Employee Relations
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Federal District Court Dismisses Justice Department's Latest "No-Poach" Case Before Jury Deliberations

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In this article, the authors explain that, despite a federal judge terminating the U.S. Department of Justice's latest "no-poach" case, the Justice Department is likely to continue to uncover, investigate, and prosecute "no-poach" conduct.

In another blow to the efforts of the U.S. Department of Justice (DOJ) to criminalize "no-poach" and "wage-fixing" agreements, a federal judge recently terminated the DOJ's latest "no-poach" case mid-trial before jury deliberations.

Judge Victor A. Bolden of the U.S. District Court for the District of Connecticut granted a motion for judgment of acquittal filed by six individual defendants accused of participating in an alleged no-poach conspiracy in the aerospace industry.[1] The court ruled that the alleged "no-poach" conduct was "not a market allocation agreement as a matter of law."[2]

The DOJ's most recent loss in the aerospace case is a significant setback in the DOJ Antitrust Division's mission to criminally prosecute "no-poach" agreements. It follows three unsuccessful trials where the government sought convictions for alleged "no-poach" or "wage-fixing" agreements. In April 2022, the DOJ lost its first attempt at prosecuting "wage-fixing" in a case involving physical therapists and assistants.[3] Also in April 2022, the DOJ lost its first attempt at prosecuting alleged

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"no-poach" conduct when a jury acquitted DaVita, Inc. and its former CEO, who were accused of conspiring not to solicit employees with other healthcare companies.[4] In March 2023, the DOJ lost another attempt to prosecute alleged "wage-fixing" and "no-poach" conduct when a jury acquitted four managers of home healthcare agencies in Maine accused of agreeing to set wages and to refrain from hiring each other's workers for one month.[5]

While these past losses ended in jury verdicts for the defendants, the DOJ's most recent loss in the aerospace case ended mid-trial (after the DOJ had presented its evidence but before the case went to the jury) when the court dismissed it under Federal Rule of Criminal Procedure 29. Rule 29 requires a judge to enter a judgment of acquittal if the evidence presented by the DOJ is insufficient to sustain a conviction.[6] The court ultimately ruled that the evidence presented by the DOJ did not amount to a criminal market allocation agreement as a matter of law and that "no reasonable juror could conclude that there was a 'cessation of "meaningful competition" in the allocated market.'"[7] The DOJ cannot appeal a Rule 29 ruling, and therefore this ruling ends the case.

This case should have a sobering effect on the DOJ. It resulted in a written decision that will be embraced and used by future defendants in similar cases. Even if the DOJ is willing to accept trial losses, it should not be willing to risk undermining the *per se* standard that is vital to the success of its criminal enforcement program. Rulings in the *DaVita* case and now the aerospace case have begun to do just that.

SUMMARY

On December 15, 2021, a grand jury indicted six aerospace industry executives for their alleged role in a no-poach conspiracy concerning aerospace engineers.[8] The conspiracy allegedly affected thousands of engineers and spanned from as early as 2011 through September 2019.[9] The government alleged the executives allocated engineers by agreeing among themselves and with Pratt & Whitney to not solicit each other's employees.[10] According to the indictment, a Pratt & Whitney manager was the leader of the conspiracy and kept tabs on the individual suppliers to ensure they kept to the terms of the agreements.[11]

In June 2022, the defendants moved to dismiss the charges. Notably, the defendants argued that a criminal indictment was inappropriate for this case because the alleged conduct was not to avoid competition for employees. The defendants argued the conduct was ancillary to their outsourcing agreement because it allowed them to complete contracted-for tasks on time and support Pratt & Whitney's ability to make commitments to future projects, helped recoup training and recruitment costs, and facilitated the customer and supplier relationship.[12]

At the motion to dismiss stage, the court rejected the argument, holding that the alleged no-poach agreement could be construed as a market allocation.[13] However, the court stated that "not all no-poach agreements are market allocations subject to *per se* treatment and therefore, determining whether a no-poach agreement is a market allocation is highly fact specific."[14] Additionally, the court subsequently issued jury instructions that placed the burden on the government to prove at trial that the charged no-poach agreement was not ancillary to a legitimate business collaboration (i.e., that it was a "naked" no-poach agreement).[15]

THE RULE 29 MOTION AND RULING

At trial, the defendants filed a joint Rule 29 motion for judgment of acquittal after the DOJ presented its evidence (before the defendants presented any evidence).[16] The defendants argued that the DOJ's evidence never established a single, overarching conspiracy to allocate employees, that the relevant market was not limited to Pratt & Whitney projects, that there was no evidence of intent to allocate a market, and that the business arrangement was ancillary to a legitimate collaboration between the suppliers and Pratt & Whitney.[17] On that last point, the defendants argued that any agreement that may have existed helped them to build dependable aircraft engines for the end customer.[18]

The court agreed with the defendants and granted their Rule 29 motion.[19] Ultimately, the court held that a market allocation agreement requires evidence that meaningful competition was limited in the relevant market.[20] Here, the evidence presented by the DOJ showed that the engineers could transfer from company to company under certain conditions and that hiring was liberally permitted under the arrangement.[21] The exceptions to any broad conspiracy were so extensive that no labor market of engineers was meaningfully allocated.[22] In fact, many engineers were hired between the companies in the relevant time period.[23] Noting these facts, the court held that no reasonable juror could find that an illegal conspiracy to allocate the market existed and granted the Rule 29 motion for judgment of acquittal.[24]

