Litigation by Ambush: The Struggle to Obtain Fair Notice of OSHA Allegations

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ABSTRACT

Employers face great obstacles in learning the details of the allegations that OSHA is making against them; to do so, they must pursue expensive and often unsuccessful discovery. A provision of the Occupational Safety and Health Act was supposed to prevent this problem by requiring that violations be described "with particularity." The provision has, however, been construed into insignificance. The courts have held that OSHA's allegations need provide only "fair notice" and thus that ambiguities in allegations may be cured during discovery or even at the hearing. No court has ever examined whether such holdings are consistent with the plain meaning of "particularity" or with case law construing a similar requirement for fraud allegations in Federal Rule of Civil Procedure 9(b). Under that case law, particularity in allegations must be provided in the complaint, not in discovery or at trial. This article urges that the wholly independent agency charged with adjudication of OSHA cases revitalize the particularity requirement by adopting an interpretive rule stating that henceforth it will be applied as written and that it will be construed as is Federal Rule 9(b).

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Chief among the difficulties that employers face when litigating cases before the Occupational Safety and Health Review Commission is learning what allegations are being made against them by citations issued by the Occupational Safety and Health Administration. The precedents and procedural rules of the Commission make this task difficult and expensive—and sometimes impossible. A provision of the Occupational Safety and Health Act (the OSH Act)[1] directly addresses the matter. Section 9(a) requires that citations "describe *with particularity* the nature of the violation."[2] The provision has, however, been construed into insignificance. This article urges that the provision be revitalized.

I. THE PROBLEM

Citations issued by the Occupational Safety and Health Administration ("OSHA") of the U.S. Department of Labor commonly make unilluminating allegations. As examples:

- Citations alleging failures to record injuries on a log may state the dates of injuries but state neither the injuries, their causes or circumstances (such as location), nor the facts that made them recordable (such as medical treatment or work restrictions). For example, a citation in a well-known such case alleged 169 violations in the following manner: "At a facility, a recordable injury that occurred to 02-18 [an employee code number], on or about July 23, 2002, was not recorded."[3] The lack of detail in the citation made defense economically infeasible, as the employer was small and could not afford to go through the expense of discovery in trying to get from OSHA the details of the many alleged violations. OSHA did not even provide the employer with a copy of the employee key when the citation was issued.

1. OSH Act §§ 2–34, 29 U.S.C. §§ 651–678.
2. OSH Act § 9(a), 29 U.S.C. § 658(a) (emphasis added).
3. OSHA Citation No. 2, Item 2, Sub-Item 90 (issued Nov. 8, 2006), *in* Inspection No. 309086593 (in author's possession), adjudicated in *inter alia* AKM LLC v. Sec'y of Lab., 675 F.3d 752 (D.C. Cir. 2012).

- A very large department store with three floors and hundreds of thousands of square feet of floor displays once received a citation alleging that somewhere within the building ("at the above addressed worksite") the electrical plug of an unnamed floor fan was missing a grounding pin.[4]
- Citations often allege violations of standards, such as OSHA's Process Safety Management Standard,[5] that have complex, technical applicability criteria.[6] Although the applicability issue is often central to the dispute between OSHA and the employer, citations almost never allege facts indicating why OSHA thinks the standard applies.

This article discusses the difficulties that employers needlessly encounter when trying to obtain the facts that OSHA is alleging. It does not concern the difficulties employers face when trying to learn what *evidence* OSHA might produce at a hearing to prove its factual allegations, though those difficulties are even greater and equally destructive of fairness.

II. SECTION 9(A) OF THE OSH ACT: THE REQUIREMENT FOR "PARTICULARITY"

If one were to read the provision of the OSH Act that directly addresses this issue, one would think that few questions should arise. OSH Act § 9(a) requires that citations "describe *with particularity* the nature of the violation, including a reference to the provision of the Act, standard, rule, regulation, or order alleged to have been violated."[7] Contemporaneous dictionaries defined "particularity" as "detailed" or "minute" in "description or statement,"[8] and "[e]xactitude of detail, especially in description."[9] The provision has no illuminating legislative history, so there is no reason to believe that Congress did not mean the provision to be taken literally. This is especially so in light of the fact that, as discussed below,

4. OSHA Citation No. 1, Item 5(a) (issued July 14, 2016), *in* Inspection No. 1118111 (in author's possession).

5. 29 C.F.R. § 1910.119 (1994) (technically called "Process safety management of highly hazardous chemicals").

6. Other examples are § 1910.120, entitled "Hazardous waste operations and emergency response," the scope provisions of which are so complex as to defy human understanding, and § 1910.269, entitled "Electric power generation, transmission, and distribution." The scope provisions of the latter are so complex that the standard's Appendix A sets out five flow charts and one tabular diagram to help employers understand when it applies.

7. OSH Act § 9(a), 29 U.S.C. § 658(a) (emphasis added). The codified version uses "chapter" instead of "Act."

8. *Particularity*, RANDOM HOUSE DICTIONARY 1052 (1st ed. 1981) (sense 3, "detailed, minute, . . . as of description or statement").

9. *Particularity*, AMERICAN HERITAGE DICTIONARY 956 (1st ed. 1969) (sense 2, "Exactitude of detail, especially in description"). *See also Particularity*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1647 (1966) (sense 2.c, "attentiveness to detail**:** precise carefulness (as of description, statement, investigation)"; sense 2.d, "preciseness in . . . expression"); *Particularity*, WEBSTER'S SECOND NEW INTERNATIONAL DICTIONARY 1783 (1957) (sense 1.d, "Attentiveness to detail"; sense 1.e, "Preciseness in . . . expression").

the word is central to an important pleading provision of the Federal Rules of Civil Procedure, which the OSH Act incorporates by reference.[10]

The OSH Act uses the word "particularity" in two other provisions, but neither of them indicate that the word was not meant to be taken literally. They also throw some light on the way "particularity" is used in § 9(a). OSH Act § 8(f)(1) states the circumstances in which an employee complaint would trigger a mandatory inspection by OSHA: The complaint must be in writing and must state "with reasonable particularity the grounds" for inspection.[11] OSH Act § 20(a)(6)[12] states the circumstances in which an employer or union request would trigger a mandatory investigation of the toxicity of a workplace chemical. It too uses the phrase "*reasonable* particularity."[13] But OSH Act § 9(a) does not use the qualifier "reasonable." That might be read to suggest that Congress intended that it be applied more strictly than sections 8(f)(1) and 20(a)(6)—not *un*reasonably so, but strictly. At least one appellate court drew that inference in contrasting "reasonably necessary" in the OSH Act's definition of an "occupational safety and health standard" in section 3(8)[14] and its criterion of "necessary" for the issuance of an emergency standard without rulemaking in section 6(c)(1)(B).[15] The latter, it held, was "more demanding."[16] So too here.

