

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA**

JANE DOES I, II, III and FRIENDS OF
FARMWORKERS, INC. D/B/A
JUSTICE AT WORK IN ITS
CAPACITY AS EMPLOYEE
REPRESENTATIVE,

Plaintiffs,

EUGENE SCALIA, IN HIS OFFICIAL
CAPACITY AS UNITED STATES
SECRETARY OF LABOR;
OCCUPATIONAL SAFETY AND
HEALTH ADMINISTRATION,
UNITED STATES notice
DEPARTMENT OF LABOR,

Defendants.

Case No.: 3:20-cv-01260

**RESPONSE TO LETTER
FROM OCCUPATIONAL
HEALTH AND SAFETY
ADMINISTRATION**

On December 2, 2020, Respondent Occupational Safety and Health Administration (OSHA) wrote to the Court to inform it that the agency was declining to cite Maid-Rite Specialty Foods, LLC. ECF Doc. 51. OSHA’s “hazard letter” reaffirms that Maid-Rite ignores physical distancing requirements, but that OSHA is unwilling to take action to protect Maid-Rite’s workers from the imminent danger that conduct creates. ECF Doc. 51-2, at 1 (merely “bring[ing] [Maid-Rite’s] attention to [the hazard of COVID-19] and some methods that have been used to address it”). *Id.* at 1. Plaintiffs have requested OSHA engage in an “informal review” of this determination. *See* Ex. 1.

As documented in the attached declarations, the dangerous conditions at Maid-Rite remain substantially unchanged. Ex. 2, Jane Doe I Decl. at ¶¶ 4-8; Ex. 3, Worker Decl. at ¶¶ 3-9. Most importantly, workers at the facility continue to work shoulder to shoulder for hours every day, which has been the cause of multiple deadly outbreaks of the virus at meat processing plants around the country. *See* ECF Doc. 43 at 9 (citing Sioux Falls Epi Aid). Recently, the CDC updated its guidance to minimize the spread of COVID-19 and reemphasized the critical importance of physical distancing to protect the public health.¹ OSHA’s conduct in this case reflects that the Agency is willing to ignore that guidance and the science—subjecting workers at Maid-Rite to workplace conditions “reasonably expected to cause death or serious physical harm,” 29 U.S.C. § 662(a)—because the Agency is unwilling to require Maid-Rite to make basic and simple changes to its production practices. This Court’s intervention to require OSHA to protect these workers from the risk of COVID-19 remains essential. *See* 29 U.S.C. § 662(d).

¹ CDC, Summary of Guidance for Public Health Strategies to Address High Levels of Community Transmission of SARS-CoV-2 and Related Deaths, December 2020, Dec. 4, 2020, https://www.cdc.gov/mmwr/volumes/69/wr/mm6949e2.htm?s_cid=mm6949e2_w.

Respectfully submitted this 8th day of December 2020.

s/ David H. Seligman

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CERTIFICATE OF SERVICE

I hereby certify that I caused this brief to be filed be filed in ECF, which caused a copy to be served on counsel for all parties.

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TOWARDS JUSTICE



Formerly known as Friends of Farmworkers

December 7, 2020

Via Email and U.S. Mail

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Mailstop OSHA-RO/19
Philadelphia, PA 19103-2968

Copy to Acting Area Director Susan Giguere
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The Stegmaier Building, Ste. 410
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Wilkes-Barre, PA 18702-5241

Email: Rivera.Michael@dol.gov
Giguere.Susan@dol.gov

Re: OSHA Complaint No. 1592950 against Maid-Rite Specialty Foods a/k/a Maid-Rite Steak Co.

Dear Regional Director Rivera,

We write to object to the results of your inspection of Maid-Rite Specialty Foods a/k/a Maid-Rite Steak Co. (Maid-Rite) as outlined in the December 2, 2020 letter to Complainants from Acting Area Director Susan Giguere. Our position is that the conditions at Maid-Rite required and continue to require action by OSHA, and therefore we are seeking an informal review. The following positions respond to some, but not all, of OSHA’s findings in response to the items raised in our complaint.

Maid-Rite's failure to implement adequate social distancing practices

OSHA's inspection found that “employees working on the production lines are fewer than 6 feet from each other[.]” Giguere Letter at 2. After finding that failure to allow social distancing was “putting workers at risk for exposure to SARS-CoV-2,” OSHA declined to issue a citation and instead made a series of recommendations to Maid-Rite without an enforcement mechanism. Hazard Alert Letter at 1.

