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COURT DEFERS TO OSHA IN COVID-19 PUBLIC-NUISANCE SUIT AGAINST AMAZON

by Glenn G. Lammi

Public nuisance is plaintiffs' lawyers' all-purpose tort. Plaintiffs have filed nuisance claims involving lead paint, climate change, opioid abuse and diversion, and e-cigarette sales, demanding that courts impose broad abatement measures. In the past six months, workplace exposure to Covid-19 has joined the target list. Not surprisingly, one of America's largest employers, Amazon.com, stands accused of creating a public nuisance at one of its fulfillment centers. Seven plaintiffs filed suit on June 3 in the Eastern District of New York, accusing the company of failing to protect them from Covid-19.

The plaintiffs have representation and *amicus* brief support befitting a battle with a tech titan. Several out-of-town law firms and special-interest groups joined forces to represent the plaintiffs. A star-studded array of *amici* backed the plaintiffs' opposition to Amazon's motion to dismiss. The New York Attorney General, several unions, Senators Bernie Sanders and Cory Booker, and 13 U.S. Representatives (including House Judiciary Committee Chairman Jerrold Nadler and 3 members of "[The Squad](#)"), were among those who participated in briefs.

On November 2, Judge Brian M. Cogan issued an [opinion](#) in *Palmer, et al. v. Amazon.com* that cut through all the hoopla with a simple, principled conclusion: this court is not a workplace health-and-safety regulator. The court granted Amazon's motion to dismiss the public-nuisance claim under the primary-jurisdiction doctrine.

Primary jurisdiction is a prudential doctrine courts apply when judicial redress of a plaintiff's claim could bring the court into conflict with an administrative agency. A finding of primary jurisdiction allows the judge to hand the matter off to the appropriate administrative agency. That type of judicial deference encourages regulatory uniformity and recognizes the superior expertise of a federal agency.

The appropriate workplace-safety regulator, Judge Cogan explained in *Palmer*, is the Occupational Safety and Health Administration (OSHA). Though the agency has not issued a Covid-19-specific workplace standard, it has acted under existing standards, exercising "its discretion in determining how to proceed in the face of an evolving pandemic fraught with uncertainty."

That discretion, and OSHA's expertise, the court reasoned, positions the agency as the best judge of whether "Amazon's workplace policies at JFK8 *adequately* protect the safety of its workers." The plaintiffs' claims, the court noted "turn on factual issues requiring both technical and policy

Glenn G. Lammi is Chief Counsel of WLF's Legal Studies Division.

expertise” and “courts are not expert in public health or workplace safety matters, lack the training, expertise, and resources to oversee compliance with evolving industry guidelines.” The court added that judges’ lack of expertise increases the risk of inconsistent rulings, a factor that dictates in favor of primary jurisdiction.

The Eastern District of New York is at least the third court to rule on workers’ public-nuisance claims in the context of the Covid-19 pandemic. On May 5, in *Rural Community Workers Alliance vs Smithfield Foods, Inc.*, the Western District of Missouri dismissed meat-packing plant workers’ nuisance claims on primary-jurisdiction grounds. A *WLF Legal Pulse* guest commentary on the decision is [here](#). And on June 3, a Cook County, Illinois Circuit Judge [refused](#) to defer to OSHA jurisdiction and allowed a nuisance suit to proceed against McDonald’s.

Judge Cogan also held that even if he didn’t defer to OSHA’s jurisdiction, the Amazon workers could not prevail on their public-nuisance claim. When a private actor, rather than a public official, pursues a claim for public nuisance, the plaintiff must demonstrate harm that is different in *kind*, not simply in degree, from the general population’s harm. Judge Cogan reasoned that the plaintiffs’ risk of exposure to Covid-19 at the Amazon facility is only different in degree, not in kind, from non-employees. In other words, the facility isn’t the only place one could contract the disease.

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The public-nuisance cause of action places a great deal of unchecked authority in the hands of plaintiffs and judges. The injunctive relief sought in nuisance lawsuits allow courts to impose mandates and curtail behavior in a manner reserved for elected officials and appointed regulators. Judge Cogan’s disinterest in judicial regulation of the workplace is admirable, and his application of the primary-jurisdiction doctrine was a wise act of discretion. And his reasoning on whether Palmer had a colorable nuisance claim, while dicta, is equally worthy of consideration by the many Covid-19 defendants yet to be sued.