

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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THE PEOPLE OF THE STATE OF NEW YORK by
LETITIA JAMES, Attorney General of the State of New
York,

Plaintiff,

-against-

AMAZON.COM INC., AMAZON.COM SALES, INC., and
AMAZON.COM SERVICES LLC,

Defendants.

----- X

Index No. 450362 / 2021

Justice Nancy M. Bannon
Motion Sequence No. 08

**PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR
PRELIMINARY INJUNCTION**

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I. INTRODUCTION

The State brings this motion to protect Amazon workers who overcome their fears of the COVID-19 virus to report to work at a facility that runs 24 hours a day, seven days a week, and houses more than 5,000 workers at a time. Amazon profits from their work while failing to take adequate and reasonable measures to protect them from the devastating risk of coronavirus transmission inside that facility, and punishing workers who express concerns. The State now seeks preliminary injunctive relief because Amazon is rolling back its already inadequate public health measures and acting as if the pandemic is over when the risk of virus transmission is increasing, and a new variant threatens to cause even higher rates of transmission, illness, and death. While case rates, hospitalizations, and deaths rise, Amazon rescinds protections and packs in more workers for its holiday rush. Amazon's ongoing—and worsening—failure to protect workers must be halted.

The Attorney General therefore requests that the Court appoint a monitor to oversee implementation of certain public health precautions at Amazon's JFK8 facility, including requiring Amazon to modify productivity monitoring policies to permit time for cleaning, hygiene, and social distancing; requiring Amazon to adopt policies for adequate cleaning and disinfection after infected workers have been present in the facility; and requiring Amazon to institute proper contact tracing protocols, including identifying and notifying close contacts. The Attorney General also requests that this Court order Amazon to offer interim reinstatement to Christian Smalls, an employee who Amazon fired after he complained about deficiencies in Amazon's COVID-19 safety practices, and require Amazon to notify employees that they have the right to complain to Amazon, the Attorney General, or any other government agency of violations of health and safety requirements.

II. STATEMENT OF FACTS

A. Amazon Employees Remain at Risk of COVID-19

Since March 2020, the COVID-19 pandemic has caused 1,157,375 reported cases and 34,808 deaths in New York City.¹ New York City currently experiences 1,211 new cases and at least seven deaths per day.² The federal Centers for Disease Control (“CDC”) categorizes Richmond County, where Amazon’s JFK8 fulfillment center (“JFK8”) is located, as having a “high” community transmission risk and recommends that “Everyone in Richmond County, New York should wear a mask in public, indoor settings.” Affidavit of David Michaels (“Michaels Aff.”) ¶ 8.³ While vaccinated individuals run far less risk than the unvaccinated, the virus may be spread by and to both the vaccinated and unvaccinated, and immunity wanes with time for vaccinated individuals. *See* Michaels Aff. ¶¶ 6–7. In part due to the extremely infectious Delta variant, other parts of the country and Europe—even where vaccination rates are higher than in New York City—have seen dramatic spikes in COVID-19 cases. *See* Michaels Aff., ¶ 9. Public health officials are concerned that the increased travel and inside gatherings associated with the holiday season and colder weather will increase transmission. *Id.* The latest strain, the Omicron variant, adds still more risk of increased transmission, as recognized by Governor Hochul’s November 26, 2021 announcement of a Disaster Emergency. *See* Michaels Aff., ¶¶ 10–11.

¹ *See* Affirmation of Julie R. Ulmet (“Ulmet Aff.”), Ex. A, *COVID-19: Data, Trends and Totals*, New York City Department of Health and Mental Hygiene (“NYCDOH”), <https://www1.nyc.gov/site/doh/covid/covid-19-data-totals.page#top> (last updated Nov. 29, 2021).

² *See* Ulmet Aff., Ex. B, *COVID-19: Latest Data*, NYCDOH, <https://www1.nyc.gov/site/doh/covid/covid-19-data.page> (last updated Nov. 29, 2021). *See also* Michaels Aff., ¶ 5.

³ David Michaels, PhD MPH, served as Assistant Secretary of Labor for the Occupational Safety and Health Administration (“OSHA”) from 2009–2017, the longest serving administrator in OSHA’s history. *See* Michaels Aff. ¶ 1.

For Amazon workers, this alarming forecast coincides with the period of longer work hours and increased hiring associated with the holiday shopping season. *See* Section II.B.5, *infra*. Strikingly, Amazon is simultaneously rolling back public health precautions at JFK8. *See id.* Recently, Amazon made JFK8 “mask-optional” for vaccinated workers, but Amazon does not enforce masking among the unvaccinated. Amazon has also eliminated enforcement of social distancing and certain measures that had facilitated social distancing. These rollbacks compound the existing risks JFK8 workers face: productivity monitoring fails to permit adequate opportunities for social distancing, hygiene, and sanitation; Amazon fails to close, clean, and disinfect areas where an infected worker was present; and Amazon fails to identify and notify workers of potential contacts with infected coworkers. Workers are fearful of complaining about these deficiencies as they are keenly aware of Amazon’s retaliation against workers who complained about COVID-19 risks earlier in the pandemic.

B. Amazon Fails to Take Reasonable Precautions and Has Scaled Back Its Already Inadequate COVID-19 Protocols

1. Amazon’s Monitoring of Productivity Fails to Allow Time for Cleaning, Hygiene, And Social Distancing

Amazon tracks employees’ productivity, work units completed per hour, and “time off task” (“TOT”), the total minutes a worker is not actively working during a shift. Amazon also leads workers to believe they must meet a “fast start” standard upon clocking in. *See* Affidavit of Derrick Palmer (“Palmer Aff.”) ¶ 46. Managers have reprimanded workers for working “too slow” and directed them to “speed up” to avoid discipline. *See* Palmer Aff. ¶ 37; *see also* Affidavit of Natalie Monarrez (“Monarrez Aff.”) ¶ 9. Amazon disciplines for low productivity or excess TOT and workers fear such discipline. *See* Affidavit of Tristian Martinez (“Martinez Aff.”) ¶¶ 24–26; Palmer Aff. ¶¶ 24–27, 32–33, 38–39. Workers cannot view these metrics

themselves, and thus constantly fear that they are at risk of discipline. *See* Martinez Aff.

