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Judge Acquits All in Most Recent DOJ No-Poach Setback

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The Department of Justice (DOJ) Antitrust Division recently suffered another setback in its most recent effort to secure criminal convictions for labor-side violations of Section 1 of the Sherman Act. In perhaps the DOJ's most high-profile no-poach criminal case to date, the court granted the defendants' motion for a directed verdict and ended the prosecution at the close of the evidence and just before the case was to go to the jury. This fourth defeat, only contradicted by a single plea deal, continues to highlight the difficulties the DOJ is facing in securing Section 1 criminal antitrust convictions in the labor market.

U.S.A v. Mahesh Patel, Robert Harvey, Harpreet Wasan, Steven Houghtaling, Tom Edwards, and Gary Prus

On December 15, 2021, a federal grand jury in the District of Connecticut issued a 14-page indictment charging Mahesh Patel, Robert Harvey, Harpreet Wasan, Steven Houghtaling, Tom Edwards, and Gary Prus (the defendants) with one count of engaging in a conspiracy to violate Section 1 of the Sherman Act.[1] Per the indictment, Patel was the manager and director of an aerospace company, which hired engineers from other companies, which outsource qualified engineers and other skilled-labor employees.[2] The remaining defendants: Harvey, Wasan, Houghtaling, Edwards, and Prus, were high-level employees at various companies, which supplied engineers to the company Patel managed.[3] Notably, the indictment did not name or charge any of the companies involved in the allegations.

The indictment alleged that beginning in 2011 and continuing through 2019, the defendants conspired to enter into an agreement to restrict the hiring and recruiting of aerospace engineers.[4] Per the indictment, the conspiracy resulted in a no-poach agreement between Patel's company and the supplier companies, as well as among the supplier companies themselves.[5] Unlike the former no-poach indictments filed by the DOJ, this indictment alleged that the conspiracy had a "leader and primary enforcer" in Patel.[6] The alleged eight-year conspiracy was carried out through dinners, emails, and in-person meetings.[7] The DOJ alleged that the defendants' agreement constituted a *per se* violation of Section 1.[8]

Motion for Judgment of Acquittal

Following a four-week trial during which the DOJ presented its entire case in chief, on April 28, the court granted the defendants' motion for judgment of acquittal.[9] The court began its opinion by noting its previous order denying the defendants' motion to dismiss, which stated that "not all no poach agreements are market allocations subject to *per se* treatment."[10] The court then ruled that "[as] a matter of law, this case does not involve a market allocation under the *per se* rule."[11] Relying heavily on *Bogan v. Nw. Mut. Life Ins. Co.*,[12] as well as jury

instructions from one of the DOJ's more recent no-poach criminal trials, which required a finding that the market allocation lead to a cessation of meaningful competition in the allocated market, the court ruled that the DOJ had failed to prove that there was an agreement between the defendants to restrict hiring and that the alleged no-poach agreement allocated the market to a meaningful extent.[13] In support of its ruling, the court cited to trial transcripts and evidence in the record showing that there was no blanket no-poach agreement, that the alleged restrictions on hiring shifted constantly, and that hiring among the defendants often permitted hiring of each other's engineers, including on a broad scale.[14] Accordingly, as a matter of law, the court concluded that the defendants were entitled to a judgment of acquittal.[15]

Conclusion

The acquittal of the defendants represents another setback for DOJ's Section 1 labor-side antitrust enforcement actions. As described previously,[16] the DOJ has yet to succeed in convincing a jury to convict a business or individual for alleged Section 1 violations involving no-poach agreements or wage fixing. Time will tell whether this most recent acquittal will shift the DOJ's strategy in prosecuting these cases. The court's order finding here that the conduct did not fall under the *per se* rule may provide more of a challenge to the DOJ in future prosecutions than the previous acquittals, where DOJ has attempted to claim success because courts have found in motions to dismiss that the charged conduct fell under the *per se* rules.

Nonetheless, businesses should not expect this most recent loss to slow down the DOJ's enforcement actions, even though one would expect repeated losses to impact charging decisions in these cases. Just weeks ago, at the American Bar Association's Annual Antitrust Spring Meeting, Jonathan Kanter, head of the DOJ's Antitrust Division, acknowledged the DOJ's recent difficulties in securing convictions but referred to the cases as righteous and stated that the DOJ would continue to bring them. The DOJ's position is very much aligned with the Biden administration's stated policy of trying to protect employees from what it perceives to be unreasonable restraints of trade. Accordingly, clients should be careful when seeking to limit the movement of their employees in agreement with competitors or discussing their employees' pay with competitors.

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[1] *U.S.A v. Mahesh Patel, Robert Harvey, Harpreet Wasan, Steven Houghtaling, Tom Edwards, and Gary Prus*, ECF 20, 3:21-cr-00220-VAB (D. Conn. Dec. 15, 2021).

[2] *Id.* at ¶ 10.

[3] *Id.* at ¶¶ 11-16.

[4] *Id.* at ¶ 19.

[5] *Id.* at ¶¶ 20-21.

[6] *Id.* at ¶ 22.

[7] *Id.* at ¶¶ 22-29.

[8] *Id.* at ¶ 19.

[9] ECF 599, 3:21-cr-00220-VAB, at 1 (April 28, 2023).

[10] *Id.* at 3.

[11] *Id.* at 11.

[12] 953 F. Supp. 532 (S.D.N.Y 1997).

[13] ECF 599, 3:21-cr-00220-VAB, at 7-13 (April 28, 2023).

[14] *Id.* at 13-19.

[15] *Id.* at 19.

[16] "DOJ Fails to Convict in No-Poach/Wage Fixing Case," *Troutman Pepper*, March 31, 2023.

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