Another indication of congressional intent is that Congress departed from the more general pleadings provision of the Administrative Procedure Act (APA), which states only that, "[p]ersons entitled to notice of an agency hearing shall be

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10. OSH Act § 12(g), 29 U.S.C. § 661(g) ("Unless the Commission has adopted a different rule, its proceedings shall be in accordance with the Federal Rules of Civil Procedure.").

11. OSH Act § 8(f)(1), 29 U.S.C. § 657(f)(1) states in part (emphasis added):

> Any employees or representative of employees who believe that a violation of a safety or health standard exists that threatens physical harm, or that an imminent danger exists, may request an inspection by giving notice to the Secretary or his authorized representative of such violation or danger. Any such notice shall be reduced to writing, shall set forth with *reasonable particularity* the grounds for the notice, and shall be signed by the employees or representative of employees . . . .

12. 29 U.S.C. § 669(a)(6).

13. *Id*. The Act states in part (emphasis added):

> The Secretary of Health and Human Services shall publish within six months of [enactment of this Act], and thereafter as needed but at least annually a list of all known toxic substances by generic family or other useful grouping, and the concentrations at which such toxicity is known to occur. He shall determine following a written request by any employer or authorized representative of employees, specifying with *reasonable particularity* the grounds on which the request is made, whether any substance normally found in the place of employment has potentially toxic effects in such concentrations as used or found; and shall submit such determination both to employers and affected employees as soon as possible.

14. 29 U.S.C. § 652(8).

15. 29 U.S.C. § 655(c)(1)(B).

16. *In re* MCP No. 165, 21 F.4th 357, 380 (6th Cir. 2021) ("To issue an ETS [emergency temporary standard], OSHA is also required to show that the ETS is 'necessary to protect employees from' the grave danger. 29 U.S.C. § 655(c)(1). This standard is more demanding than the 'reasonably necessary or appropriate' standard applicable to permanent standards. *See id*. § 652(8)."), *rev'd on another ground sub nom*. Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., 142 S. Ct. 661 (2022).

timely informed of . . . (3) the matters of fact and law asserted."[17] The departure seems to have been deliberate, as the Senate and House committees that drafted competing versions of the OSH Act were keenly aware of the APA and referenced it numerous times. For example, both committees noted that employers accused of violations would be entitled to a hearing under the APA;[18] the Senate committee even reproduced the APA as an attachment to its report.[19]

III. FED. R. CIV. P. 9(B) AND OTHER REQUIREMENTS FOR PARTICULARITY IN PLEADINGS

When the OSH Act was passed in 1970, the most well-known provision requiring that a matter be pled "with particularity" was Federal Rule of Civil Procedure 9(b). It states that, "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." Another such provision, Federal Rule 23.1(b)(3), requires that a class action complaint "state with particularly" efforts to obtain satisfaction from corporate directors or shareholders, and why they were unsuccessful.

Case law under Federal Rule 9(b) at the time of the OSH Act's passage in 1970 held that a failure to plead fraud with particularity rendered the complaint "vulnerable to a motion to dismiss for failure to state a claim"[20] or vulnerable to a motion for a more definite statement.[21] Complaints were dismissed on this ground.[22] Federal Rule 9(b)'s particularity requirement was viewed as a common law-based departure from the notice-pleading requirements that generally apply under the federal rules.[23]

Non-OSH Act case law since the OSH Act's passage in 1970 has emphasized the importance of Federal Rule 9(b)'s particularity requirement. The Supreme Court has held that matters required to be pled with "particularity" must be stated with "greater" specificity than matters governed by the notice-pleading requirements in Federal Rule 8.[24] The Second Circuit, which hears many corporate fraud

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17. 5 U.S.C. § 554 ("Adjudications") states in part: "(b) Persons entitled to notice of an agency hearing shall be timely informed of . . . (3) the matters of fact and law asserted."

18. S. REP. NO. 91-1281, at 14 (1970) ("a formal hearing under the Administrative Procedure Act"), *reproduced in* SENATE COMM. ON LABOR & PUB. WELFARE, 92D CONG., 1ST SESS. 154, *Legislative History of the Occupational Safety and Health Act of 1970*, at 854 (1971) [hereinafter LH]; H. REP. NO. 91-1291, at 24 (1970) ("a hearing governed by the Administrative Procedure Act").

19. LH, *supra* note 18, at 186.

20. Perma Rsch. & Dev. Co. v. Singer Co., 410 F.2d 572, 576 n.12 (2d Cir. 1969) (citing Robison v. Caster, 356 F.2d 924 (7th Cir. 1966)).

21. *Id*. at 576 n.12 (first citing Trussell v. United Underwriters, Ltd., 228 F. Supp. 757, 774 (D. Colo. 1964); then citing Lynn v. Valentine, 19 F.R.D. 250 (S.D.N.Y. 1956)).

22. *See* Robison v. Caster, 356 F.2d 924, 925 (7th Cir. 1966) (citing Duane v. Altenburg, 297 F.2d 515, 518 (7th Cir. 1962)) ("[T]he complaint was properly dismissed.").

23. *See* Duane v. Altenburg, 297 F.2d 515, 518 (7th Cir. 1962).

24. *See* Bell Atlantic Corp. v. Twombley, 550 U.S. 544, 569 n. 14 (2007); *see also* Windy City Metal Fabricators & Supply, Inc. v. CIT Tech. Fin. Servs., Inc., 536 F.3d 663, 670 (7th Cir. 2008) (distinguishing between cases that "need only meet the notice pleading standard of Rule 8(a), not the particularity requirement in Rule 9(b)"); Smith v. Clark/Smoot/Russell, 796 F.3d 424, 433 (4th Cir.

suits, has likewise held that Federal Rule 9(b)'s particularity requirement is "an exception to the generally liberal scope of pleadings allowed by Federal Rule 8."[25] The Third Circuit has held that to comply with Federal Rule 9(b)'s "particularity" requirement, "a party must plead his claim with enough particularity to place defendants on notice of the 'precise misconduct with which they are charged.'"[26] This holding has been followed by the Sixth,[27] Ninth,[28] and Eleventh[29] Circuits. The Ninth Circuit requires that the complaint be specific enough that the defendants "can defend against the charge and not just deny that they have done anything wrong," and that the complaint must state "the who, what, when, where, and how of the misconduct charged."[30] The Seventh Circuit requires the complaint to state "the identity of the person making the misrepresentation, the time, place, and content of the misrepresentation, and the method by which the misrepresentation was communicated to the plaintiff."[31]

Federal Rule 9(b)'s particularity requirement has salutary effects beyond notice or greater-than-usual specificity. One is the avoidance of at least some discovery costs, for the courts have held that plaintiffs must have the required facts in hand *before* discovery.[32] Thus, plaintiffs subject to Federal Rule 9(b) are generally not allowed to conduct discovery to "fill in the blanks."[33] As a consequence, a failure to plead fraud with particularity results not in discovery or trial to supply the facts but dismissal without prejudice with leave to replead[34] or an order to supply a more definite statement under Federal Rule 12(e).[35] The upshot is,

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2015) (stating that certain "allegations need pass only Civil Procedure Rule 8(a)'s relatively low notice-pleadings muster—in contrast to Rule 9(b)'s specificity requirements").