¶¶ 25–27, 30; Palmer Aff. ¶¶ 25, 29, 33.

Although Amazon temporarily paused productivity-related discipline in 2020,⁴ it has returned to both tracking and disciplining workers, which deters personal protective measures such as cleaning and disinfecting workstations, washing hands, and social distancing, because time spent on these measures negatively impacts productivity rates and TOT, and could expose workers to discipline. *See* Martinez Aff. ¶¶ 10, 25, 32; Palmer Aff. ¶¶ 24–27, 32, 38; Monarrez Aff. ¶ 13.

With respect to cleaning, Amazon’s COVID-19 policies explicitly provide, [REDACTED]

[REDACTED]

[REDACTED] *See* Ulmet Aff., Ex. C [REDACTED]

[REDACTED]

[REDACTED]. However, Amazon does not provide flexibility in productivity and TOT metrics to account for time spent cleaning and disinfecting workstations. *See* Martinez Aff. ¶ 33; Palmer Aff. ¶ 46. Some workers arrive early to clean their workstations before their shift, but managers have directed workers to “start working” instead of cleaning their workstations. *See* Monarrez Aff. ¶ 8. Workers do not have quick access to cleaning supplies, which can take several minutes to locate. *See* Martinez Aff. ¶ 33; Palmer Aff. ¶ 45. Fear of productivity or TOT discipline leaves workers afraid to clean and disinfect even when other workers enter their workstations, or they are required to switch workstations mid-shift. *See* Martinez Aff. ¶¶ 32–33; Palmer Aff. ¶¶ 41, 49–52.

⁴ *See* Ulmet Aff., Ex. U (Fitzgerald Supp. Declaration, ¶ 2).

With respect to hygiene, it can take ten or more minutes to go to the nearest restroom. *See* Palmer Aff. ¶ 42; Monarrez Aff. ¶ 13. Workers are careful to limit time spent hand-washing because it will negatively impact productivity rates and TOT. *See* Martinez Aff. ¶ 32; Monarrez Aff. ¶ 13; Palmer Aff. ¶ 41.

Productivity tracking also inhibits workers' ability to social distance because on the frequent occasions when a coworker enters another's workstation to fix machinery, reload and organize supplies, and offer other assistance, workers must continue working to avoid negative productivity rates or TOT. *See* Martinez Aff. ¶¶ 36–37; Palmer Aff. ¶¶ 49–52; Monarrez Aff. ¶ 5.

Workers are aware that they are essentially forced to compete as to productivity, and can be disciplined for being in the bottom 3–5% of rates in their department. *See* Martinez Aff. ¶¶ 28, 31; Palmer Aff. ¶ 31. Productivity or TOT discipline may have a negative impact on advancement within Amazon and can ultimately lead to termination. *See* Martinez Aff. ¶¶ 25–26, 28; Palmer Aff. ¶¶ 25–26, 31–32, 36.

2. Amazon Fails to Clean and Disinfect After Confirmed COVID-19 Cases Are Identified

Amazon fails to close off, clean, and disinfect workstations and adjacent areas after an infected person has been present in the facility. *See* Monarrez Aff. ¶¶ 7, 11; Martinez Aff. ¶¶ 7, 10; Palmer Aff. ¶ 48. Since at least early-2021, workers have not observed any workstation closed for cleaning, *see* Monarrez Aff. ¶ 11; Martinez Aff. ¶ 34; Palmer Aff. ¶ 48, despite Amazon reporting no fewer than [REDACTED] confirmed COVID cases from January 1 through October 31, 2021. *See* Ulmet Aff., Ex. D ([REDACTED]). [REDACTED]

[REDACTED]
[REDACTED].⁵

3. Amazon Fails to Employ Proper Contact Tracing Protocols

Amazon inadequately tracks, contact traces, and notifies workers of confirmed COVID-19 cases. *See* Affidavit of Jazmin Escobar (“Escobar Aff.”) ¶¶ 5, 8, 10–11; Martinez Aff. ¶¶ 6–7, 10, 44; Monarrez Aff. ¶ 17. When workers alert Amazon that they have tested positive for SARS-CoV-2, Amazon does not conduct interviews to identify or alert affected coworkers. *See* Escobar Aff. ¶¶ 5, 8. While workers receive notifications about positive cases almost daily, these notifications do not include information about what department the infected employee worked in, whether any given employee was a close contact, or other information that would help workers evaluate whether they are at risk. *See* Monarrez Aff. ¶ 17; Escobar Aff. ¶ 11. Workers report informing Amazon that they are close contacts of coworkers who have tested positive, and on multiple occasions Amazon has dismissed these concerns. *See* Monarrez Aff. ¶ 12; Martinez Aff. ¶ 44.

4. Amazon Has Rescinded Its Already Inadequate COVID-19 Protocols

Early in the pandemic, Amazon implemented certain strategies to enable social distancing, such as [REDACTED] social distancing barriers in shared areas, limiting two-way traffic, [REDACTED], [REDACTED], and staggering shifts and break times. *See* Ulmet Aff., Ex. E ([REDACTED] [REDACTED]); Palmer Aff., ¶¶ 7, 15, 19, 54; Martinez Aff., ¶¶ 14–15. However, Amazon has rolled back many of these measures.