Justice at Work
December 8, 2020
Page 2

OSHA's Interim Guidance for Meat and Poultry Processing Workers (Interim Guidance) repeatedly states that the distance between workers in meat processing facilities is a primary factor affecting workers' risk for exposure to COVID-19.¹ In fact, the first control recommended by the Interim Guidance is to "configure communal workspaces so that workers are spaced at least six feet apart, if possible."²

As OSHA acknowledged in its December 2, 2020 Hazard Letter to Maid-Rite, the hierarchy of controls it uses when attempting to prevent exposure to occupational hazards prioritizes engineering and administrative controls—like increasing space between workers on the production line—over Personal Protective Equipment (PPE), yet OSHA did not describe whether any changes in production practices at Maid-Rite were made to allow for increased worker spacing. Instead, OSHA stated that employees "do wear face coverings and shields" when referencing the lack of social distancing. OSHA points to one form of hazard mitigation as justification for failure to require Maid-Rite to take other proven effective steps to protect its workers. This approach is opposite to the one found the CDC's December 4, 2020 Public Health Guidance, which stresses that "COVID-19 pandemic control requires a multipronged application of evidence-based strategies while improving health equity [including] universal face mask use, physical distancing, avoiding nonessential indoor spaces ... and achieving widespread COVID-19 vaccination coverage."³

In addition to the failure to allow for social distancing on production lines and noting the lack of visual clues for social distancing near the time clocks, Giguere Letter at 2, OSHA's findings do not address whether Maid-Rite allows or ensures sufficient social distancing in other parts of the facility.

Production line speed

As stated above, OSHA's findings do not address whether Maid-Rite has slowed or could slow the production lines to allow for greater space between production workers as recommended by the interim guidance.

Attendance incentives and bonus structure

OSHA confirmed that the Maid-Rite's bonus structure required a full week of work plus a full shift on Saturday to receive incentive pay. Giguere Letter at 2, OSHA's findings did not address whether this incentivized workers who may have been exposed to or are suffering from symptoms of SARS-CoV-2 to attend work, or whether Maid-Rite had considered or should consider modification of these policies in accordance with the Interim Guidance.

¹ *Meat and Poultry Processing Workers and Employers: Interim Guidance from CDC and the Occupational Safety and Health Administration (OSHA)* (updated Nov. 12, 2020), available at: <https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/meat-poultry-processing-workers-employers.html> at p. 2

² *Id.* at 2-3.

³ Honein et. al, *Summary of Guidance for Public Health Strategies to Address High Levels of Community Transmission of SARS-CoV-2 and Related Deaths, December 2020* (Dec. 4, 2020), available at: https://www.cdc.gov/mmwr/volumes/69/wr/mm6949e2.htm?s_cid=mm6949e2_w.

Justice at Work
December 8, 2020
Page 3

Separation of ill employees and cohorting

OSHA's inspection fails to address Maid-Rite's integration of new workers into the production facility from Polarized Meats and the ongoing failure to cohort production workers. Maid-Rite has continued to bring in new production workers to the facility without SARS-CoV-2 testing or other precautions. Those new workers then work shoulder to shoulder and/or face to face with current employees.

We also object to OSHA's finding that Maid-Rite regularly informs affected employees of possible exposure of COVID-19 or separates employees demonstrating possible COVID-19 symptoms, as it is contrary to the experience of our clients.

Hand hygiene

While OSHA finds that Maid-Rite had handwashing sinks in production areas, it fails to address whether Maid-Rite has provided sufficient additional handwashing stations or adjustments to worker's schedules to allow for social distancing while washing hands. Giguere Letter at 2, Maid-Rite has removed many temporary hand sanitizing stations put in place before OSHA's on-site visit. Furthermore, OSHA fails to address whether employees are given additional breaks from the production line to increase the frequency of their handwashing or hand sanitizing.

Personal Protective Equipment (PPE)

As stated above, while the Interim Guidance continues to recommend face coverings as a protective measure "in addition to social distancing," the hierarchy of controls used by OSHA ranks PPE as the least effective form of controlling worker exposure to hazards.⁴ OSHA's inspection found that Maid-Rite provided "disposable or cloth" face coverings to employees on a biweekly basis. OSHA does not address how the provision of one disposable face covering in a two-week period would adequately protect against the spread of COVID-19.

OSHA also does not address whether Maid-Rite ensures all its employees wear those or other PPE face coverings on an ongoing basis and/or in a properly protective manner. Many Maid-Rite employees, including managers, regularly fail to properly wear face coverings.

Finally, we object to the finding that the face shields provided by Maid-Rite do not cause difficulty in breathing, or that they are adequate PPE for Maid-Rite employees. The report states that employees tilt out their face shields "to allow for more airflow and to decrease fogging." Giguere Letter at 1. Employees who continue to wear the face shields wear them off their faces completely in order to be able to see their work and breathe properly. OSHA does not address how this modification in use affects the efficacy of this PPE.

⁴ <https://www.cdc.gov/niosh/topics/hierarchy/default.html>; Interim Guidance at p. 7.