COMMENT

Faced with yet another loss in a criminal no-poach case, the DOJ is likely to carefully consider which labor market cases to bring under a criminal theory. While the government has achieved some minor wins in the area of labor market prosecutions, namely a company plea agreement and an individual deferred prosecution agreement,[25] the Rule 29 acquittal on top of several trial losses indicates that the DOJ will need to reevaluate its litigation strategy. Future defendants in other types of criminal antitrust cases will argue that these rulings should not be limited

to no-poach cases. That said, the DOJ is likely to continue to uncover, investigate, and prosecute "no-poach" conduct.[26] Companies need to take steps to ensure employees understand where the line is before communicating with other companies about hiring-related matters.

Companies should familiarize themselves with the Antitrust Guidance for Human Resource Professionals published jointly by the DOJ and the Federal Trade Commission in October 2016 and review any agreements with other companies regarding hiring decisions.[27]

NOTES

1. Dan Papscun, "Ex-Pratt & Whitney Exec, Others Acquitted in No-Poach Case," Bloomberg (Apr. 28, 2023), https://news.bloomberglaw.com/white-collar-and-criminal-law/ex-pratt-whitney-exec-others-acquitted-in-dojs-no-poach-case.

2. Ruling And Order on Defendants' Motions for Judgment of Acquittal at 18, United States v. Patel, et al., No. 3:21-cr-220 (VAB) (D. Conn. Apr. 28, 2023) (hereinafter Ruling And Order).

3. Katie Buehler, "DOJ's 1st Wage-Fixing Suit Ends With Not Guilty Verdicts," Law360 (Apr. 14, 2022), https://www.law360.com/articles/1484191/doj-s-1st-wage-fixing-suit-ends-with-not-guiltyverdicts. The jury found one individual in the first case guilty of one count of obstruction of an FTC investigation. See Press Release, U.S. Dep't of Just., "Former Health Care Staffing Executive Convicted of Obstructing FTC Investigation into Wage-Fixing Allegations" (Apr. 14, 2022).

4. Diane Bartz, "DaVita and its former CEO acquitted of U.S. antitrust charges," Reuters (Apr. 18, 2022), https://www.reuters.com/business/healthcare-pharmaceuticals/davita-its-former-ceo-acquitted-antitrustcharges-2022-04-15/.

5. Mike Scarcella, "'Misguided' federal wage-fix prosecution ends in acquittal for home health agencies," Reuters (Mar. 23, 2023), https://www.reuters.com/legal/government/misguided-federal-wage-fix-prosecution-ends-acquittal-home-health-agencies-2023-03-23/.

6. Fed. R. Crim. P. 29.

7. Ruling And Order at 18.

8. Indictment, United States v. Patel, et al., No. 3:21-cr-220 (VAB) (D. Conn. Dec. 15, 2021).

9. Id. at 4.

10. Id.

11. Id. at 5.

12. Ruling and Order on Motions at 23, United States v. Patel, et al., No. 3:21-cr-220 (VAB) (D. Conn. Dec. 2, 2022).

13. Id. at 17.

14. Id. at 21.

15. Proposed Annotated Post-trial Jury Instructions at 50, United States v. Patel, et al., No. 3:21-cr-220 (VAB) (D. Conn. Mar. 27, 2023) (Ancillary Restraints instruction). According to the instruction, to be ancillary, the no-poach agreement must be (i) subordinate and collateral to a separate, legitimate business collaboration, and (ii) reasonably necessary to achieving the legitimate and pro-competitive purposes of the business collaboration.

16. Memorandum Of Law in Support of Defendants' Joint Motion for Judgment of Acquittal, United States v. Patel, et al., No. 3:21-cr-220 (VAB) (D. Conn. Apr. 24, 2023).

17. Id. at 2-5.

18. Id. at 5.

19. Ruling And Order.

20. Id. at 11-13.

21. Id. at 17.

22. Id.

23. Id. at 17-18.

24. Id. at 18-19.

25. See Press Release, U.S. Dep't of Just., "Health Care Company Pleads Guilty and is Sentenced for Conspiring to Suppress Wages of School Nurses" (Oct. 27, 2022), https://www.justice.gov/opa/pr/health-care-company-pleads-guilty-and-sentenced-conspiring-suppress-wages-school-nurses; Bryan Koenig, "Deal Caps DOJ's 1st Win In Individual No Poach Criminal Case," Law360 (Jan. 24, 2023), https://www.law360.com/articles/1568672.

26. The grand jury indicted another individual in March 2023 for allegedly conspiring to fix nurses' wages. Press Release, U.S. Dep't of Just., "Health Care Staffing Executive Indicted for Fixing Wages of Nurses" (Mar. 16, 2023), https://www.justice.gov/opa/pr/health-care-staffing-executive-indicted-fixing-wages-nurses.

27. The Antitrust Guidance for Human Resource Professionals can be found on the DOJ's website, https://www.justice.gov/atr/file/903511/download.