⁵ *See* Ulmet Aff., Ex. C ([REDACTED]).

On July 7, 2021, Amazon informed workers that it would return to many pre-pandemic practices. *See* Palmer Aff., ¶ 7. Since then, Amazon has gradually eliminated distancing enforcement and temperature screenings, removed social distancing barriers, reverted to two-way walkways, closed off most exits, de-staggered shift and break times, reduced break times, restored breakrooms and locker rooms to full capacity, and resumed gatherings in the JFK8 “stand-up” area, where large groups of workers cluster together to discuss assignments. *See* Martinez Aff. ¶¶ 14–18, 20–22; Palmer Aff. ¶¶ 7, 14–23, 53–54; Ulmet Aff. Ex. S (photo of late-October 2021 gathering in stand-up area). These changes create crowding and prevent workers from keeping a safe social distance, thereby increasing the risk of virus transmission. *See* Martinez Aff. ¶¶ 10, 16–23; Palmer Aff. ¶¶ 12, 14, 17–18.

5. Amazon’s Peak Season Increases Threats to Worker Safety

Amazon has just entered its peak season, which spans the holiday season from Thanksgiving to Christmas. *See* Martinez Aff. ¶ 4; Palmer Aff. ¶ 4. During this season, the workforce at JFK8 increases substantially, *see* Martinez Aff. ¶ 13; Palmer Aff. ¶ 13; Monarrez Aff. ¶ 16; all workers are required to perform mandatory overtime,⁶ and Amazon prohibits workers from taking vacation, *see* Palmer Aff. ¶ 4. Together, these measures maximize the number of employees in the facility at any moment.

Amazon has already hired peak season workers at JFK8, and with the influx of new workers, it becomes even more difficult to engage in proper health and safety precautions. *See* Martinez Aff. ¶¶ 5, 16, 22; Monarrez Aff. ¶ 16. There is additional crowding in common areas and bathrooms, long crowded lines to enter and exit the building, and workers spend longer

⁶ Mandatory overtime shifts require workers to increase their hours from a 40-hour work week to a 50-plus hour work week. *See* Martinez Aff. ¶¶ 3–4; Palmer Aff. ¶¶ 3–4.

hours inside the facility. *See* Monarrez Aff. ¶ 16; Martinez Aff. ¶¶ 16–22. Workers fear working in these conditions alongside coworkers who may not be vaccinated, may not use face coverings, or may be infected. *See id.*

6. Employees Are Afraid to Complain about Unsafe Practices Because Amazon Has Retaliated Against Workers Who Do

a. Workers Do Not Feel Safe at JFK8 But Are Afraid to Complain

As safety conditions worsen, JFK8 workers are afraid to share their concerns with Amazon directly or with government agencies. *See* Affidavit of Christian Smalls (“Smalls Aff.”) ¶ 19; Martinez Aff. ¶¶ 9, 11; Monarrez Aff. ¶ 18. Workers are particularly aware of Amazon’s firing of employee Christian Smalls last year. *See* Martinez Aff. ¶ 9; Monarrez Aff. ¶ 18. Employees know that Amazon fired Smalls—a long-time employee with a history of positive job performance and promotions—after he complained about Amazon’s deficient COVID-19 health and safety practices early in the pandemic. *See* Martinez Aff. ¶ 9; Monarrez Aff. ¶ 18; Smalls ¶¶ 2, 6–16. Consequently, although workers do not feel safe, they are afraid of complaining and jeopardizing their own employment. *See* Martinez Aff. ¶¶ 9–11; Monarrez ¶ 18; Palmer Aff. ¶¶ 41, 49, 51–52; Smalls Aff. ¶ 19.

b. Amazon Retaliated Against Smalls

During the week of March 22, 2020, Smalls, a Process Assistant to whom forty employees reported, led coworkers in communicating concerns that, first, Amazon should close JFK8 to conduct proper cleaning and disinfection consistent with public health guidance and, second, that Amazon was failing to adequately identify and notify workers exposed to infected

coworkers. *See* Smalls Aff. ¶¶ 9, 11; Palmer Aff. ¶ 57; Martinez Aff. ¶ 7.⁷ Smalls notified Amazon managers that he and other workers had contacted the CDC and complained that Amazon was not following CDC protocols. *See* Smalls Aff. ¶ 10; Palmer Aff. ¶ 58.⁸

On March 26, Smalls and employee Derrick Palmer told Amazon that they had been in close contact with an infected coworker and that they should be quarantined. Amazon did not direct them to go home or quarantine, nor ask any questions. Instead, Amazon merely responded that it would review surveillance videos to determine if they met the standards for quarantine. *See* Smalls Aff. ¶ 13.

During the afternoon of March 27, Human Resources (“HR”) Manager Christine Hernandez and her associate Pooja Desai were already discussing “perceived . . . retaliation” of Smalls, who they expected would be fired on March 30 for violating a quarantine order by participating in a planned employee protest.⁹ However, it was not until hours later that Hernandez received notification that video surveillance identified Smalls as a close contact of an infected worker, and the following day, March 28, that Senior Operations Manager Zachary

⁷ *See also* Ulmet Aff., Ex. F (Amazon notes summarizing conversations with General Manager Sai Kotha and HR Manager Christine Hernandez reflect that Smalls spoke on behalf of assembled coworkers, complained that JFK8 should “close[] to do the deep-clean” at AMZ_NYAG_JFK8_00002580); Ex. G, (internal chat document transcribed Smalls’s complaint that “this building needs to be closed and sanitized”). Documents showing Amazon’s internal chats (“Chime chats”) are printed in reverse-chronological order.