25. Luce v. Edelstein, 802 F.2d 49, 54 (2d Cir. 1986).

26. United States *ex rel*. Petras v. Simparel, Inc., 857 F.3d 497, 502 (3d Cir. 2017).

27. Sanderson v. HCA-The Healthcare Co., 447 F.3d 873, 876–77 (6th Cir. 2006).

28. Bly-Magee v. California, 236 F.3d 1014, 1018 (9th Cir. 2001).

29. *E.g*., Durham v. Business Management Associates, 847 F.2d 1505, 1511–12 (11th Cir. 1988).

30. Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1106 (9th Cir. 2003) (internal quotation marks omitted).

31. Uni*Quality, Inc. v. Infotronx, Inc., 974 F.2d 918, 923 (7th Cir. 1992).

32. United States *ex rel*. Nathan v. Takeda Pharms. N. Am., Inc., 707 F.3d 451, 456 (4th Cir. 2013) (stating that Fed.R.Civ.P. 9(b)'s purpose is to "eliminate fraud actions in which all the facts are learned after discovery"); Republic Bank & Trust Co. v. Bear Stearns & Co., 683 F.3d 239, 255–56 (6th Cir. 2012) ("to prevent fishing expeditions" in discovery); United States *ex rel*. Marlar v. BWXT Y-12, L.L.C., 525 F.3d 439, 445 (6th Cir. 2008) (same); Pirelli Armstrong Tire Corp. v. Walgreen Co., 631 F.3d 436, 441 (7th Cir. 2011) (discouraging a "sue first, ask questions later" philosophy); Ackerman v. Northwestern Mut. Life Ins. Co., 172 F.3d 467, 469 (7th Cir. 1999) (stating that having the required facts is useful to force the plaintiff to do more than the usual investigation before filing complaint, so as to assure that fraud charge is responsible and factually supported).

33. United States *ex rel*. Joshi v. St. Luke's Hosp., Inc., 441 F.3d 552, 559–61 (8th Cir. 2006); *see also* Torch Liquidating v. Stockstill, 561 F.3d 377, 391–92 (5th Cir. 2009).

34. *See* Luce v. Edelstein, 802 F.2d 49, 56 (2d Cir. 1986).

35. Douglas v. Renola Equity Fund II, LLC, No. 13-6192, at *10 (E.D. La. Mar. 14, 2014) ("A party may rely on Rule 12(e) to challenge the sufficiency of a pleading under Rule 9(b)."). FED.R.CIV.P. 12(e) states:

> *Motion for a More Definite Statement*. A party may move for a more definite statement of a pleading to which a responsive pleading is allowed but which is so vague or ambiguous that the party cannot reasonably prepare a response. The motion must be made before filing a responsive

however, the same: If the plaintiff fails to supply particularity in the amended complaint or in the more definite statement, the case does not go to trial in the hope that discovery will uncover additional details. Instead, the complaint is dismissed with prejudice.[36] As to amendments, the D.C. Circuit, following the Ninth Circuit, has held that Rule 9(b)'s heightened pleading standard "does not alter the operation of Rule 15(a),"[37] which requires that courts freely give leave to amend when justice so requires. The amended pleading must nevertheless satisfy Rule 9 (b)'s particularity requirement.[38]

Another purpose that Federal Rule 9(b)'s particularity requirement serves has in recent decades attained a certain resonance under the OSH Act: The protection of reputation. The requirement "safeguard[s] a defendant's reputation from 'improvident charges of wrongdoing.'"[39] One might think that this consideration has less force under the OSH Act, as OSHA citations carry less moral opprobrium than fraud allegations. The problem is that OSHA often practices what a former OSHA head called "regulation by shaming"—the issuance of a highly critical press release on the heels of a citation.[40] Such press releases commonly trigger stories in local and even national news outlets. As a result, employers find themselves faced with headlined stories repeating OSHA denunciations to their

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> pleading and must point out the defects complained of and the details desired. If the court orders a more definite statement and the order is not obeyed within 14 days after notice of the order or within the time the court sets, the court may strike the pleading or issue any other appropriate order.

36. *See* Wagner v. First Horizon Pharmaceutical, 464 F.3d 1273, 1280 (11th Cir. 2006) (stating that dismissal with prejudice proper after "repeated failure on Plaintiffs' part to draft a conforming complaint").

37. Belizan v. Hershon, 434 F.3d 579, 584 (D.C. Cir. 2006) (citing Bly-Magee v. California, 236 F.3d 1014, 1019 (9th Cir. 2001)).

38. *See* United States *ex rel*. Joshi v. St. Luke's Hosp., Inc., 441 F.3d 552, 557–58 (8th Cir. 2006).

39. O'Brien v. Nat'l Property Analysts Partners, 936 F.2d 674, 676 (2d Cir. 1991); *see also* Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1104 (9th Cir. 2003) ("Fraud allegations may damage a defendant's reputation regardless of the cause of action in which they appear, and they are therefore properly subject to Rule 9(b) in every case.").

40. *See* Letter from David Michaels, Assistant Sec'y, Occupational Safety & Health Admin., U.S. Dep't of Labor, to Colleagues, "OSHA at Forty: New Challenges and New Directions" (July 19, 2010), https://perma.cc/T7J2-TAVN:

> In some cases, 'regulation by shaming' may be the most effective means for OSHA to encourage elimination of life-threatening hazards and we will not hesitate to publicize the names of violators, especially when their actions place the safety and health of workers in danger.

See generally Sharon Yadin, *Regulatory Shaming*, 49 ENVTL. L. 407 (2019); *OSHA Head Says Wide Range of Tools Needed to Enforce Rules on Worker Safety*, BLOOMBERG (Jan. 9, 2013), https://news.bloomberglaw.com/safety/osha-head-says-wide-range-of-tools-needed-to-enforce-rules-on-worker-safety (quoting Dr. Michaels as characterizing critical press releases as "a common law enforcement technique to discourage others from getting in that same situation. And I think it's been effective. We have to look at the effectiveness of all our tools, and it's one of the arrows in our quiver."). The policy has been called effective, *see* Matthew Johnson, *Regulation by Shaming: Deterrence Effects of Publicizing Violations of Workplace Safety and Health Laws*, 110 AM. ECON. REV. 1866 (2020), and unlawful and immoral, *see* Arthur G. Sapper, *OSHA Shaming and the Rule of Law*, REGUL. MAG., Fall 2020, at 4.

customers. Contesting and defeating a citation before the independent[41] Occupational Safety and Health Review Commission ("Commission") cannot undo the harm, as newspapers rarely report the outcome of such litigation; the employer's reputation thus "stays destroyed."[42]

IV. FROM GRANITE TO SAND: THE CONTRARY EVOLUTION OF OSH ACT 9(A)'S PARTICULARITY REQUIREMENT

One would have thought that when the particularity requirement of OSH Act § 9(a) was first considered, the plain meaning of "particularity" and the body of case law that evolved under Federal Rule 9(b)'s particularity requirement would have been taken into account. After all, the requirement for particularity represented a sharp departure from both the APA's requirement and the notice-pleading regime that generally obtains under the Federal Rules of Civil Procedure. Moreover, Federal Rule 9(b)'s language is similar to OSH Act § 9(a).

