

## DOJ's Latest, Biggest No-Poach Trial Thrown Out

By **Bryan Koenig and Nadia Dreid**

Law360 (April 28, 2023, 10:36 AM EDT) -- The Justice Department's latest, and one of its most high-profile, no-poach criminal case will never make it to jury deliberations after a Connecticut federal judge ruled Friday that no reasonable juror could convict six accused aerospace and staffing company bosses based on evidence presented by prosecutors.



The DOJ on Friday saw its latest no-poach criminal case thrown out, the latest blow for the agency that has failed to win a single jury conviction on similar accusations. (Jimmy Hoover | Law360)

U.S. District Judge Victor A. Bolden's ruling is the first time in decades that criminal antitrust charges have been thrown out under Federal Rule of Criminal Procedure 29 and is the latest blow for U.S. Department of Justice Antitrust Division efforts to prosecute alleged deals to fix wages or restrict recruitment and hiring, having so far failed to win a single jury conviction on those accusations.

Judge Bolden said that workers were still able to switch between different engineering staffing companies servicing Raytheon Technologies Corp.'s Pratt & Whitney division. He held that means there's been no showing of an illegal market allocation for labor.

"Under these circumstances, the alleged agreement itself had so many exceptions that it could not be said to meaningfully allocate the labor market of engineers from the supplier companies working on Pratt and Whitney projects," he said.

While there is evidence of some restrictions, the court said that the restrictions "shifted constantly

throughout the course of the conspiracy," suggesting that "hiring was permitted, sometimes on a broad scale," so altogether, there wasn't enough to add up to market allocation.

"Even if this was not the case, no reasonable juror could conclude that there was a 'cessation of 'meaningful competition' in the allocated market,'" Judge Bolden said.

Closing arguments had been expected for Tuesday in **the case** against Mahesh Patel, a former director for global engineering sourcing with Pratt & Whitney. He was indicted alongside Robert Harvey, Gary Prus, Harpreet Wasan, Steven Houghtaling and Tom Edwards, executives at engineering staffing companies that, like Raytheon, are unnamed in the indictment but identified in private follow-on litigation as Quest Global Services NA Inc., Belcan Engineering Group, Agilis Engineering Inc., Cyient Inc. and Parametric Solutions Inc.

The DOJ declined to comment Friday. Counsel for some of the defendants welcomed the ruling and railed against the DOJ's prosecution.

"We are obviously very happy and relieved that this nightmare is over for Mr. Edwards," said Craig A. Gillen of Gillen Withers & Lake LLC. Gillen argued that the evidence is clear that all the defendants were innocent. "It's unfortunate they had to endure this prosecution but it is now behind them."

An attorney for Wasan, Marc A. Weinstein of Hughes Hubbard & Reed LLP, similarly railed against the DOJ's new but **important trendline** in pursuing criminal cases against alleged deals to fix wages or restrict recruitment and hiring. He called those prosecutions "a misguided policy experiment. Trying to criminalize HR issues."

The DOJ, Weinstein argued further, has shown an "unwillingness to listen," refusing to meet with defendants ahead of indictments to give their counsel a chance to push back on prosecutor's assessments.

"They're not listening to defense attorneys before they charge and they're not listening to juries after they lose," Weinstein said.

Juries have so far rejected every labor-side antitrust charge to reach them. The DOJ's only jury conviction in the cases was on a charge of lying to government investigators. Its only convictions on labor-side antitrust charges came from **a pair of plea deals**.

The DOJ's criminal antitrust losses have piled up outside the labor-context as well. Last October, the DOJ **dropped the last** pending case stemming from its beleaguered price-fixing investigation in the chicken industry after a Colorado federal judge excluded much of the evidence against a pair of former Pilgrim's Pride executives. An attorney for Pilgrim's Pride CEO Jayson Penn, who was **acquitted** in an earlier round of those prosecutions, told Law360 on Friday that "something has gone seriously wrong over at the Antitrust Division."

"They are making bad charging decisions, and it's showing in the results," said Michael Tubach of O'Melveny & Myers LLP.

The DOJ also has criminal no-poach charges pending against UnitedHealth Group's Surgical Care Affiliates over an alleged agreement with DaVita. The DOJ **already lost** a criminal case against DaVita and its former CEO.

