficient to raise a genuine issue of material fact as to whether Mr. Dunkel's conduct on February 14, 1996, was isolated and unpreventable employee misconduct contrary to Final Touch's work rules and/or the training given him by Final Touch. Final Touch has provided evidence through the affidavits filed by Mr. Lange and David F. Trumble, a co-owner of the company, that the company has a safety policy, video training, and testing procedures; its employees are "trained properly" and "routinely instructed" in the use of "proper equipment"; and that Mr. Dunkel completed training provided by Final Touch. Although the current training materials used by Final Touch apparently differ in some respect from the manuals produced by Final Touch in response to document requests served by the Department (see response to Interrogatory 14), the manuals produced contain repeated references to the impropriety of standing on the top step of a stepladder and using ladders that are not sufficiently long for the job. For example, these manuals state that, as a general rule, a ladder must extend three feet beyond the roof line if an employee is going to climb onto the structure; workers must "[n]ever stand any higher than . . . the second step from the top of a stepladder"; if a worker were to stand on the top step of the wrong kind of ladder, he would be engaged in an "unsafe act"; and a "user [of a ladder] shall not step or stand higher than the step or rung indicated on the label marking the highest standing level of a ladder." Gretz Affidavit, Exhibits C ("Ladder Safety Manual") at 8-9, 11, 14, 16, and Ex. D ("Final Touch Services, Inc., Ladders Safety and Training: Their Use and Application") at 2. The affidavits filed by Messrs. Lange and Trumble also indicate that Final Touch is a "founding and active member" of the International Window Cleaning Association (ICWA), which has issued safety guidelines specifying that "[t]he top rung of any ladder should not be used for support. The worker should not work beyond the top portion of a ladder." Lange Affidavit, Ex. G at 10. Final Touch indicated in response to Interrogatories 12 and 13 of the Department's interrogatories that it recognized the IWCA Safety Guidelines for Window Cleaning to be in conformance with established window clearing industry safety standards and that it is Final Touch's practice to comply with those guidelines. Final Touch further indicated in response to Interrogatory No. 17 that it is not the practice of Final Touch employees to stand or bear weight on the top

step of a stepladder during the course of their work. Furthermore, the work order issued by Final Touch for the work on the Golden Rule Building appears to call for the use of an extension ladder. Lange Affidavit, Ex. A.

The company's allegation that Mr. Dunkel was trained not to step on the top step of ladders, was trained to use a ladder of a greater length or some other device when cleaning windows under circumstances similar to those in the Golden Rule building, and/or acted in violation of work rules on February 14, 1996, may, if proven at trial and coupled with evidence that Final Touch took steps to discover violations and enforce its ladder safety rules, support a determination that Final Touch has established an unpreventable employee misconduct defense. The evidence presented by the Department that Final Touch has been cited on eight prior occasions for OSHA violations and has received two prior citations for violations of fall protection standards does not necessarily defeat the assertion of the unpreventable employee misconduct defense here, since there is no evidence that the prior citations involved similar ladder safety violations. See, e.g., Falcon Steel Co., 1993 O.S.H. Dec. (CCH) ¶ 30,059 at 41, 343 (Rev. Comm. 1993) (Review Commission emphasized that prior violations were "quite recent and remarkably similar to the cited instances"); Daniel Construction Co., 1982 O.S.H. Dec. (CCH) ¶ 26,027 at 32,672 (Rev. Comm. 1982) (Review Commission found that "the instances of employees failing to tie off their lanyards are too numerous to permit a conclusion that Daniel's rule requiring the use of safety equipment was effectively enforced"); Prestressed Systems, Inc., 1981 O.S.H. Dec. (CCH) ¶ 25,358 (Rev. Comm. 1981) (number of proven instances of noncompliance with the safety belt rule led to the conclusion that there was no effective enforcement of the rule); Jensen Construction Co., 1979 O.S.H. Dec. (CCH) ¶ 23.664 (Rev. Comm. 1979) (evidence of several recent instances of employees and a supervisor working without safety belt protection undermined assertion of defense in case involving safety belt violation).

Since, as in most OSHA matters, it is reasonable to expect that the hearing will be of limited length, it makes sense to allow Final Touch the opportunity to present testimony and other evidence supporting its position that the violation was the result of unpreventable employee misconduct. In light of the factual disputes between the parties, it will be important for the Administrative Law Judge to hear witness testimony at a hearing and gauge the credibility of the witnesses on these issues. The Administrative Law Judge must, however, caution Final Touch that it will need to make a much more coherent and detailed presentation of evidence at the hearing than it made with respect to the motion for summary judgment if it hopes to persuade the Judge that it should prevail in this matter. Final Touch should keep in mind that it bears the burden of proving the affirmative defense of unpreventable employee misconduct.

Accordingly, because genuine issues of material fact remain for hearing, the Department's Motion for Summary Disposition must be denied.

B.L.N.