But no decision by either the Commission or an appellate court construing the particularity requirement of OSH Act § 9(a) has ever examined the plain meaning of "particularity" or the case law developed under Federal Rule 9(b). As a result, the case law on OSH Act § 9(a)'s particularity requirement has evolved into a regime that is the exact opposite of what Congress intended.

A. The National Realty *Case: The Trouble with Dicta*

The matter got off on the wrong foot in 1973, in the D.C. Circuit's opinion in the path-breaking *National Realty* case[43]—the first opinion by any court of appeals in an OSHA enforcement case. Although the court's holding was narrow,[44] the court's dicta-laced opinion is filled with digressions on all manner of topics. Concerning the "particularity" requirement, the opinion is an undisciplined and naïve shambles.

To see why, let us step back to the two settings in which the wording of a citation's allegations can be important under the OSH Act: (a) when the citation is being used as a charging document and thus is used to give notice of the charges and frame the issues to be tried; and (b) when it is being used as a yard stick

41. The Commission is not a part of OSHA or the U.S. Department of Labor. It is an independent agency in the Executive Branch. *See* OSH Act § 12(a), 29 U.S.C. § 661(a).

42. Noam Scheiber, *Labor Department Curbs Announcements of Company Violations*, N.Y. TIMES, Oct. 23, 2020, at B1, www.nytimes.com/2020/10/23/business/economy/labor-department-memo.html [https://perma.cc/3HS7-N7EH] (under original headline, "Labor Dept. Is Dimming A Spotlight It Relied On") (quoting A. Sapper that employer reputation "stays destroyed even if the employer is later vindicated"). The publicity curb mentioned in the article occurred only during the Trump Administration; the Biden Administration has resumed the previous practice. *See, e.g.*, News Release, OSHA, Investigation into Worker's Severe Arm Injury Finds Cusseta Auto Parts Manufacturer, Supplier Willfully Ignored Safety Precautions (Oct. 15, 2021), www.osha.gov/news/newsreleases/region4/10152021 [https://perma.cc/562W-VYAV].

43. Nat'l Realty & Const. Co. v. OSHRC, 489 F.2d 1257 (D.C. Cir. 1973).

44. The court held that, where OSHA accuses an employer of violating the General Duty Clause (29 U.S.C. § 654(a)(1), OSH Act § 5(a)(1)), OSHA must propose a means of abatement and prove its feasibility and usefulness.

against which to later determine whether an employer should be further penalized because the employer failed to abate the final order resulting from either an adjudicated or uncontested citation.[45]

In *National Realty*, the citation alleged that "an employee was *permitted* to stand as a passenger on the running board of [a front end loader] while the loader was in motion."[46] The employer argued that the record did not show that it had "permitted" such riding either expressly or impliedly. The administrative law judge agreed, finding that evidence of implied permission was lacking; equipment riding had been "an isolated and a rare occurrence" because there had been only "four or five occurrences in two years."[47] Commissioner Burch, writing for himself, did not confine himself to the allegation as written, reasoning that, "[i]t is only necessary to show that the employer knew or, with the exercise of reasonable diligence, could have known of the forbidden practice."[48] He thought it enough that the employer "fail[ed] to prevent an employee from" riding equipment.[49] Commissioner Van Namee found "the several occurrences" of equipment riding put the employer on notice that it needed to have done more to implement its safety policy effectively.[50] Dissenting commissioner Moran argued that the employer had been charged with "permitting" equipment riding, not with failing to prevent it.[51]

The employer appealed to the D.C. Circuit, arguing the Commission had "range[d] far beyond the sole legal issue in this case—did the Petitioner by express consent or by consent inferred from its silence permit Foreman Smith to ride the loader as alleged?"[52] The employer complained the Commission held that "a failure to prevent the accident is the equivalent of permission."[53] The employer did not, however, invoke OSH Act § 9(a)'s particularity requirement; neither the word "particularity" nor a citation to § 9(a) appears in its briefs.

In response, the court devoted a section of its opinion to the matter, entitled "The Relative Unimportance of the Charge." The court wrote:

> The citation and complaint stated that National Realty breached its general duty by permitting Smith to ride the loader. This charge was doubly unfortunate. Permission usually connotes knowing consent, which is not a necessary

45. A citation's abatement requirement can become a final order if the citation is not contested (OSH Act § 10(a), 29 U.S.C. § 659(a)) or if the citation is affirmed by the Commission. OSH Act § 10(c), 29 U.S.C. § 659(c). For the practical necessity of particularity in failure-to-abate cases, *see*, *e.g.,* Marshall v. Harrison Lumber Co., 569 F.2d 1303 (5th Cir. 1978).

46. 489 F.2d at 1261 n.11 (emphasis added) (quoting the citation).

47. Nat'l Realty & Const. Co., 1 BNA OSHC 1049 (OSHRC 1971) (ALJ Kennedy). The ALJ decision follows the Commissioners' opinions but is not paginated.

48. *Id*. at 1051.

49. *Id*.

50. *Id*. at 1054.

51. *Id*. at 1055.

52. Brief of Petitioner at 22, National Realty & Constr. Co. v. OSHRC, No. 72-1978 (D.C. Cir. Dec. 29, 1972) (on file with author).

53. *Id*.

