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## SMITHFIELD, SAFETY, AND OSHA: NAVIGATING THROUGH LITIGATION IN THE COVID-19 ERA

by Robert J. O'Hara

On April 23, 2020, during the height of the COVID-19 pandemic, workers in Milan, Missouri sued the largest pork producer in the United States, Smithfield Foods, Inc. ("Smithfield"), over its failure to provide a safe workplace. Press accounts indicated that hundreds of employees at other Smithfield facilities in South Dakota and Wisconsin became infected with COVID-19, creating "virus hot spots" in those locations, forcing Smithfield to shut down those plants. Although there were no Milan workers infected by the COVID-19 virus at the time of suit and the plant continued to operate, the Milan workers were understandably concerned that they could also fall victim to the virus.

The suit, *Rural Community Workers Alliance vs Smithfield Foods, Inc.* (No. 5:20-CV-06063-DGK) brought in the Western District of Missouri, alleged that Smithfield knowingly endangered its workers by failing to follow the Centers for Disease Control and Prevention ("CDC") guidelines and state public health officials. Specifically, the workers contended that Smithfield:

- Did not provide sufficient personal protective equipment ("PPE")
- Forced workers to work shoulder to shoulder and scheduled their worktime and breaks in a manner that forced workers to be crowded into cramped hallways and restrooms
- Refused to provide workers sufficient opportunities or time to wash their hands
- Discouraged workers from taking sick leave when they are ill and even established bonus payments that encouraged workers to come into work sick
- Failed to implement a plan for testing and contact-tracing workers who may have been exposed to the virus that causes COVID-19

The workers sued under the common-law principles of public nuisance and breach of a duty to provide a safe workplace. Instead of money damages, the workers sought injunctive relief to force Smithfield to change its practices, to follow the CDC guidelines, to provide appropriate PPE, and change work processes to prevent the virus' spread.

On April 27, Smithfield filed a Motion to Dismiss under the "primary-jurisdiction" doctrine arguing that the matter should be deferred to the Occupational Health and Safety Administration of the US Department of Labor ("OSHA"). Coincidentally, the next day, the President signed an Executive Order under § 4511(b) of the Defense Production Act ("DPA"), 50 U.S.C. § 2061 *et seq.*, delegating authority to the Secretary of Agriculture to take all appropriate action "to ensure that

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meat and poultry processors continue operations consistent with the guidance for their operations jointly issued by” the CDC and OSHA.<sup>1</sup>

At the Milan plant, OSHA had already initiated an investigation one day before the suit was filed, by sending a “Rapid Response Investigation” (RRI)<sup>2</sup> notice to Smithfield seeking information about its COVID-19 work practices and infections at the plant. OSHA requested information about Smithfield’s COVID-19 practices including whether the company had given its workers PPE, what engineering controls Smithfield had implemented, what contact-tracing methods had been employed, and what policies the company had changed or implemented in light of the pandemic. Smithfield responded within the seven days required by the RRI.

OSHA is the Federal regulatory body responsible for safety and health in the U.S. workplace. It enforces the Occupational Safety and Health Act of 1970 by setting and enforcing standards (such as for PPE, hazardous chemical usage, bloodborne pathogens, respiratory devices, lock-out/tag-out procedures for energized equipment...), and by providing training, education, and assistance to employers and workers. To accomplish this, it fields nearly 1,000 investigators and conducts tens of thousands of investigations, both on paper and on-site annually.

The COVID-19 pandemic strained OSHA’s standard investigation processes, and eliminated on-site inspections for COVID-related issues due to the nature of the disease and the concern about infecting OSHA inspectors. At the same time, CDC and OSHA issued *Meat and Poultry Processing Workers and Employers –Interim Guidance* (“the Joint Guidance”), which provided supplemental guidance to meat-processing plants concerning COVID-19.<sup>3</sup>

According to court filings, Smithfield reported that as a result of the COVID-19 pandemic, it had instituted the following changes at the Milan plant:

- Instituted thermal temperature screening
- Initiated a COVID-19 symptom ID procedure which would prompt 14-day paid quarantine leave
- Implemented a contact-tracing questionnaire for those with symptoms
- Ensured no penalties for missing work due to illness
- Assigned a nurse and health and safety clerk to perform checks throughout the plant
- Provided masks daily to all workers and replaced them as needed
- Required employees to wear nitrile gloves and face shields on the production floor (in addition to the normal PPE that meat-processing workers wear)
- Required hand sanitizing when workers left the production line and entered common areas

<sup>1</sup> Exec. Order on Delegating Authority Under the DPA with Respect to Food Supply Chain Resources During the National Emergency Caused by the Outbreak of COVID-19, <https://www.whitehouse.gov/presidential-actions/executive-order-delegating-authority-dpa-respect-food-supply-chain-resources-national-emergency-caused-outbreak-covid-19/> (Apr. 28, 2020).