⁸ *See also* Ulmet Aff. Ex. F (Amazon notes reference employees stating that they contacted the CDC at AMZ_NYAG_JFK8_00002582-2583); Ex. H (Chime chat document reflects that Smalls and other employees told a security guard “they were waiting for CDC at 10” and Amazon managers were “monitoring” those employees at AMZ_NYAG_JFK8_00003467).

⁹ Ulmet Aff., Ex. I (Chime chat between Hernandez (“hrnanch”) and Desai (“poodesai”) (“Hernandez/Desai Chime”) dated March 27, 2020 at AMZ_NYAG_JFK8_00002818-2819, Desai: “are we sureeeeeee [sic] thats [sic] not going to perceived and considered retaliation?”; Hernandez: “I think it will be perceived as such”). During their March 27 chat, Desai anticipated that Amazon would issue Smalls a directive to quarantine, and that he would violate it by attending a protest. *See* Ulmet Aff., Ex. J, Desai Transcript p. 159.

Marc informed Smalls that Amazon was placing him on quarantine. *See Smalls Aff.* ¶ 14. And finally, it was not until March 30 that Smalls entered Amazon’s parking lot to participate in a protest. *See id.* ¶ 15.

On March 29, one day before the planned protest and Smalls’s discharge, Desai communicated to Hernandez (who ignored the caution) that Smalls should receive a “seek to understand” conversation¹⁰ and a final written warning before termination.¹¹ On March 30, Amazon employees, including Smalls, participated in a protest outside JFK8 to complain about Amazon’s health and safety practices. *See Smalls Aff.* ¶ 15; *Palmer Aff.* ¶ 60. That evening, Marc informed Smalls that he was fired for violating the quarantine order and social distancing requirements during the protest.¹² Marc was given a termination script “reviewed and approved by Ops, Legal, HR, ER, and PR,” and was instructed not to “deviate or allow time for questions.”¹³

The day of Smalls’s discharge, Desai messaged Hernandez that Smalls’s firing did not seem justified, noting that Amazon had not communicated to Smalls that the quarantine order included the parking lot, and that suspending an employee badge would suggest to most people

¹⁰ “Seek to understand” is Amazon’s term for a conversation in which an employee can identify any information Amazon should take into consideration prior to issuing discipline. *See Smalls Aff.* ¶ 17.

¹¹ *See Ulmet Aff., Ex. I* (Hernandez/Desai Chime dated March 29, 2020 at AMZ_NYAG_JFK8_00002817).

¹² *See Smalls Aff.* ¶ 16; *Ulmet Aff., Ex. K* (Smalls’s Termination Document). During the protest, Smalls was in the parking lot of JFK8 and adjacent sidewalk and did not enter the facility. At no point did Amazon ask him to leave or communicate concerns about health risks he was supposedly posing. *See id.* And when Marc informed Smalls that he was placed on quarantine, he suspended Smalls’ employee badge but did not explain what the directive entailed, including whether the order included Amazon property outside JFK8’s security gates such as the parking lot. *See Smalls Aff.* ¶ 14.

¹³ *See Ulmet Aff., Ex. L* (March 30, 2020, email).

that the employee could not pass the facility’s security gates.¹⁴ She concluded, “this is going to [be] perceived as retaliation”; Hernandez agreed.¹⁵

III. ARGUMENT

A. Preliminary Injunction Standard

To obtain a preliminary injunction, a party must typically establish (1) a likelihood of success on the merits, (2) irreparable injury absent an injunction, and (3) that the equities balance in her favor. *Goldfarb v. Town of Ramapo*, 89 N.Y.S.3d 307, 308 (2d Dep’t 2018); *see also* C.P.L.R. § 6301. Where, as here, the State seeks a preliminary injunction pursuant to Executive Law § 63(12), it is unnecessary to show irreparable injury and the State need only show the other two factors. *People v. Apple Health & Sports Clubs*, 174 A.D.2d 438, 438–39 (1st Dep’t 1991); *see also State v. Terry Buick, Inc.*, 520 N.Y.S.2d 497, 500 (N.Y. Sup. Ct. Dutchess Cty. 1987). “[A]s to the likelihood of success on the merits, a *prima facie* showing of a right to relief is sufficient; actual proof of the case should be left to further court proceedings.” *Terrell v. Terrell*, 279 A.D.2d 301, 303 (1st Dep’t 2001).

B. The State Is Likely to Succeed on The Merits

1. Amazon Fails to Provide a Safe Workplace

Labor Law § 200(1) requires employers “to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein.” The statute “codifies the

¹⁴ *See* Ulmet Aff., Ex. I (Hernandez/Desai Chime dated March 30, 2020 at AMZ_NYAG_JFK8_00002816–2817; Desai’s message highlights that Smalls had not entered the JFK8 facility on March 30, Amazon had only communicated to him that his badge was suspended, which to most people would “mean not past lenels;” and Smalls had engaged in social distancing during his discussions with JFK8 managers). (Amazon’s security gates, which permit entry by employee badge, are referred to as “lenels,” *see* Ulmet Aff., Ex. J (Desai Tr., 146:3)).

¹⁵ *See* Ulmet Aff., Ex. I (Hernandez/Desai Chime dated March 30, 2020 at AMZ_NYAG_JFK8_00002816–2817).

common-law duty . . . to provide employees with a safe place to work.” *Romang v. Welsbach Elec. Corp.*, 852 N.Y.S.2d 144, 145 (2d Dep’t 2008). An employer is required to “use reasonable care commensurate with the hazard to be apprehended and to maintain his premises in such a condition that those who go there . . . shall not unnecessarily or unreasonably be exposed to danger.” *Monroe v. City of New York*, 414 N.Y.S.2d 718, 722 (2d Dep’t 1979); *see also Koullias v. Farm*, 798 N.Y.S.2d 877, 878 (N.Y. Sup. Ct. Kings Cty. 2005) (“duty of care ‘measured by whatever public safety requires’”) (citation omitted).