> element of a general duty violation. Second, the charge overemphasized a single incident rather than directly indicting the adequacy of National Realty's safety precautions regarding equipment riding. Nevertheless, the pleadings were not so misleading as to foreclose the Secretary from litigating the statutory sufficiency of National Realty's safety program. In the circumstances, the word "permitted" could fairly have been read to suggest merely a wrongful *failure to prevent* the Smith incident, rather than a knowing authorization of his conduct. Moreover, any ambiguities surrounding the Secretary's allegations could have been cured at the hearing itself. So long as fair notice is afforded, an issue litigated at an administrative hearing may be decided by the hearing agency even though the formal pleadings did not squarely raise the issue.[28] This follows from the familiar rule that administrative pleadings are very liberally construed[29] and very easily amended.[30] The rule has particular pertinence here, for citations under the 1970 Act are drafted by non-legal personnel, acting with necessary dispatch. Enforcement of the Act would be crippled if the Secretary were inflexibly held to a narrow construction of citations issued by his inspectors.[31] [Some footnotes omitted.]
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> [28] NLRB v. Mackay Radio Telegraph Co., 304 U.S. 333, 350, 58 S.Ct. 904, 82 L.Ed. 1381 (1938); Golden Grain Macaroni Co. v. FTC, 9 Cir., 472 F.2d 882, 885-886 (1972); L. G. Balfour Co. v. FTC, 7 Cir., 442 F.2d 1, 19, 21 (1971); Swift Co. v. United States, 7 Cir., 393 F.2d 247 (1968).
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> [29] Professor Davis states the rule with characteristic verve: "The most important characteristic of pleading in the administrative process is their unimportance. And experience shows that unimportance of pleadings is a virtue. * * *" 1 K. Davis, Administrative Law Treatise § 8.04 at 523 (1958). See also Tashof v. FTC, 141 U.S.App.D.C. 274, 437 F.2d 707 (1970).
>
> [31] Allowing subsequent amendment of a citation's charges will not disturb the central function of the citation, which is to alert a cited employer that it must contest the Secretary's allegation or pay the proposed fine. In the typical case, the more inaccurate or unhappily drafted is a citation, the more likely an employer will be to contest it. But a citation also serves to order an employer to correct the cited condition or practice, and a failure to so correct is a punishable violation. 29 U.S.C. § 666(d). Obviously an employer cannot be penalized for failing to correct a condition which the citation did not fairly characterize. Thus, before penalizing a failure to correct a cited violation, the Commission must satisfy itself that the citation defines the "uncorrected" violation with particularity. 29 U.S.C. § 658(a).[54]

The court should have, and could have, stopped its discussion with the holding that "the word 'permitted' could fairly have been read to suggest merely a wrongful *failure to prevent* the Smith incident, rather than a knowing authorization of

54. Nat'l Realty & Const. Co. v. OSHRC, 489 F.2d 1257, 1263–65 & nn.28–31 (D.C. Cir. 1973).

his conduct." That holding would at least arguably comport with the statute's particularity requirement.

Where the court went wrong was in its next sentence: "Moreover, any ambiguities surrounding the Secretary's allegations could have been cured at the hearing itself."[55] Inasmuch as the Secretary's brief never claimed that events at the hearing had cured any ambiguities, the statement was dictum. Moreover, neither party briefed the issue. Had the point been briefed, the court might have been apprised that, under the strongly analogous particularity requirement in Federal Rule 9(b), ambiguities in allegations may not be cured at the hearing, or even in discovery. They are expected to be cured in the complaint.

The same defect affects the next sentence: "So long as fair notice is afforded, an issue litigated at an administrative hearing may be decided by the hearing agency even though the formal pleadings did not squarely raise the issue."[56] The statement was dicta because the Secretary's brief never claimed that any issue had been litigated other than that stated in the citation—whether the employer had "permitted" equipment riding. Again, the issue had not been briefed. Had it been, the employer might have pointed out that the authorities cited by the court were inapposite. They either held that the Due Process Clause of the Fifth Amendment required only fair notice, or they construed the APA's requirement that private parties "be timely informed of . . . the matters of fact and law asserted."[57] None of the cited authorities addressed the requirement in an agency's organic statute that violations be stated "with particularity." Although one cited case stated that "[t]here can be no justification [under the National Labor Relations Act] for confining such an inquiry to the precise particularizations of a charge,"[58] the court seemed to overlook that the OSH Act does contain such a justification—the express particularity requirement in § 9(a). And while fair notice may generally be the test for pleading sufficiency in administrative adjudications and under the APA, it would not suffice under a particularity requirement.[59]

To support the proposition that "administrative pleadings are very liberally construed," the court quoted from an administrative law treatise: "The most important characteristic of pleadings in the administrative process is their unimportance. And experience shows that unimportance of pleadings is a virtue."[60] The statement was dicta because the court had already held that "the word 'permitted' could fairly have been read to suggest merely a wrongful *failure to prevent* the Smith incident, rather than a knowing authorization of his conduct." Again, the

55. *Id*. at 1264.

56. *Id*.

57. NLRB v. Mackay Radio Tel. Co., 304 U.S. 333, 350 (1938) (due process); Golden Grain Macaroni Co. v. FTC, 472 F.2d 882, 885–86 (9th Cir. 1972) (due process and APA); L.G. Balfour Co. v. FTC, 442 F.2d 1, 19, 21 (7th Cir. 1971) (due process and APA); Swift Co. v. United States, 393 F.2d 247, 252 (7th Cir. 1968) (due process).

58. NLRB v. Fant Milling Co., 360 U.S. 301, 308 (1959).

59. See *supra* notes 23–31 & accompanying text.

60. 1 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE 8.04 at 523 (1958).

issue was not briefed. The court's statement may have been true under the APA and may well have accurately characterized administrative adjudication generally, but it is inapposite and wrong under a statute that requires "particularity."

The court's next sentence strayed further, resorting to extratextual considerations and naked policy appeals: "The rule [that administrative pleadings are very liberally construed and very easily amended] has particular pertinence here, for citations under the 1970 [OSH] Act are drafted by non-legal personnel, acting with necessary dispatch."[61] This statement has been quoted in other appellate court decisions[62] and several Commission decisions.[63] But it is wrong on one crucial point and wrong in crucial part on another.

Contrary to the court's statement, it is emphatically *un*true that, when citations are drafted, OSHA is "acting with necessary dispatch." OSHA almost never issues citations with *any* dispatch. OSHA commonly takes months to issue a citation, often bumping up against the statutory limitations period of six months.[64] And if OSHA *were* concerned that delay would endanger employees, issuing a citation is the last thing that it would do, for an employer's notice of contest stays any abatement requirement.[65] Instead, OSHA would threaten to sue or would sue in federal district court for an imminent danger injunction under OSH Act § 13.[66] But imminent danger suits are rare because the vast majority of OSHA violations either pose no current danger to employees or are abated immediately by employers who wish to curry favor with OSHA or seek to earn penalty reductions through immediate abatement. Further evidence of this can be seen from the rarity of motions for expedited proceedings on this ground for cases already before the Commission.[67] That too almost never occurs. On this point, the court was wrong, and naïvely so.

