

**OFFICE OF THE ELECTION SUPERVISOR
for the
INTERNATIONAL BROTHERHOOD OF TEAMSTERS**

IN RE: HOFFA-HALL 2011,)	Protest Decision 2011 ESD 340
)	Issued: October 11, 2011
Protestor.)	OES Case Nos. P-279-061711-NA
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Hoffa-Hall 2011 filed a pre-election protest pursuant to Article XIII, Section 2 of the Rules for the 2010-2011 IBT International Union Delegate and Officer Election (“Rules”). The protest alleged that Fred Gegare and the Gegare slate impermissibly retaliated against James P. Hoffa and Hoffa-Hall 2011 by filing a lawsuit against Hoffa, among others, for failing to take action to end the Consent Decree.

Election Supervisor representatives Deborah Schaaf and Jeffrey Ellison investigated this protest.

Findings of Fact

On March 14, 1989, the United States and the IBT entered into a Consent Order in *United States v. International Brotherhood of Teamsters*, 88 Civ. 4486 (S.D.N.Y.) to resolve claims brought “pursuant to the civil remedies provisions of the Racketeer Influenced and Corrupt Organizations (‘RICO’) Act, 18 U.S.C. § 1964.” The Consent Order provides that:

Upon satisfactory completion and implementation of the terms and conditions of this order, this Court shall entertain a joint motion of the parties hereto for entry of judgment dismissing this action with prejudice and without costs to either party.

Consent Order, § A(2). No such motion has been presented and the Consent Order remains in place.

Under the Consent Order, the IBT agreed to certain changes in its constitution (Consent Order, § D), and to the appointment of independent Court Officers to supervise and conduct union disciplinary proceedings (Consent Order, § F(12)(A)), review IBT expenditures, contracts and appointments (Consent Order, § F(12)(B)), and conduct International union delegate and officer elections (Consent Order, § F(12)(D)).¹ The Consent Order established an Independent Review Board, starting after the certification of the 1991 International Officer election results, to investigate and report on certain matters and to oversee union discipline arising from those investigations. (Consent Order, § G). The IBT consented to U.S. Department of Labor supervision of any International officer elections after 1991. (Consent Order, § F(12)(D)).

Instead of electing for Department of Labor supervision after the Election Officer’s position ended, the United States Government stipulated with the IBT to conduct the 2011 IBT International

¹ The individual IBT defendants did not secure personal benefits under the Consent Order. Rather, the Consent Order provided that “[t]he union defendants herein remain as officers of the IBT, subject to all of the terms herein, including the disciplinary authority of the Court-appointed officers” Consent Order, § C. Several members of the General Executive Board were charged and removed from office under the Independent Administrator’s disciplinary authority.

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Union Delegate and Officer Election through the appointment of an Independent Election Supervisor with authority similar to that of the Election Officer under the Consent Order. See *United States v. International Brotherhood of Teamsters*, 88 Civ. 4486, Election Agreement (S.D.N.Y. November 17, 2009). A similar Election Agreement created the framework for independent supervision of the 2006 and 2001 elections.

On June 13, 2011, Fred Gegare and 49 other members of the IBT filed a verified complaint in the United States District Court for the Southern District of New York for declaratory relief terminating the Consent Order.² The matter is assigned to Chief Judge Loretta A. Preska, who currently oversees the Consent Order. In that role, Judge Preska approved the 2009 Election Agreement and, ultimately, the Office of the Election Supervisor is accountable to the Court.

The suit named James P. Hoffa, the IBT, and the United States as defendants. The suit alleged that it was brought as a derivative action by the plaintiffs to “enforce various rights that the IBT may properly assert, but has failed to enforce.”³ Specifically, the plaintiffs claim that the Consent Order was unlawfully obtained, violates the laws and Constitution of the United States, and, regardless, has accomplished its stated purpose.⁴

Similar claims have been advanced and disposed of previously. Thus, when the original Court Officers began to exercise their authority, IBT members and IBT subordinate bodies challenged whether the changes effected by the Consent Order were legitimately effectuated or applicable to them. An early exercise of the Independent Administrator’s disciplinary authority was challenged by an IBT member who was not a party to the RICO case or a signatory to the Consent Order. Rejecting the challenge to the authority of the Independent Administrator, the Second Circuit Court of Appeals stated:

While we need not decide whether Hughes as a nonparty could be bound by each and every term of the Consent Decree, he clearly could be bound by the terms of the disciplinary mechanism set in place by the Consent Decree. This is so because the investigatory and disciplinary powers of the court-appointed officers are proper delegations of the powers of the IBT General President and the GEB within the scope of the IBT Constitution that binds all members of the IBT, and because the IBT Constitution, in Article XXVI, section 2, contemplates amendment by the GEB, under the circumstances of this case, as a result of judicial direction.

United States v. International Brotherhood of Teamsters (“Friedman & Hughes”), 905 F.2d 610, 622 (2d Cir. 1990).

A later challenge by IBT subordinate entities disputed the application of the Consent Order’s election provisions. Again, the Second Circuit Court of Appeals upheld the agreement:

Friedman & Hughes ... held that, at least as far as the constitutionally delegated powers of the IBT and its officers are concerned, IBT members, and presumably

² The case number is 11 Civ. 3980.

³ Verified complaint, ¶ 6.

⁴ *Id.*, ¶10.

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affiliates, are bound by the Consent Decree. We believe that similar reasoning applies to provisions governing the selection of IBT Convention delegates and IBT officers.

United States v. International Brotherhood of Teamsters (“1991 Election Rules Order”), 931 F.2d 177, 184 (2d Cir. 1991). In the twenty years since these fundamental rulings confirmed the legitimacy of the Consent Order, hundreds of decisions have issued under its framework.