Here, the State is likely to succeed on the merits of its § 200 claim because Amazon has repeatedly and persistently failed to provide a reasonably safe workplace during the pandemic, a hazard requiring a high degree of care. Current public health guidance indicates minimums for “reasonable and adequate protection” under § 200. *See Ehlinger v. Bd. of Educ.*, 465 N.Y.S.2d 378, 379–80 (4th Dep’t 1983) (guidelines properly considered by jury). Amazon unreasonably failed to follow these minimum guidelines, including reasonable measures to limit transmission of the virus through adequate social distancing; allowing workers sufficient time to take protective measures such as washing hands and cleaning workstations; closing and cleaning areas of the facility where infected workers were present; and identifying and notifying workers who may have had contact with infected coworkers. Injunctive relief is necessary because Amazon’s peak season and recent rollbacks add dangers while the risk of infection rises.

a. Amazon’s Productivity Monitoring Fails to Give Employees Time for Cleaning, Hygiene, and Social Distancing

CDC guidance, which informs what is reasonable under § 200, recommends frequent cleaning and disinfection of shared spaces “[i]f the space is a high traffic area, with a large

number of people.”¹⁶ N.Y. Department of Health (“DOH”) guidance adds that high risk areas and frequently touched surfaces must be cleaned and disinfected twice daily, and shared equipment or workstations must be cleaned and disinfected between uses.¹⁷ The Occupational Safety and Health Administration (“OSHA”) recommends workers “practice good personal hygiene and wash [their] hands often,” and also continues to recommend implementing physical distancing (at least 6 feet) in all communal work areas for unvaccinated and otherwise at-risk workers.¹⁸ The DOH (implementing CDC Interim Public Health Recommendations for Fully Vaccinated People) likewise strongly recommend social distancing in indoor settings where vaccination status of individuals is unknown.¹⁹

¹⁶ See Ulmet Aff., Ex. M, *COVID-19, Cleaning Your Facility: Every Day and When Someone Is Sick*, CDC, https://www.cdc.gov/coronavirus/2019-ncov/community/disinfecting-building-facility.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fcommunity%2Forganizations%2Fcleaning-disinfection.html (last updated Nov. 15, 2021)).

¹⁷ See Ulmet Aff., Ex. N, *Public and Private Facilities Cleaning and Disinfection Guidance*, DOH, 2–3 (May 10, 2021), https://coronavirus.health.ny.gov/system/files/documents/2021/05/cleaning-and-disinfection-guidance-for-public-and-privatefacilities_051021.pdf.

¹⁸ See Ulmet Aff., Ex. O, *Protecting Workers: Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace*, OSHA, <https://www.osha.gov/coronavirus/safework> (last updated June 10, 2021). Because OSHA’s guidance is not a standard, it can inform the “reasonable and adequate” prong of the Labor Law § 200 analysis without raising preemption or primary jurisdiction issues. The currently-stayed “COVID–19 Vaccination and Testing; Emergency Temporary Standard,” 86 Fed. Reg. 61402 (Nov. 5, 2021) (the “November ETS”), set minimum vaccination and testing requirements for employers without addressing the social distancing, cleaning, and contact tracing practices at issue in this action. The negligible impact of the November ETS on Amazon’s preemption and primary jurisdiction arguments is addressed in Plaintiff’s Motion to Dismiss Defendants’ Counterclaims and Affirmative Defenses (Docket No. 184).

¹⁹ See Ulmet Aff., Ex. P, *New York State, Reopening New York: Implementing CDC Guidance*, https://www.governor.ny.gov/sites/default/files/2021-05/NYS_CDCGuidance_Summary.pdf (last accessed Nov. 29, 2021).

Yet as discussed in Point II(B) above, Amazon’s productivity and TOT monitoring deters workers from taking proper personal protective measures, such as cleaning and disinfecting workstations, hand-washing, and social distancing. *See* Martinez Aff. ¶¶ 25–33, 37; Palmer Aff. ¶¶ 24–27, 29–33, 41, 49–52; Monarrez Aff. ¶ 13. Workers are afraid to spend time on these measures for fear of discipline, including job loss. *See* Martinez Aff. ¶ 41; Palmer Aff. ¶¶ 36–40.

b. Amazon Does Not Employ Proper Cleaning and Disinfection Protocols When There Are Confirmed Cases

CDC guidance provides, “[i]f there has been a sick person or someone who tested positive for COVID-19 in your facility within the last 24 hours, you should clean and disinfect the spaces they occupied. Close off areas used by the person who is sick and do not use those areas until after cleaning and disinfecting” and “[w]ait as long as possible (at least several hours) before you clean and disinfect.”²⁰ The DOH also invokes these guidelines.²¹

[REDACTED]. However, this policy is inadequate because the CDC guidance²² requires areas to be closed for at least several hours before cleaning when there is a confirmed COVID-19 case, [REDACTED].²³ JFK8 workers have not seen any areas closed for cleaning

²⁰ *See* Ulmet Aff., Ex M, *COVID-19, Cleaning Your Facility: Every Day and When Someone Is Sick*, CDC.

²¹ *See* Ulmet Aff., Ex. N, *Public and Private Facilities Cleaning and Disinfection Guidance*, DOH.

²² *See* Ulmet Aff., Ex. M, *COVID-19, Cleaning Your Facility: Every Day and When Someone Is Sick*, CDC.