The other part of the court's assertion—that "citations under the 1970 Act are drafted by non-legal personnel"[68]—is usually true (though OSHA's lawyers occasionally do draft citations), but it is entirely lacking in the force the court imagined. The court seemed unaware that from the Act's earliest days, the Commission's rules of procedure have required that OSHA's lawyers file a formal pleading called a "complaint."[69] Thus, OSHA has always been required to have, at the earliest litigation stage, lawyers available to draft complaints with enough detail to cure any lack of particularity in the citation or, if ordered, to draft a more definite statement. The court also seemed unaware that OSH Act § 12(g)[70]

61. *Nat'l Realty & Const. Co.*, 489 F.2d at 1264.
62. *See, e.g.,* Donovan v. Williams Enters., Inc., 744 F.2d 170, 177 (D.C. Cir. 1984); Donovan v. Royal Logging Co., 645 F.2d 822, 828 (9th Cir. 1981).
63. *See, e.g.,* Louisiana-Pacific Corp., 5 BNA OSHC 1994 (OSHRC 1977).
64. OSH Act § 9(c), 29 U.S.C. § 658(c).
65. OSH Act § 10(b), 29 U.S.C. § 659(b).
66. 29 U.S.C. § 662.
67. 29 C.F.R. § 2200.103, "Expedited proceeding" (2020).
68. Nat'l Realty & Const. Co. v. OSHRC, 489 F.2d 1257, 1264 (D.C. Cir. 1973).
69. 29 C.F.R. § 2200.7(d) (1972).
70. 29 U.S.C. § 661(g) (2011).

made the Federal Rules of Civil Procedure applicable unless the Commission adopted a different rule. With respect to amendment, the Commission had not then and still has not adopted a different rule; it thus follows Federal Rule 15. Yet, Federal Rule 15(a) requires that courts "freely give leave [to amend] when justice so requires," a requirement that applies even in cases governed by Federal Rule 9(b).[71] OSHA therefore can, using *legal* personnel, supply the detail required by the statute. Enforcement of the OSH Act would therefore not be "crippled" if the particularity requirement were enforced. Again, the court was wrong, and naïvely so.

The court also stated: "Enforcement of the Act would be crippled if the Secretary were inflexibly held to a narrow construction of citations issued by his inspectors."[72] This statement overlooks that, as discussed immediately above, complaints may be amended to supply missing particulars. Moreover, Congress was presumably aware of the case law under Federal Rule 9(b) and chose nevertheless to write into OSH Act § 9(a) a particularity requirement. It was not for the court to, in effect, disagree with Congress's implicit judgment that OSHA could live with that requirement.

Later in the opinion, the court made its only express mention of the Act's particularity requirement. In footnote 31, the court, citing OSH Act § 9(a), stated that "before penalizing a failure to correct a cited violation, the Commission must satisfy itself that the citation defines the 'uncorrected' violation with particularity."[73] Together with the rest of the court's discussion, footnote 31 effectively confined the particularity requirement to a yardstick for measuring the fairness of a failure-to-abate penalty, and made it irrelevant for measuring the specificity of a citation as a charging document. The court nowhere justified its confinement of the particularity requirement to failure-to-abate cases.

The court's statements, all dicta save one,[74] deserve severe criticism. First, the particularity issue was not briefed. Second, the court's approach to statutory construction, and especially its failure to consider the plain meaning of "particularity" (upon which contemporaneous dictionaries agreed[75]) was inconsistent with the Supreme Court's holding that, "In the absence of persuasive reasons to the contrary, we attribute to the words of a statute their ordinary meaning."[76] It also is contrary to the Supreme Court's recent holdings that a statute must be construed in accord with its ordinary public meaning[77] and that a court may not disregard that meaning based on "extratextual considerations"[78] or "naked policy appeals."[79]

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71. *See supra* note 37 & accompanying text.
72. *Nat'l Realty & Const. Co.*, 489 F.2d at 1264.
73. *Id.* at 1265 n.31.
74. The one exception is the statement that the citation "could fairly have been read to" encompass the action found violative. *Id.* at 1264.
75. *See supra* notes 8 & 9.
76. Banks v. Chi. Grain Trimmers Ass'n, 390 U.S. 459, 465 (1968).
77. Bostock v. Clayton Cnty., 140 S.Ct. 1731, 1738 (2020).
78. *Id.*
79. *Id.* at 1753.

Third, nowhere did the D.C. Circuit consider the case law developed under Federal Rule 9(b)'s particularity requirement even though that rule imposes a well-known exception to the notice pleading regime generally imposed by the federal civil rules. Fourth, as stated above, none of the authorities the court cited concerned a statutory requirement that a charging document allege violations with particularity; they concerned looser requirements. The court's reliance on APA case law was wrong because the OSH Act is expressly stricter than the APA on this point, and the APA states that it "do[es] not limit or repeal additional requirements imposed by statute."[80]

Fifth, the statute was new and unfamiliar to the court. The court's foray into the issue preempted the natural development of case law by the Commission, the body that Congress established to administer the adjudicatory function under the OSH Act.[81] Instead of allowing the Commission to work out the principles governing pleadings under the OSH Act against the backdrop of a wider range of cases and issues than any court would have opportunity to reflect upon, the D.C. Circuit produced an object lesson in the perils of judicial adventurism.

B. The Statute Knocked Further Off Course

Soon after the D.C. Circuit issued *National Realty*, the Second Circuit followed, holding in *REA Express*[82] that a charge "provided fair notice of the Secretary's position and complied with the dictates of due process."[83] The decision did not mention particularity and held that the employer was afforded "due process," citing *National Realty*.

The *National Realty* line of cases had a strong effect on the Commission. Until the D.C. Circuit issued that decision, the meaning of the "particularity" requirement was discussed only in separate opinions and in decisions on other issues.

But in 1975, the Commission followed *National Realty* in holding the purpose of the pleadings "is merely to provide fair notice."[84] Four years later, the Commission made clear how useless the particularity provision would be. It held that a citation alleging excessive workplace noise is not required to "specify the excessive noise levels" to satisfy the particularity requirement of section 9(a).[85] Instead, "[t]he citation need only provide fair notice of the general locations of

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80. 5 U.S.C. § 559 (2012) ("Effect on other laws . . . [t]his subchapter . . . do[es] not limit or repeal additional requirements imposed by statute or otherwise recognized by law.").

81. Judith M. Stinson, *Preemptive Dicta: The Problem Created by Judicial Efficiency*, 54 LOY. L.A. L. REV. 587, 621 (2021) ("[D]icta for judicial efficiency purposes undermine the basic precepts of our judicial system. This 'preemptive dicta' cuts off the natural debate, arguments, and development of the law that are essential in our common law system.").

82. REA Express, Inc. v. Brennan, 495 F.2d 822, 826–27 (2d Cir. 1974).

83. The Second Circuit's opinion was then followed, *inter alia*, by Noblecraft Indus., v. Sec'y of Lab., 614 F.2d 199, 206 (9th Cir. 1980) (rejecting particularity objection because "[t]he essential concern of that requirement is that the employer have notice of precisely what he did wrong and what he must do to cure the violation").

84. Pukall Lumber Co., 2 BNA OSHC 1675, 1677 & n. 9 (OSHRC 1975).

85. Wheeling-Pittsburgh Steel Corp., 7 BNA OSHC 1581, 1585 (OSHRC 1979).

excessive noise levels" and refer "to the areas of excessive noise."[86] Worse, the Commission held, "[t]he purposes of the particularity requirement may be fulfilled and additional information obtained during the . . . discovery, and hearing stages of the litigation."[87] Soon thereafter, the Commission stated that the particularity requirement would not be enforced unless the employer was prejudiced.[88] It repeated that "[l]ack of particularity . . . may be cured at the hearing" and that discovery may supply the required information.[89] Thus was the particularity requirement made a dead letter except in failure-to-abate cases.