<sup>2</sup> An RRI is an OSHA procedure which generally does not involve an onsite inspection of the workplace. In lieu of an onsite inspection, an employer is expected to conduct its own investigation into the work-related incidents and share its findings promptly with OSHA.

<sup>3</sup> CDC and OSHA, *Meat and Poultry Processing Workers and Employers*, <https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/meat-poultry-processing-workers-employers.html> (Apr. 26, 2020).

- Adjusted work start times, lunch, and break times
- Provided outside tents to ensure adequate spacing for lunch and breaks
- Increased sanitization of the plant, as often as every two hours
- Installed clear plastic barriers along the production line to separate employees working across from and side-by-side other employees
- Reduced the number of hogs being processed daily
- Sent some employees home before lunch

U.S. District Court Judge Greg Kays initially had to decide whether the public nuisance and breach of duty to provide a safe workplace claims were best dealt with in his courtroom or by the experts at the agency entrusted with worker safety. The court first explored the primary-jurisdiction doctrine—a “common-law doctrine that is utilized to coordinate judicial and administrative decision making.” *Access Telecomms. v. Sw. Bell Tel. Co.*, 137 F.3d 605, 608 (8th Cir. 1998) (citation omitted). The doctrine allows a district court to refer a matter to the appropriate administrative agency, even when reviewing a cognizable claim. *Id.*

The court noted two primary reasons for courts to apply the doctrine. First, to “obtain the benefit of an agency’s expertise and experience...” *Access Telecomms.*, 137 F.3d at 608 (noting “agencies created by Congress for regulating the subject matter should not be passed over”) (quoting *Far E. Conference v. United States*, 342 U.S. 570, 574 (1952)). And second, “to promote uniformity and consistency within the field of regulation. *Id.* (citation omitted).

Since the workers claimed that Smithfield was not adhering to the CDC and Joint Guidance, under the facts listed above, the court held that OSHA was in a better position to decide whether Smithfield was following the guidance based on its expertise and its mission to enforce safety and health standards. The court specifically noted that OSHA was already working to evaluate Smithfield’s safety processes when the suit was filed. Second, the court concluded that even if it ruled on Smithfield’s adherence to the Joint Guidance, it would only be binding on Smithfield and not any other meat-processing plants, which could lead to inconsistent regulation in the industry.

Next the court looked at public nuisance under Missouri law. “A public nuisance is an offense against the public order and economy of the state and violates the public’s right to life, health, and the use of property, while, ‘at the same time annoys, injures, endangers, renders insecure, interferes with, or obstructs the rights or property of the whole community, or neighborhood, or of any considerable number of persons.’” *State ex rel. Schmitt v. Henson*, ED 107970, 2020 WL 1862001, at \*4 (Mo. Ct. App. April 14, 2020) (citations omitted). The parties agreed that the operation of a meat-processing plant during a global pandemic isn’t *per se* public nuisance. As the court found, Smithfield had implemented substantial health and safety measures to protect its workers, and no employees at the Milan plant had been diagnosed with COVID-19 as of late April. The court thus concluded that the workers were unlikely to prevail on their public-nuisance claim.

Similarly, on the breach of duty claim, the court stated that Smithfield had already taken substantial steps to reduce the potential for COVID-19 exposure. And as the workers were unable to show actual injury—only the potential for injury in the future—this claim would be unlikely to succeed. Based on these facts, the court granted Smithfield’s Motion to Dismiss without prejudice finding the issue of compliance with safety standards and guidelines falls directly within OSHA’s and, in this industry, the Department of Agriculture’s jurisdiction.

This case pivoted on a few key factors—deference to an expert agency and lack of injury. The court stepped out of OSHA’s way, but left an opening to revisit the claim if warranted. Since the OSH Act contains no private right of action, litigants in such situations will need to pursue a public-nuisance claim. Such a cause of action is already being tested against employers in other industries in the COVID-19 context. Employers should monitor those cases closely.

The most important takeaway here is that a thoughtful review and implementation of guidance issued by CDC, OSHA, state agencies etc. may be the best deterrent to the spread of COVID-19 in the workplace and the best defense to the rash of suits on the horizon. Stay tuned, as the COVID-19 virus has evolved, so too will regulation, law, and litigation.