Justice at Work
December 8, 2020
Page 4

OSHA's advance notice of on-site inspection

Despite regulations that say OSHA should give employers advance notice of on-site inspection only in rare circumstances,⁵ the Compliance Safety and Health Officer who conducted the July 9, 2020 inspection of Maid-Rite told the District Court that she informed Maid-Rite of the inspection in advance of July 9. Employees confirmed that Maid-Rite made changes to its practices to hide the extent of its unsafe working conditions, including spacing workers farther apart on production lines. As recounted in our clients' sworn declarations, when the Compliance Safety and Health Officer left the Maid-Rite facility, employees were instructed to go back to previous practices. As such, the OSHA inspection is based on fundamentally flawed information about the conditions faced by Maid-Rite workers.

Based on the previous objections, we seek review by the OSHA Regional Administrator. If you have any questions, please contact us at (412) 218-6886.

Sincerely,



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⁵ 29 C.F.R. §1903.6

Declaration

1. My name is [REDACTED]. I am an employee of Maid-Rite Specialty Foods.
2. I work packing raw hamburger meat in packages to sell to consumers.
3. I filed a complaint with OSHA because I do not think Maid-Rite was doing the necessary things to keep me and my coworkers safe from the spread of COVID-19.
4. Maid-Rite has not made changes to the way we work since we filed the complaint.
5. Workers continue to work elbow-to-elbow on the production lines.
6. The lines continue to run extremely fast, so we are not able to maintain a distance of six feet apart from other workers.
7. The only change I have seen Maid-Rite is to add some hand sanitizing stations.
8. In addition, Maid-Rite brings in many new workers whom I have never seen before to work alongside us. As far as I know, Maid-Rite does not require COVID-19 testing of the new workers. This makes me worried about the risk to myself and my family.
9. I continue to go to work in fear of contracting COVID-19 every day.

I, [REDACTED], hereby certify that the above statement is true and accurate to the best of my knowledge and belief, and that it has been read to me in my native language, Spanish.

Yo, [REDACTED], certifico que la declaración arriba es verdadera y correcta en mi mejor entender y creencia, y que se me ha leído en mi lenguaje natal, español.

[REDACTED SIGNATURE]

Signature / Firma

12/07/20

Date / Fecha

Declaración

1. Mi nombre es [REDACTED] Soy una empleada de Maid-Rite Specialty Foods.
2. Trabajo empaquetando carne cruda de hamburguesa en recipientes para vender a consumidores.
3. Yo presenté una queja con OSHA porque no creo que Maid-Rite hayan hecho las cosas necesarias para mantenerme y mis colegas salvos de la propagación de COVID-19.
4. Maid-Rite no ha hecho cambios a la manera en que trabajamos desde que presentamos la queja.
5. Los trabajadores siguen trabajar codo a codo en las cadenas de producción.
6. Las cadenas de producción sigan muy rápido, para que no podamos mantenernos 6 pies en distancia de los otros trabajadores.
7. El único cambio que he visto es que Maid-Rite instaló algunos puestos de desinfectante de manos.
8. Más, recientemente Maid-Rite trae muchos trabajadores nuevos desconocidos para trabajar a nuestro lado. De mi conocimiento, Maid-Rite no requiere prueba de COVID-19 para los nuevos trabajadores. Me preocupe por este riesgo a mí y a mi familia.
9. Entro mi trabajo cada día con el miedo de contraer el virus COVID-19.

Yo, [REDACTED] certifico que la declaración arriba es verdadera y correcta en mi mejor entender y creencia, y que se me ha leído en mi lenguaje natal, español.

[REDACTED]

Firma

12/7/2020

Fecha

Sworn Declaration of [REDACTED]

1. My name is [REDACTED]. I am an employee at Maid-Rite Specialty Foods, where I have worked since 2015. I have previously submitted sworn declarations in the case Jane Does I, II, III et al. v. Scalia et al.
2. I am writing this declaration to update this Court on what has been happening at Maid-Rite over the past few months. I am not trying to cause trouble, I just do not feel safe.
3. Nothing has changed since OSHA's inspection of Maid-Rite.
4. Everyone on the production lines are still working elbow to elbow. There are still no markings on the floor or any dividers to show people where to stand. We have no choice but to walk or stand close to each other in order to do our work.
5. Some people at Maid-Rite wear masks, and some do not. Some people have masks but usually keep them down around their necks. Some of the people that typically don't wear masks over their mouth and nose are in management.
6. Maid-Rite still has a bonus policy in place that means you get more money if you come in every day. If you work all week and on Saturday, you get a bonus that is paid out once a month. You can make up to \$1200 this way. It seems to me like this would mean people come to work even if they're not feeling great, because they want perfect attendance to get the bonus.
7. Maid-Rite is still doing temperature checks at the door, but they are not strictly enforced. I saw someone come in with a temperature over the limit, and he was still allowed to work.
8. I am not sure if there are people getting sick with COVID-19, but that is only because Maid-Rite isn't telling us what's happening. I notice people out for three weeks, a month, but they don't tell us anything about it.
9. There is a general feeling that there is nothing we can do about Maid-Rite's disregard for employee safety.

I, [REDACTED], declare under penalty of perjury that this declaration is true and correct to the best of my knowledge and understanding.

[REDACTED]

Signature

12/8/2020

Date