V. THE EFFECT ON EMPLOYERS

Turning OSH Act § 9(a)'s particularity requirement into a dead letter has severely affected the ability of employers to inexpensively and timely find out what OSHA is alleging.

Commission and court cases often say that employers can obtain the needed details of a charge in discovery. If only that were as true as the Commission and courts say. In fact, if OSHA's attorneys wish to hide the ball from the employer (and they often do), the Commission's rules and precedents let them. At the very least, OSHA's attorneys can make it expensive and difficult to find out what OSHA is alleging.

On the surface, the Commission's discovery rules appear generous enough. Employers may request the production of documents,[90] and may propound twenty-five interrogatories,[91] and make twenty-five requests for admissions.[92] Depositions are not permitted as of right.[93] They may be taken by consent or by order of the judge, though parties often consent. As is common in courts throughout the nation, the Commission's rules require that parties confer on discovery disputes before filing a motion to compel.[94]

Unlike the Federal Rules, however, the Commission's rules do not permit parties to be sanctioned for violating the discovery rules. Instead, a party may be sanctioned only for violating an order compelling discovery.[95] If an employer is forced to file a motion to compel, and it is granted, the Commission's rules lack any provision for the employer to recover his or her costs.

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86. *Id*.
87. *Id*.
88. Meadows Indus., Inc., 7 BNA OSHC 1709, 1710–11 (OSHRC 1979).
89. *Id*.
90. 29 C.F.R. § 2200.53 ("Production of documents and things").
91. 29 C.F.R. § 2200.55(a) ("Interrogatories").
92. 29 C.F.R. § 2200.54 ("Requests for admissions").
93. 29 C.F.R. § 2200.56 ("Depositions").
94. 29 C.F.R. § 2200.40(d).
95. 29 C.F.R. § 2200.52(f)(2) ("If a party fails to comply with an order compelling discovery . . . ."). It is hard to justify this aspect of the Commission's rules. *See* Richard Freije, Note, *The Use of Discovery Sanctions in Administrative Agency Adjudication,* 59 IND. L.J. 113 (1983).

The Commission's discovery rules thus appear to permit parties to ignore discovery deadlines and grant themselves an extension of time.[96] Attorneys for OSHA, unlike most attorneys for employers, are keenly aware of this. As a result, they commonly ignore discovery requests and deadlines, and wait for an e-mail or letter from the employer protesting the lack of response. The result is needless expense. But that is just one obstacle in the employer's way.

Compounding the problems are that discovery before the Commission is as least as fraught with expense and abuse as discovery in any other forum, and often more so. The problems that specially or often afflict employers in OSHRC discovery include the following:

Unilluminating investigative files. OSHA's investigative files are often barely more illuminating than the citation itself. OSHA's investigative files usually contain handwritten interview notes taken by the inspector during the inspection, documents obtained from the employers (which tell the employer nothing new), photographs taken by the inspector, and, most importantly, OSHA's citation worksheet, called the Form 1B. The Form 1B is supposed to represent the agency's distillation of the facts upon which OSHA relied to issue the citation. Sometimes it does provide valuable insights into the facts but more often it states nothing not already in the citation. Almost never does Form 1B include the basis for stating that the cited standard applies in the first place.

Erroneous assertions of deliberative process privilege. As a government agency, OSHA frequently invokes the deliberative process privilege. This invocation would not be a problem, except that OSHA's attorneys frequently invoke the privilege without regard to the general principle that it does not permit the withholding of facts.[97] OSHA's attorneys therefore commonly use block redactions—that is, blacking out entire pages of the file—instead of redactions targeted at deliberative statements. Trying to convince OSHA's attorneys to use targeted redactions is time-consuming and expensive. Trying to convince an administrative law judge to enforce the distinction just adds to the cost and the uncertainty.

Erroneous assertions of informer's privilege. As a government enforcement agency, OSHA often invokes the informer's privilege. OSHA's attorneys also often use this privilege to black out entire pages of the investigative file. This practice is impermissible if, as is often the case, the statements in the blacked-out portion cannot be used to identify the informant. For example, it is common for OSHA to interview all members of a crew about an accident. The substance of the accounts in OSHA's interview notes almost never contain tell-tale signs of identity. It should, therefore, be enough for OSHA to redact from its interview notes the few personal identifiers and tell-tale signs of identity, and yet leave the substance of the remarks intact. But that is not often done. Similarly, OSHA's

96. A party's failure to respond in any way to discovery requests, however, may be held to waive privileges. *See, e.g.*, Peskoff v. Faber, 244 F.R.D. 54, 64 (D.D.C. 2007); Fonville v. District of Columbia, 230 F.R.D. 38, 42 (D.D.C. 2005).

97. EPA v. Mink, 410 U.S. 73 (1972).

attorneys use the privilege to black out the portion of the OSHA Form 1A that contains the list of persons interviewed by OSHA. This is impermissible because merely identifying someone as an interviewee does not mean that the person made a statement that the employer would have cause to resent. It is expensive and time consuming to convince OSHA's attorneys to undo such redactions, and filing a motion to compel is often expensive and uncertain of success.

Evasion of requirements to answer interrogatories. If a citation is unilluminating and the employer propounds an interrogatory asking for the facts upon which OSHA is relying to allege a violation (commonly called a contention interrogatory), OSHA often refuses to state the facts in plain English. Instead, it often invokes the option in Federal Rule 33(d) to produce business records; it produces the investigative file and then tells the employer that the answer may be found there—somewhere. This practice is abusive because the rule may be used only "if the burden of deriving or ascertaining the answer will be substantially the same for either party" and, because only OSHA knows what facts it is relying upon, the burden can never be equal. Even though courts have therefore held such responses to be improper,[98] OSHA's lawyers only rarely agree to provide a narrative response, forcing the company to move to compel. Even if the motion succeeds, the employer cannot recover his or her costs because, again, parties cannot be sanctioned for disobedience of a rule but only for disobeying an order compelling discovery. The result of all this is more expense to employers.

Sometimes OSHA's attorneys resort to indefensible tactics, such as stating that interrogatory responses are limited to the date that the investigative file was provided by OSHA to its attorneys, thereby refusing, without any possible justification, to provide facts that came to the attention of OSHA or its attorney after that date. The rules require that interrogatory responses be current to the date of the response,[99] not to some artificial date conjured up by OSHA.

Limited usefulness and expense of depositions. As stated above, depositions may not be taken as a matter of right, though parties usually consent to them. But depositions are both enormously expensive and of doubtful usefulness. In a moderately complex case, it can take days of attorney time to prepare well for the deposition of a compliance officer. Most employers' attorneys think that deposing the compliance officer is a good idea, but why? Except for statements made during interviews of informants (and that is a big exception), and admissions made by management representatives during the inspection and not recorded in the Form 1B, it is unlikely that the compliance officer will know more about the facts surrounding the case than the employer does. If the compliance officer is asked about the statements of informants (which only OSHA knows), OSHA's lawyer

98. *See, e.g.*, United States *ex rel.* Landis v. Tailwind Sports Corp., 317 F.R.D. 592, 594 (D.D.C. 2016) ("[C]ourts have consistently held that [Rule 33(d)] cannot be used with respect to contention interrogatories."); *see also* S.E.C. v. Elfindepan, S.A., 206 F.R.D. 574, 577, 577 n.5 (M.D.N.C. 2002) (rule "may not be used as a substitute for answering [contention] interrogatories").