The DOJ has previously targeted alleged labor-side antitrust violations in civil cases that didn't come with the risk of prison time. Its first criminal cases only started appearing in 2020, but the DOJ has expressed a continuing public commitment to pursuing those prosecutions.

The loss comes just weeks after the head of the Antitrust Division, Assistant Attorney General Jonathan Kanter, argued that labor-side criminal prosecutions remain a priority for prosecutors. Kanter **called the prosecutions "righteous,"** and he argued they are in defense of workers in often vulnerable positions.

Weinstein on Friday called the DOJ's view "offensive," arguing that purported victim witnesses in this case actually said that working for Quest got them their dream jobs.

"They're experimenting with people's lives," Weinstein said of prosecutors.

Tubach also noted Kanter's statement **in the face of earlier losses**, in which he told staffers to listen to Tom Petty's "I Won't Back Down" and to "dance like nobody's watching."

"Rather than tell his prosecutors to 'dance like no one's watching,' Mr. Kanter should be doing a deep dive on why his division keeps losing. Maybe that is something the new criminal leadership in the division will undertake," Tubach said.

For all its losses, the DOJ has claimed success in the fact that judges have allowed its prosecutions to move forward as per se, or automatic antitrust violations on par with clearly illegal deals carving up markets and fixing prices. But this time around, even after previously allowing the prosecution to move forward, Judge Bolden held that the per se allegations don't hold up.

"As a matter of law, this case does not involve a market allocation under the per se rule," the judge said, pointing to the regular movement of workers between employers.

Carsten Reichel, a partner at Norton Rose Fulbright US LLP and former federal prosecutor, called that holding crucial.

"Today's ruling is a clear win for these defendants, who have been acquitted of the charges. But the court's order also poses a challenge to DOJ's broader efforts to prosecute no-poach conduct criminally. The judge here found that the conduct at issue did not fall under the per se rule," Reichel said in a statement. "In earlier cases, even when juries ultimately acquitted, DOJ has pointed to its success in pre-trial rulings that the charged conduct fell under per se rules and has cited those decisions in other litigation. They won't be able to do that with today's order."

Judge Bolden also pushed back Friday on DOJ arguments that he was imposing new requirements for making out a per se case or that he was going against his previous ruling allowing the case to move forward under the per se rule and refusing to dismiss.

"If anything, the government has tried to expand the common and accepted definition of market allocation in a way not clearly used before," the judge said.

The government is represented by Carrie A. Syme, T. Jakob Sebow, Amanda Ann Barnes, Kathryn Kushner and Joseph Muoio of the U.S. Department of Justice's Antitrust Division, and David Tien-Wei Huang of the U.S. Attorney's Office for the District of Connecticut.

Patel is represented by Brian E. Spears, Ivan J. Ladd-Smith and Leslie A. Cahill of Spears Manning & Martini LLC.

Harvey is represented by Guy Petrillo, Caelyn Stephens and Leonid Sandlar of Petrillo Klein & Boxer LLP and Paul McConnell of the McConnell Family Law Group.

Wasan is represented by Marc A. Weinstein, Kiran Rosenkilde and Raquel Gonoretzky of Hughes Hubbard & Reed LLP and Craig A. Raabe of IZARD Kindall & Raabe LLP.

Houghtaling is represented by Richard F. Albert, Penina Moisa, Andrew Dennis Dillon and Jorja Knauer of Morvillo Abramowitz Grand Iason & Anello PC and Patrick A. Klingman of Klingman Law LLC.

Edwards is represented by Marc Siegel of Farmer Brownstein Jaeger Goldstein Klein & Siegel LLP, James M. Moriarty of Zeisler & Zeisler PC and Anthony C. Lake and Craig A. Gillen of Gillen Withers & Lake LLC.

Prus is represented by Audrey A. Felsen of Koffsky & Felsen LLC and Kenneth Rosenthal of the Law Office of Kenneth Rosenthal.

The case is U.S. v. Patel et al., case number 3:21-cr-00220, in the U.S. District Court for the District of Connecticut.

--Additional reporting by Matthew Perlman and Cara Salvatore. Editing by Alyssa Miller and Emily Kokoll.

*Update: This story has been updated with more details and with case and counsel information for the parties. It has also been updated with comment from attorneys.*

