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## **Chain Settles Suit After Directing Workers to Wear Doggie Diapers as Masks**

The restaurant found itself in hot water as COVID-19 ravaged its workforce, infecting 25 employees and leading to a 33-day strike.

By **Jeffrey Campolongo** | August 19, 2021



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In the last year and a half, we have seen and heard of several harrowing COVID-19 workplace stories. This column previously explored litigation surrounding nurses who blew the whistle on unsafe working conditions. (See “Case Involving Nurses Who Blew Whistle on Employer for Violating COVID Orders Moves Forward (<https://www.law.com/thelegalintelligencer/2021/01/22/case-involving-nurses-who-blew-whistle-on-employer-for-violating-covid-orders-moves-forward/>)”). A recent settlement out of California shines a light on some of the more deplorable conditions at a local McDonald’s in Oakland, California. Workers there claim they were given doggie diapers and coffee filters instead of masks as coronavirus protective gear last year.

The restaurant found itself in hot water as COVID-19 ravaged its workforce, infecting 25 employees and leading to a 33-day strike. McDonald’s has now agreed to settle the public nuisance lawsuit brought by the workers with changes to safety conditions and regular health checkups. The settlement comes during the same week that the Occupational Safety and Health Administration (OSHA) issued new regulations to mitigate and prevent the spread of COVID in the workplace.

# Doggie Diapers and Coffee Filters as Masks?

The fast-food restaurant shut down in May 2020 when 20 workers refused to show up for work citing unsafe conditions that had purportedly sickened 25 employees and family members. According to the McDonald's lawsuit, after the first wave of COVID-19 cases in March 2020 led state and federal officials to declare states of emergency, workers at the restaurant asked their employer for masks and instead were given dog diapers and coffee filters to cover their faces. The complaint states that the restaurant later provided masks but required workers to use them for several days before replacing them. The case was filed as *Hernandez v. VES McDonald's*, Case No. RG20064825 (Ca. Super. Ct., Alameda County).

The suit also alleged that three of the workers were required to complete their shifts or report for work even after reporting coronavirus symptoms. The employees later tested positive for COVID-19. The plaintiffs alleged that the restaurant failed to notify or protect the employees who were exposed to sick co-workers, refused to send workers home on paid sick leave and made no attempt to keep workers six feet apart.

The complaint bemoaned the fact that “the space in which these workers work is small and enclosed, and these infected workers all worked in close contact with several other coworkers, even when they were highly contagious.” The lead plaintiff, Yamilett Olimara Osoy Hernandez, contends that she told management she was feeling ill, her symptoms included trouble breathing, head and body aches and faintness. Hernandez asked to go home early but was forced to stay at work by her manager until she could find someone to cover the rest of her shift, according to the complaint. Moreover, even as the workers reported positive COVID test results, management still failed to implement practices that would stop the spread of the disease.

The lawsuit made novel claims in that it sought to have the restaurant declared a public nuisance and disgorge any profits from their failure to implement policies and practices that would have protected the community. The plaintiffs accused VES of unfair business practices and creating a public nuisance in violation of state law, as well as violating an Oakland ordinance that required employers to give workers up to two weeks of paid leave during the pandemic.

The plaintiffs sought an immediate court order continuing the closure of the restaurant until it can demonstrate that it will comply with “minimum COVID-19 health and safety standards.” According to the complaint, “absent immediate injunctive relief, there will be serious irreparable physical and emotional injury to the plaintiffs as COVID-19 continues to spread through their families and communities.”

## Injunctive Relief Granted

The restaurant on Telegraph Avenue in Oakland, a largely Latino community, voluntarily closed on May 26, 2020, after most of its employees refused to come to work because they feared becoming sick. In June 2020, Alameda County Superior Court Judge Patrick McKinney issued a temporary restraining order barring McDonald's from reopening until the court ruled on the plaintiffs' motion for a preliminary injunction.

The following month, Superior Court Judge Richard Seabolt ordered McDonald's to provide masks and gloves to the workers and take other safety measures, including wellness checks, regular temperature testing and hand-washing breaks every 30 minutes. Seabolt also ordered McDonald's to grant leave to

sick workers and regularly “deep clean” the restaurant and conduct contact tracing of workers and customers who are known or suspected to have COVID-19.

## **The Settlement: A Win For Workers**

In a settlement announced on Aug. 11, the owners agreed to leave the foregoing measures in place for the next year unless they are no longer recommended by federal, state or local health agencies, according to the plaintiffs’ lawyer, B.J. Chisholm. As part of the settlement, McDonald’s also agreed to set up a safety committee where managers would meet monthly with employee representatives to discuss health concerns. Per a press release issued by the employees’ counsel, the safety committee “will provide workers with a voice in addressing the evolving COVID-19 pandemic and the need to ensure safe working conditions.”

After the settlement, one of the plaintiffs, Angely Lambert, said in a statement “last year when McDonald’s tried to treat us like dogs, we didn’t sit down or stay silent. We joined together and fought for our dignity as human beings—and we won.” Plaintiffs counsel also declared victory by saying that the “settlement with the McDonald’s franchisee is an important step forward because it secures workplace protections and ensures workers will have a role in responding to the ever-evolving challenges posed by the pandemic,” per Bloomberg law.

## **New OSHA Guidance**

OSHA issued its new workplace guidance (<https://www.osha.gov/coronavirus/safework>) on Aug. 13 and while it does not have the force and effect of law, OSHA guidelines are generally recommended for all employers to follow. The guidance is intended to help employers and workers who are located in areas of substantial or high community transmission, who should take appropriate steps to prevent exposure and infection regardless of vaccination status.

The guidance is essentially divided into two parts, one directed at actions that workers themselves can take, and the other directed at employers to keep workers safe. For workers, OSHA has adopted the recommendations of the Centers for Disease Control and Prevention (CDC) and lists the following as most significant actions that should be taken:

- Get the COVID-19 vaccine.
- Wear a face covering over your nose and mouth.
- Stay far enough away from other people so that you are not breathing in particles produced by them (i.e., six feet or about two arms’ lengths).
- Participate in any training offered by your employer.
- Wash your hands often.
- Get tested regularly.

As it relates to what employers need to continue to do to protect these workers, OSHA recommends the following:

- Facilitate employees getting vaccinated.
- Instruct any workers who are infected, unvaccinated workers who have had close contact with someone who tested positive for SARS-CoV-2, and all workers with COVID-19 symptoms to stay

home from work.

- Implement physical distancing in all communal work areas for unvaccinated and otherwise at-risk workers.
- Provide workers with face coverings or surgical masks.
- Educate and train workers on COVID-19 policies and procedures.
- Suggest or require that unvaccinated customers, visitors, or guests wear face masks.
- Maintain ventilation systems.
- Perform routine cleaning and disinfection.
- Record and report COVID-19 infections and deaths.
- Implement protections from retaliation and set up an anonymous process for workers to voice concerns about COVID-19-related hazards.
- Follow other applicable mandatory OSHA standards.

Lessons from today's column: wear a mask, get vaccinated, keep your distance and for goodness sake, do not tell employees to wear doggie diapers or coffee filters as masks. Stay safe.

**Jeffrey Campolongo** *is the founder of the Law Office of Jeffrey Campolongo, which, for over a decade, has been devoted to counseling employees, working professionals and small businesses in employment discrimination and human resource matters.*