²³ As noted earlier, Amazon’s policy instructs [REDACTED]. *See* Ulmet Aff., Ex. C [REDACTED].

despite near-daily notification of confirmed COVID cases.²⁴ See Monarrez Aff. ¶¶ 7, 11; Martinez Aff. ¶¶ 10, 34; Palmer Aff. ¶¶ 47–48.

c. Amazon’s Contact Tracing Protocols Are Inadequate

OSHA encourages employers to “instruct . . . unvaccinated workers who have had close contact with someone who tested positive for SARS-CoV-2 . . . to stay home from work,” and recommends that even fully vaccinated people who have a known exposure to someone with suspected or confirmed COVID-19 should take precautions including testing and masking.²⁵ The CDC recommends that employers provide “identification of potential people exposed to COVID-19 who worked in the same area and on the same shift.”²⁶ Although Amazon purports to conduct “contact tracing,” and has a “contact tracing” protocol, its procedures are deficient, and evidence suggests that Amazon fails to follow its own procedures. See Ulmet Aff., Ex. C [REDACTED]. Employees rely on Amazon to provide information sufficient to determine whether they have had close contact with infected coworkers, but as discussed in Point II(B)(3) above, Amazon fails to adequately track cases, contact trace, and notify workers.

²⁴ Amazon has yet to produce information regarding enhanced cleanings that took place as a result of confirmed cases at the facility from November 1, 2020 to the present. However, out of 173 confirmed cases from March 1, 2020 to October 31, 2020 at JFK8, only six enhanced cleanings were performed. Those consisted of cleaning the associate’s and immediately adjacent workstations. See Ulmet Aff., Ex. T (Fitzgerald Declaration, ¶ 32).

²⁵ See Ulmet Aff., Ex. O, *Protecting Workers: Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace*, OSHA. See also footnote 18, *supra*.

²⁶ See Ulmet Aff., Ex. Q, *Case Investigation and Contact Tracing in Non-healthcare Workplaces: Information for Employers*, CDC <https://www.cdc.gov/coronavirus/2019-ncov/community/contact-tracing-nonhealthcare-workplaces.html> (last updated Oct. 20, 2021).

d. Amazon's Recent Removal of Already Inadequate COVID-19 Protocols Makes Social Distancing Even Less Feasible

As noted, OSHA continues to recommend that employers “[i]mplement physical distancing for unvaccinated and otherwise at-risk workers in all communal work areas.”²⁷ And in May 2021, the DOH adopted and implemented CDC guidance for most businesses, requiring social distancing and masks indoors for unvaccinated individuals.²⁸ Yet as discussed in Point II(B)(4) above, after implementing certain protective measures to enable social distancing early in the pandemic, Amazon informed JFK8 employees in July 2021 that it would return to its pre-pandemic practices, and since then has gradually eliminated its already inadequate COVID-19 protocols by eliminating social distancing enforcement, removing certain social distancing barriers, reverting to two-directional walkways, and de-staggering shifts and breaks.

As discussed in Point II(B)(4), these changes create crowding and prevent workers from keeping a safe distance, thereby increasing the chance of virus transmission. Adequate distancing is also impossible at lengthy “stand up” meetings with managers and when workers inevitably enter each other’s workstations throughout the day. These changes coincide with the seasonal influx of new hires and increased work-hours, discussed in Point II(B)(5), heightening the already unreasonable danger of virus transmission.

²⁷ See Ulmet Aff., Ex. O, *Protecting Workers: Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace*, OSHA. See also footnote 18, *supra*.

²⁸ See Ulmet Aff., Ex. P, *Reopening New York: Implementing CDC Guidance*.

C. Amazon Unlawfully Retaliated Against Christian Smalls in Violation of Labor Law § 215 and § 740

2. Legal Standard

Labor Law § 215 states that an employer may not discharge or in any other manner retaliate against any employee for complaining to “his or her employer . . . or any other person, that the employer has engaged in conduct that the employee, reasonably and in good faith, believes violates any provision of this chapter [the Labor Law];” and that the worker “need not make explicit reference to any section or provision of this chapter to trigger the protections of this section.” *See, e.g., Kingston v. Int’l Bus. Machines Corp.*, 187 A.D.3d 578 (1st Dep’t 2020) (complaint to employer concerning wage law violation was protected conduct).

To establish a prima facie case under § 215, a plaintiff must plead that “she made a complaint about the employer’s violation of the law and, as a result, was terminated . . . or subjected to an adverse employment action[,]” whereupon “the burden of production shifts to the employer to demonstrate that a ‘legitimate, nondiscriminatory reason’ existed for its action.” *Copantitla v. Fiskardo Estiatorio, Inc.*, 788 F. Supp. 2d 253, 302 (S.D.N.Y. 2011) (citations omitted). The plaintiff can counter that reason with evidence that the explanation is pretextual. *Id.* Retaliatory animus and close temporal proximity between a complaint and adverse action are indicia of a causal connection and pretext. *See, e.g., Schmidt-Sarosi v. Offs. for Fertility & Reprod. Med., P.C.*, 195 A.D.3d 479, 481 (1st Dep’t 2021) (termination four weeks after a complaint).