99. *See* 29 C.F.R. § 2200.55(b) (requiring "[a]ll answers [to interrogatories] shall be made . . . as completely as the answering party's information will permit").

will instruct him or her to not answer on the ground of informer's privilege. If the employer tries to get to the heart of the matter and asks the compliance officer for the "reasons why" the citation was issued, OSHA's lawyer may often instruct him or her to not answer on the ground of deliberative process privilege. The employer may then try to pose the question more sharply and ask the compliance officer for the facts that the agency is relying upon to allege that a standard applies or was violated. But if the compliance officer is being personally deposed (that is, as a witness, and not as a party designee under Federal Rule 30(b)(6)), he or she may answer, logically, that he or she does not know, not being the area director (who signed the citation) or the attorney for OSHA. While many compliance officers do candidly answer such questions, any answer given does not, theoretically, bind OSHA, for the compliance officer does not speak for the agency. Although many administrative law judges of the Review Commission do not stand on this ceremony (to their credit), no employer can be sure of this determination in advance. Only if OSHA agrees to provide a representative under Federal Rule 30(b)(6) might the answer be authoritative and useful. And then depositions under that rule are often attended by disputes over the requirement in the rule that the deposition notice "describe with reasonable particularity the matters for examination" and by whether the testimony does, in fact, bind the agency.

The reader might object that the above difficulties and costs are the same ones that litigants commonly face in federal district court litigation. Why should OSHA litigation be different? Because it was *supposed* to be different. "The object of the" APA was to ensure "that any citizen may have his day in court with a minimum of delay and expense."[100] The purpose of administrative administration was to make adjudication easier, less technical, and less costly, not equally costly and complex. The purpose of OSH Act §9(a) was to provide employers the particulars of allegations without cost or difficulty.

Two questions might therefore be raised: Would not a citation stating the allegations with particularity, as the statute requires, be a less expensive and troublesome way to proceed? Would not a more definite statement be a more efficient way to cure a lack of particularity?

VI. OTHER REASONS FOR IMPLEMENTING THE STATUTE AS WRITTEN

OSHA's attorneys often argue that they must use discovery to obtain the facts that they need to prove a violation. It would be fair for OSHA's attorneys to resort to discovery to learn the bases for the employer's affirmative defenses or those for which the employer has the burden of pleading. But the argument is wrong with respect to the elements of OSHA's case-in-chief. If, as OSH Act § 9(a) requires, the citation states the allegations with "particularity," OSHA should have already learned the facts it needs during its inspection or investigation, or it should not have alleged a violation at all. This follows not only from the word

100. STAFF OF S. COMM. ON THE JUDICIARY, 79TH CONG., ADMINISTRATIVE PROCEDURE ACT—LEGISLATIVE HISTORY 1944-46, S. DOC. NO. 248, at 345–46 (1946) (floor statement of Rep. Sabath).

"particularity" but from OSHA's formidable discovery-like powers at the inspection stage.

OSHA may enter the employer's worksite and inspect it—the equivalent of an entry upon land in Federal Rule 34(a)(2).[101] OSHA may subpoena documents and things[102]—the equivalent of document production under Federal Rule 34(a)(1). It may subpoena witnesses to investigatory depositions under oath—the equivalent of depositions under Federal Rule 30.[103] It can, during the inspection, interview employees privately,[104] a power that goes beyond anything available under the Federal Rules. That Congress so endowed OSHA suggests another reason why it required OSHA to allege violations with particularity—that OSHA could do so.

Except for employer allegations that take OSHA by surprise, such as affirmative defenses, a faithful application of the particularity requirement of § 9(a) would obviate much of the need for discovery by OSHA and thus greatly lower the cost of Commission litigation. It would, it is true, shift that cost to the inspection and investigation stage but Commission discovery proceedings are much clumsier and more expensive to navigate than OSHA's inspection and investigation demands.

VII. CONCLUSION: HOW TO REVITALIZE A DEAD STATUTE

The best way for the Commission to revitalize OSH Act § 9(a)'s particularity requirement is through a rulemaking. Although the Commission might theoretically do so in adjudication—that is, overrule its previous holdings in a litigated case—that method is clumsy, time-consuming, and unlikely to result in a broad cure. For one thing, the issue might take decades to present itself to the Review Commissioners as a justiciable issue. Employers cannot be expected to often litigate it, and discovery may have supplied the details required, albeit after unnecessarily expensive efforts, making the controversy moot and not worth litigating further.

The rulemaking would produce the following:

- An interpretive rule stating that the particularity requirement of OSH Act § 9(a) will henceforth be applied as written, and will be construed as under Federal Rule 9(b).
- A procedural rule stating that, if the employer moves for a more definite statement, the obligation to answer a formal complaint is suspended until

101. OSH Act § 8(a), 29 U.S.C. § 657(a) (2012). Although OSHA's power to enter is qualified by the Fourth Amendment and the requirement for an inspection warrant founded on probable cause, *see* Marshall v. Barlow's, Inc., 436 U.S. 307, 320–21 (1978) ("Probable cause in the criminal sense is not required."), if specific evidence of a violation is lacking, OSHA can still inspect under a "general administrative plan . . . derived from neutral sources." *Id.* As a result, few employers today demand inspection warrant, and counsel usually advises against doing so.

102. OSH Act § 8(b), 29 U.S.C. § 657(b) (2012).

103. *Id.*

104. OSH Act § 8(a)(2), 29 U.S.C. § 657(a)(2) (2012).

the motion is ruled upon and any required further statement is provided. If the employer instead moves that the citation be vacated for lack of particularity, and lack of particularity is found, the complaint (but not the citation) will be dismissed without prejudice to re-filing. If the further statement or amended complaint is found to still lack particularity, the citation will generally be vacated with prejudice to re-issuance.

- A preambular statement that cases holding that a lack of particularity may be cured through discovery or at the hearing, or that a showing of prejudice is needed to enforce the particularity requirement, will no longer be followed. The preamble would point out that, inasmuch as federal courts would not accept that argument under Federal Rule 9(b), it will no longer be accepted under OSH Act § 9(a). The preamble would explain that, where particularity is statutorily required, the prejudice to be avoided is not merely the ordinary lack of notice that can be cured by discovery or at a hearing. It is the tangible and substantial harm caused to employers who are denied, at the outset of litigation, precise information of what they supposedly did wrong, whose names were too-freely sullied, and who are then unnecessarily put through the expense and travails of discovery and trial. Notice through discovery or trial would cure none of these harms; it would just compound them.