

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

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BEFORE THE ADMINISTRATOR

In the Matter of:)
)
Hanson's Window and Construction, Inc.) Docket No. TSCA-05-2010-0013
_____)

Complainant's Response to Respondent's Motion to Dismiss Complaint

Complainant, the United States Environmental Protection Agency, Region 5, is asking the Presiding Office to DENY Respondent's request that the Complaint filed in this matter be dismissed.

Respondent Hanson's Window and Construction, Inc., refers to Bowen v. Georgetown University Hosp., 488 U.S. 204, 109 S. Ct. 468, 102 L.Ed.2d 493 (1998) for the proposition that Complainant may not retroactively enforce 40 C.F.R. Part 745, Subpart E, and as the basis for seeking to dismiss the Complaint in this matter. In Bowen, the Supreme Court affirmed the principle that federal legislation should affect future, rather than past, actions. However, Complainant is not attempting to enforce rules retroactively. Rather, Complainant is enforcing regulations in effect at the time of the violations alleged in the Complaint, but its Complaint referred to the same regulations as amended and recodified.

As Complainant states in the Complaint at paragraph 5:

On June 1, 1998, EPA promulgated regulations codified at 40 C.F.R. Part 745, Subpart E, Requirements for Hazard Education Before Renovation of Target Housing (Pre-Renovation Education Rule or PRE Rule) pursuant to 15 U.S.C. § 2686, which was subsequently amended and recodified on April 22, 2008 at 40 C.F.R. Part 745, Subpart E, Lead; Renovation, Repair, and Painting Program; Lead Hazard Information Pamphlet (RRP Rule).

As stated in the Complaint, 40 C.F.R. Part 745, Subpart E, was amended and recodified in 2008. The primary purpose of the amendment and recodification of Subpart E was to add new work practice requirements pertaining to how lead work must be performed in a manner that reduces exposure to lead hazards generated during renovation work by ensuring that individuals performing renovations regulated in accordance with 40 C.F.R. § 745.82 are properly trained, renovators and firms performing these renovations are certified, and the work practices in 40 C.F.R. § 745.85 are followed during these renovations.

In the instant matter, Complainant has not alleged that Hanson's violated the more recently promulgated work practice requirements. Rather, Complainant is enforcing the portion of the regulations that were promulgated and in effect since 1998.

Complainant has reviewed the regulatory history of 40 C.F.R. Part 745, Subpart E, and has determined that the regulations prior to the year 2008 recodification are the appropriate citations for the year 2005 violations alleged by Complainant against Respondent. Complainant is therefore moving the Presiding Officer for permission to amend the Complaint in a separate Motion to Amend Complaint. As set forth in greater detail in Complainant's Memorandum in Support of Motion to Amend Complaint, when the PRE Rule was amended and recodified, the regulation at 40 C.F.R. § 745.85 entitled "Information distribution requirements," was recodified at 40 C.F.R. § 745.84. The substantive requirements of the regulation, "Information distribution requirements," were not significantly changed. The original Complaint cited to the PRE Rule as recodified at 40 C.F.R. § 745.84. Complainant has determined that the citations to 40 C.F.R. § 745.85, in effect at the time of the 2005 transactions, rather than to 40 C.F.R. § 745.84 as

recodified, are the correct citations, and that all other citations in the Complaint should reference the regulations in effect in 2005.

Complainant notes that the original Complaint included a narrative description of the alleged violations pertaining to each transaction (at paragraphs 47 and 321 of the original Complaint). Although the original Complaint cites to the recodification of the PRE Rule rather than to the original regulatory citations, the Complaint did provide notice to Respondent that its claims were alleged violations under the PRE Rule, which was in effect in 2005.

Respondent has had the relevant information in Complainant's possession pertaining to the alleged violations since the Complaint was filed. Complainant has only recently realized this error, and is moving immediately to correct the citations. Therefore, Complainant has not been dilatory in seeking an amendment.

The standard for dismissing a complaint is set forth at 40 C.F.R. § 22.20(a), and is met if the Presiding Officer determines that Complainant has failed to establish a prima facie case or on other grounds which show no right to relief on the part of Complainant.

The Environmental Appeals Board considers motions to dismiss under Section 22.20 (a) to be analogous to motions for dismissal under Rule 12(b)(6) of the Federal Rules of Civil Procedure (FRCP). In the Matter of Asbestos Specialists, Inc., TSCA Appeal No. 92-3, 4 E.A.D. 819, 827 (EAB, Oct. 6, 1993).


Rule 12(b)(6) of the FRCP provides for dismissal when the complaint fails "to state a claim upon which relief can be granted." It is well established that dismissal is warranted for failure to state a claim when the plaintiff fails to lay out "direct or inferential allegations respecting all the material elements necessary to sustain recovery under some viable legal

theory.” Bell Atl. Corp. v. Twombly, 550 U.S. 544, 562 (2007). The standard for dismissal further requires that the allegations in the complaint be taken as true and that all inferences be drawn in favor of the plaintiff . See Twombly, 550 U.S. at 555. Accordingly, to prevail in its Motion, Respondent must show that Complainant’s allegations, assumed to be true, do not prove a violation of TSCA as alleged. In short, Respondent must demonstrate that Complainant has failed to properly plead a prima facie case.

Complainant has alleged violations in its original Complaint that comply with the regulations in effect at the time of the violations. Complainant had included the substantive regulatory violations in the Complaint, but referred to the newly codified version of these regulations in effect in 2008, rather than the original regulatory citations in effect at the time of Respondent’s alleged violations, in 2005. Complainant maintains that Respondent violated the substantive requirements pertaining to the regulations in effect in 2005. Complainant is seeking to conform the pleadings, so that the original regulations, rather than the recodified regulations, are referenced in the Amended Complaint. Accordingly, Complainant respectfully requests that Respondent’s Motion to Dismiss Complaint be denied.

Respectfully submitted,

U.S. Environmental Protection Agency

A handwritten signature in blue ink, appearing to read "Mary T. McAuliffe", is written over a horizontal line.

Mary T. McAuliffe

Mark Palermo

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In the Matter of Hanson's Window and Construction, Inc.
Docket No. TSCA-05-2010-0013

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CERTIFICATE OF SERVICE

I hereby certify that on the August 12, 2010, I filed the original and one copy of this Complainant's Response to Respondent's Motion to Dismiss Complaint with LaDawn Whitehead, Regional Hearing Clerk, EPA Region 5, 77 West Jackson Blvd., Chicago, Illinois 60604, and placed a copy of Complainant's Response to Respondent's Motion to Dismiss Complaint to be mailed by Pouch Mail to:

Chief Judge Susan L. Biro
Office of the Administrative Law Judges
U.S. Environmental Protection Agency
Ariel Rios Building, Mail Code 1900L
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460-2001

and placed for pickup to be mailed a copy of Complainant's Response to Respondent's Motion to Dismiss Complaint, by Express Mail, to:

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Great Falls, Virginia 22066



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