Additionally, Labor Law § 740 prohibits retaliatory action against an employee who “discloses, or threatens to disclose to a supervisor or to a public body an activity, policy or practice of the employer that is in violation of law, rule or regulation which violation creates and presents a substantial and specific danger to the public health or safety” (Labor Law § 740(2)(a))

or “objects to, or refuses to participate in any such activity, policy or practice” (Labor Law § 740(2)(c)). The elements of a § 740(2)(a) complaint include that the employee (1) disclosed or threatened to disclose the illegal practice to a supervisor or public body, (2) the practice was actually illegal, and (3) the violation “presented a substantial and specific danger to the public.... In addition, a plaintiff must demonstrate a causal nexus—*i.e.*, that the adverse employment action was taken ‘because’ of his disclosure or threatened disclosure[.]” *Rivera v. AffinEco LLC*, 2018 WL 2084152, at *3 (S.D.N.Y. Mar. 26, 2018). The same standard applies under § 740(2)(c) except that the first element is that the employee objected to or refused to participate in the illegal practice. *See Villarín v. Rabbi Haskel Lookstein Sch.*, 96 A.D.3d 1, 8 (1st Dep’t 2012) (Labor Law § 740(2)(c)).

3. Smalls Complained About Health and Safety Violations and Amazon Retaliated

The State is likely to succeed on its claim that Amazon unlawfully retaliated against Smalls under Labor Law § 215 and § 740. Smalls complained of health and safety conditions which he correctly believed to be illegal. *See Smalls Aff.* ¶ 7. He complained to the media and to senior management at JFK8, made it known to Amazon that he had contacted the CDC, and was a highly visible symbol of worker objection to unlawful working conditions at JFK8 because of his speeches to Amazon officials the week of March 22 as well as before and during the March 30 walkout.²⁹ Such complaints, disclosures, and objections are protected under § 215(1)(a), § 740(2)(a), and § 740(2)(c), and Smalls’ prominence among those who complained gave Amazon’s retaliatory message devastating impact.

²⁹ *Id.*, ¶¶ 8-12; Palmer Aff. ¶ 57-58; Martinez Aff. ¶ 7; *See also* Ulmet Aff., Ex. F (Notes); Ex. G (Desai Chime); Ex. H (Gilbert-Differ Chime).

At the time of Smalls’s complaints, Amazon was violating Labor Law § 200 by:

(1) failing to conduct proper cleaning, disinfection and ventilation of the JFK8 facility upon a confirmed COVID-19 case,³⁰ and (2) failing to adequately identify and notify workers exposed to infected coworkers.³¹ Failure to mitigate transmission of COVID-19 during a pandemic presented a substantial and specific danger to the public, satisfying the second element of a § 740 claim. Amazon fired Smalls within days of his open complaints to management, where he told them he contacted the CDC and complained that JFK8 was not following CDC protocols by failing to close the facility for cleaning. *See* Smalls Aff. ¶ 15; Ulmet Aff., Ex. K (Smalls’s termination document). The timing of Smalls’ firing—immediately following his complaints to Amazon managers about Amazon’s failure to protect its workers and within days of notifying Amazon managers that he had complained about its practices to the CDC—is sufficient to establish a causal connection between his protected activity and the firing. *See Schmidt-Sarosi*, 195 A.D.3d at 481.

There is also substantial evidence, discussed in Point II(B)(6) above, that Amazon’s purported reason for firing Smalls—that he violated a quarantine directive and social distancing policy—is a pretext for retaliation. Smalls was a long-tenured employee with a history of promotions and good work performance. Amazon, however, fired him without engaging in any

³⁰ CDC guidance issued on March 8, 2020 recommended employers “close off areas used by the ill persons and wait as long as practical before beginning cleaning and disinfection to minimize potential for exposure to respiratory droplets. Open outside doors and windows to increase air circulation in the area. If possible, wait up to 24 hours before beginning cleaning and disinfection.” *See* Ulmet Aff., Ex. R, *COVID-19 Environmental Cleaning and Disinfection Recommendations*, CDC, <https://web.archive.org/web/20200309030609/https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/cleaning-disinfection.html> (last updated March 6, 2020).

³¹ Amazon’s contact tracing protocol for JFK8 did not contain an interview component (*see* Ulmet Aff. Ex. V, Section 3.2 (3.2(a))), and Amazon managers dismissed efforts to self-report potential contacts. *See* Smalls Aff. ¶ 13.

progressive discipline, which was troubling to even Amazon’s HR employees. *See Smalls Aff.* ¶ 14.³² Indeed, Hernandez and Desai discussed Smalls’ imminent discharge for violating a quarantine order, which they predicted would be “perceived as retaliation,” before Smalls was even given the order.³³

D. Amazon Workers and the State of New York Will Suffer Imminent and Irreparable Harm Without Immediate Action

While the State need not adduce evidence of irreparable harm to obtain an injunction under Executive Law § 63(12), evidence readily shows irreparable harm if Amazon’s practices are not enjoined. Because Executive Law § 63(12) grants the Attorney General the power to apply to the Supreme Court for an order enjoining fraudulent or illegal acts, “[t]he irreparable injury to be enjoined is an injury to the public,” not an injury to any individual or entity. *Terry Buick*, 137 Misc. 2d at 294.

4. Irreparable Harm on Labor Law § 200 Claim

New York courts have found it “universally accepted that people working and living together are at exponentially heightened risk for contracting COVID-19, a virus that can cause long-term health complications and death.” *In re Holden v. Zucker*, No. 801592/2021, 2021 WL 2395292 at *9 (N.Y. Sup. Ct. Bronx Cty. Mar. 30, 2021). New York courts have specifically recognized the threat of COVID-19 illness as irreparable harm. *Fisher v. City of New York*, No. 452069/2020, 2021 WL 240542 at *7 (N.Y. Sup. Ct. N.Y. Cty. Jan. 25, 2021); *see also Basank v. Decker*, 449 F. Supp 3d 205, 210-213 (S.D.N.Y. 2020). Here, irreparable harm is demonstrated by the threat of increased illness and death caused by COVID-19 (*see Point II(A) supra* and

³² *See also Ulmet Aff.*, Ex. I (Hernandez/Desai Chime at AMZ_NYAG_JFK8_00002816–2817).

