

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR,)	
)	
Complainant,)	
)	
v.)	OSHRC Docket No. 06-1990
)	
AKM LLC dba VOLKS CONSTRUCTORS,)	
)	
Respondent.)	

BRIEF OF THE *AMICUS CURIAE*,
THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS
LEGAL FOUNDATION
IN SUPPORT OF VOLKS CONSTRUCTORS

November 27, 2007

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CORPORATE DISCLOSURE STATEMENT

Pursuant to the § 2200.35 of the Occupational Health and Safety Review Commission's Rules of Procedure, the National Federation of Independent Business Legal Foundation ("NFIB Legal Foundation") provides the following corporate disclosure statement:

The NFIB Legal Foundation is a 501(c)(3) public interest law firm. We are affiliated with the National Federation of Independent Business, a 501(c)(6) business association, which supports the Legal Foundation through grants and exercises common control of the NFIB Legal Foundation through officers and directors. No publicly-held company has 10% or greater ownership of the NFIB Legal Foundation. The NFIB Legal Foundation has no parent or subsidiary corporations.

Respectfully submitted this 27th day of November.

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INTEREST OF THE *AMICUS CURIAE*

The National Federation of Independent Business Legal Foundation (“NFIB Legal Foundation”) is a nonprofit public interest law firm established to protect the rights of America’s small-business owners. It is the legal arm of the National Federation of Independent Business, the nation’s oldest and largest organization dedicated to representing the interests of small-business owners throughout all 50 states. NFIB members own a wide variety of small businesses. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB’s mission is to promote and protect the right of its members to own, operate and grow their businesses. To fulfill this role as the voice for small business, the NFIB Legal Foundation frequently files *amicus* briefs in courts throughout the country in cases that will impact small businesses.

The members of NFIB are affected by the issues presented in this case because most small-business owners lack specialized staff to address OSHA compliance. As a result, most of the work associated with OSHA recordkeeping and OSHA inspections falls to the company owner. Accordingly, the decision in this case will directly impact the activities of NFIB’s members.

ARGUMENT

The issues presented before the Commission in this case are of serious consequence to small businesses of all industries. Small-business owners are committed to following the laws and regulations that apply to their companies. This is particularly true of the OSH Act, which carries stiff fines and penalties. Because small firms cannot afford staff dedicated to compliance, this burden most often falls to the owner himself.¹ In fact, 77 percent of small-business owners conduct periodic safety inspections *themselves*.² Compliance work falls on top of the other responsibilities common to small-business owners: waiting on customers, ordering inventory, and managing all human resources responsibilities.

¹ *NFIB National Small Business Poll: Paperwork and Record-Keeping*, Volume 3, Issue 5, 2003. pp. 2.

² *NFIB National Small Business Poll: Workplace Safety*, Volume 2, Issue 1, 2002. pp. 4.

Small-business owners spend a great deal of time making sure they comply with the letter of the law — and they expect the same from the bodies that regulate them. This case highlights critical inconsistencies among the text of the OSH Act, its corresponding regulations and the agency’s enforcement of the Act and its implementing regulations. In particular, we are concerned about the agency’s failure to adhere to the six-month statute of limitations on issuing a citation for a recordkeeping violation.

The Importance of Statutes of Limitations to Small Businesses

The OSH Act unambiguously provides a six-month statute of limitations for issuing citations. According to section 9(c) of the Act “[n]o citation may be issued under this section after the expiration of six months following the occurrence of any violation.” 29 U.S.C. § 658(c). In the case presented before the Commission, a citation issued in November of 2006 cited recordkeeping violations dating back to January 2002. A small-business owner — making a good-faith effort to comply with the recordkeeping requirement — would read section 9(c) and assume that he or she no longer had to worry about any violations that may have occurred more than six months ago. Clearly, OSHA’s practice of issuing citations beyond the six-month time limit unfairly exposes a small-business owner to serious fines and penalties.

The sixth-month limit was not included by Congress so that employers could get away with violations. Rather, Congress understood the burden of mounting a defense once a claim has become stale. An employer’s ability to tell its story dissipates sharply as time passes, particularly when it comes to subtle details. Memories fade and employees quit, retire or die. This problem is becoming ever more acute for employers, exacerbated by trends in employee mobility. The likelihood that all of the employees and witnesses an employer needs to tell its story convincingly will still be working for the employer dwindles as the alleged recordkeeping violation and injury recedes into the past.

The American workforce currently has a median job tenure of only four years.³ This number is substantially lower (2.9) for workers between ages 25 and 30, and is lower still (1.3) for workers in their early twenties.⁴ The burden of defending stale claims is particularly difficult for small firms to meet. Small-business owners lack the time and resources that some large companies may have to research the whereabouts of former employees and find evidence for events that might have occurred five years ago.

The U.S. Supreme Court, on several occasions, has supported the use of statutes of limitations to “promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.” *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 554 (1974). Adhering to such legislatively-mandated statutes of limitations is therefore a necessity to ensure legal fairness for the governed. OSHA’s practice, as illustrated in this case, is contrary to established precedent and places an unfair burden upon the nation’s small-employers.

We respectfully ask the Commission to vacate items one through five of Citation 2, in order to adhere to Congress’s intent when crafting the OSH Act and provide small businesses fairness for OSHA’s inspections of injury logs.

Respectfully submitted this 27th day of November.

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³ See Employee Tenure Summary, Sept. 8, 2006; U.S. Department of Labor, Bureau of Labor Statistics News, <http://www.bls.gov/news/release/nro.htm>.

⁴ *Id.*

CERTIFICATE OF SERVICE

This is to certify that on November 27, 2007, a copy of the Brief of *Amici Curiae* National Federation of Independent Business Legal Foundation was served on the following counsel of record by First Class, United States Mail as follows:

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