³³ *See Ulmet Aff.*, Ex I (Hernandez/Desai Chime at AMZ_NYAG_JFK8_00002819).

Michaels Aff.) due to transmission of the virus that could have been prevented but for Amazon's inadequate and dwindling precautions (*see* Point II(B)).

5. Irreparable Harm on the § 215 and § 740 Claims

Similarly, Amazon's unlawful firing of Smalls continues to intimidate employees who fear that complaints about health and safety conditions could jeopardize their livelihoods, and are thus chilled from exercising their protected Labor Law rights. Retaliatory discharge "carries with it the distinct risk that other employees may be deterred from protecting their rights[.]" *Holt v. Cont. Group, Inc.*, 708 F.2d 87, 91 (2d Cir. 1983). Interim reinstatement is appropriate under Labor Law § 215 where evidence shows that an employer's "retaliatory actions have caused irreparable harm by chilling the exercise of worker rights." *Lin v. Great Rose Fashion, Inc.*, No. 08-CV-4778(NGG)(RLM), 2009 WL 1544749, at *21 (E.D.N.Y. June 3, 2009); *see also Stagliano v. Herkimer Cent. Sch. Dist.*, 151 F. Supp. 3d 264, 273–74 (N.D.N.Y. 2015) (granting interim reinstatement to a plaintiff alleging retaliation for complaining of violations of the Family and Medical Leave Act, because other workers seeking leave to care for family workers might be chilled). In *Stagliano*, the court found that "weakened enforcement... can *itself* be irreparable harm". *Id.* Similarly, here Amazon's retaliatory firing of Smalls has resulted in chilling Amazon workers' protected rights, leading to decreased safety complaints, both of which constitute irreparable harm.

E. The Balance of Equities Weighs in Plaintiff's Favor

The balance of equities weighs in the State's favor. The State has a fundamental interest in protecting the health and safety of New Yorkers. The State Constitution (Article XVII, § 3) provides that "protection and promotion of the health of the inhabitants of the state are matters of public concern and provision therefor shall be made by the state." Indeed, *Jacobson v.*

Massachusetts, 197 U.S. 11, 29 (1905), recognized that “in every well-ordered society charged with the duty of conserving the safety of its members[,] the rights of the individual in respect of his liberty may at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand.”

To balance the equities, a court must inquire into whether threatened injury to the plaintiff is more burdensome than the harm an injunction will cause the defendant. *See Barbes Rest. Inc. v. ASRR Suzer 218, LLC*, 140 A.D.3d 430 (1st Dep’t 2016); *see also Bocelli Ristorante Inc. v. Cuomo*, 70 Misc. 3d 722, 733 (N.Y. Sup. Ct. Richmond Cty. 2020) (holding that the State’s interest in fighting COVID is at least as significant as the interruption of business). Courts may “restrain acts which are dangerous to human life, detrimental to the public health and occasion great public inconvenience and damage.” *Inc. Vil. of Babylon v. John Anthony’s Water Cafe, Inc.*, 137 A.D.2d 792, 795 (2d Dep’t 1988) (citation omitted); *see also People ex rel. Bennett v. Laman*, 277 N.Y. 368, 381 (1938) (injunction proper where “real danger is threatened to the public health by the conduct of the defendant” and “irreparable damage to the health of individuals is likely to result”). Here, Amazon’s inadequate COVID-19 prevention measures place its workers and other New Yorkers at risk of exacerbation of the pandemic, and the State’s interest in protecting the public health outweighs Amazon’s interest in maximizing profits.

IV. CONCLUSION

For these reasons, the Court should order Amazon to:

- 1) Modify productivity and TOT policies to permit time for cleaning, hygiene, and social distancing, and communicate this to employees;
- 2) Adopt policies for adequate cleaning and disinfection after workers infected with the SARS-CoV-2 virus have been present in the facility;
- 3) Use proper contact tracing protocols, including interviews and timely notification to close contacts;
- 4) Appoint a Court-approved monitor to oversee implementation of these changes and make additional recommendations as appropriate;

- 5) Offer reinstatement to Christian Smalls pending the outcome of this litigation; and
- 6) Communicate to employees that they have the right to complain to Amazon, the Attorney General, or any other government agency of violations of Labor Law, including violations of COVID-19 related health and safety requirements;

and grant such other relief as is appropriate.

Dated: November 30, 2021

Respectfully submitted,

LETITIA JAMES
Attorney General of the State of New York

By: /s/ Julie R. Ulmet

KAREN CACACE
Chief of Labor Bureau
JULIE R. ULMET
Deputy Chief of Labor Bureau

ROYA AGHANORI
KRISTEN FERGUSON
FIONA J. KAYE
ELIZABETH KOO
SETH KUPFERBERG
JEREMY PFETSCH
Assistant Attorneys General

Office of the New York State Attorney General
28 Liberty Street
New York, NY 10005
Phone: (212) 416-8681
Julie.Ulmet@ag.ny.gov

Attorneys for the State of New York

ATTORNEY CERTIFICATION PURSUANT TO UNIFORM RULE 202.8-b

I, Julie R. Ulmet, an attorney duly admitted to practice law in the courts of the State of New York, hereby certify that this Memorandum of Law in Support of Plaintiff's Motion for a Preliminary Injunction complies with the word count limit set forth in Rule 202.8-b of the Uniform Civil Rules for the Supreme Court and the County Court because it contains 6819 words, excluding the parts exempted by Rule 202.8-b. In preparing this certification, I have relied on the word count of the word-processing system used to prepare this affirmation.

Dated: November 30, 2021

/s/ Julie R. Ulmet

Julie R. Ulmet