The suit that is the subject of this protest raises these same arguments – already disposed of – again. It further asserts that the plaintiffs are unable to intervene in the original action that resulted in the Consent Order and must therefore bring a derivative action. Among the reasons asserted for their alleged inability to intervene is the claim that the Consent Order has negated any incentive for General President Hoffa to move for its dissolution. Thus, the plaintiffs allege that Hoffa has, “with the apparent complicity of the defendant U.S., managed to create for himself a monarchy which secures its longevity by machinations he ruthlessly orchestrates.”⁵ Included among the alleged “machinations” the plaintiffs attribute to Hoffa are suspending his opponents from membership to destroy their eligibility for elected office; failing to provide periodic reports of expenditures as required; exercising his leadership of the union for his own benefit; raising dues, per capita, and initiation fees; decreasing members’ retirement benefits; and raising his own compensation.⁶

Counsel for plaintiffs is Robert McKay of Carney & McKay in Garden City, New York. In 1995, McKay brought a similar suit as counsel for Richard Volpe and 46 other plaintiffs alleging that the Consent Decree was improperly obtained.⁷ Before his retirement, Volpe served the IBT as Eastern region vice president and director of the bakery conference, among other duties. The 2011 suit copies verbatim many portions of the 1995 action. However, two significant differences distinguish the suits. First, the 1995 suit named only the United States as a defendant, while the current suit names Hoffa, the IBT, and the United States. Second, the allegations concerning Hoffa are exclusive to the current suit.

Volpe told our investigator that he brought the 1995 suit because he believed the 1991 convention had not ratified the General Executive Board’s resolution agreeing to the Consent Order, as the IBT constitution required. For that reason, he believed the IBT had not validly entered into the Consent Order and it should be dissolved. The United States filed a pre-answer motion to dismiss the complaint, citing the judicial determinations that had previously disposed of the arguments that Volpe’s suit raised. Confronted with this motion, Volpe discontinued the suit pursuant to Fed. R. Civ. P. 41(a)(1); he told our investigator he did so to avoid the risk of sanctions pursuant to Fed. R. Civ. P 11.

Volpe also told our investigator that at the time it was filed and for several years after, the complaint was circulated to and among anyone who was interested. Given this wide distribution, Volpe said he was not surprised that Gegare ended up with the same lawyer who had represented

⁵ *Id.*, ¶14.

⁶ *Id.*, *op.cit.*

⁷ The case number was 95 Civ. 6549 (S.D.N.Y.).

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Volpe and that the current suit was similar to Volpe's (except for the allegations against Hoffa). Volpe said he could not recall specifically discussing with Gegare the suit Volpe had filed.

Plaintiffs in the present suit allege that Hoffa has acted or failed to act in his official capacity as IBT General President. The verified complaint makes no claim against Hoffa as a candidate and does not seek any relief to limit any speech or conduct of the Hoffa campaign. Neither Gegare nor the other 49 plaintiffs⁸ allege that Hoffa has harmed them personally, either by defaming them or in any other way.

The Gegare suit does not seek damages from Hoffa or the other defendants. It seeks only declaratory relief for the purported benefit of the IBT. Thus, the suit requests termination of the Consent Order, a declaration that the Consent Order violated the Constitution and laws of the United States, and an order directing defendants, the IRB, and the IBT General Executive Board⁹ to cease and desist from further internal union disciplinary action against members and subordinate bodies until an election not supervised by the government is concluded. Finally, the suit seeks an award of plaintiffs' costs and attorneys fees.

Although the suit was filed June 13, service was not made on the IBT until September 21. Service was attempted on Hoffa on September 21 by delivery of the summons and complaint to the reception desk at IBT headquarters in Washington, D.C.; the receptionist was not authorized to accept service for Hoffa personally and therefore declined the delivery. Service on the Government was attempted by certified mail on the United States Attorney for the Southern District of New York on September 29; no evidence was found that simultaneous service was made on the Attorney General of the United States, and the court docket does not reflect proper service on defendant United States. Nonetheless, the Government on October 7 petitioned the Court by letter seeking to stay all proceedings and deadlines until after November 29, 2011 "to ensure that defendants' responses and court proceedings ... not be used by one or more parties to influence the 2011 IBT Election."

The protest here asserts that Gegare's suit is undertaken to retaliate against Hoffa for Hoffa's candidacy for re-election as IBT General President. The protest contends that a lawsuit brought against a candidate during the electoral period may proceed only if it is well-grounded in fact and law, and the protest asserts that the Gegare suit is neither. Factually, the protest claims that the suit is "infested with politically charged rhetoric and a number of false allegations concerning Mr. Hoffa and the IBT." With respect to its legal merit, the suit (according to the protest) "is frivolous, not well grounded and objectively baseless." Further, although it purports to be a derivative action, the suit does not name the General Executive Board members as defendants, which the protest states is a legal defect in the complaint. The protest speculates that the GEB is not named because Gegare himself is a member of the GEB.

⁸ The 49 plaintiffs joining Gegare in the suit assert they are members of the IBT. Twenty-five claim membership in Local Union 120 (Blaine, Minnesota); five in Local Union 396 (Covina, California); one in Local Union 554 (Omaha, Nebraska); one in Local Union 695 (Madison, Wisconsin); sixteen in Local Union 848 (Covina, California); and one in Local Union 896 (Los Angeles, California). Aside from Gegare, none of the 50 plaintiffs are nominated candidates for International office, although one, Richard Galvan, sought nomination unsuccessfully at the IBT convention.

⁹ Gegare is a member of the IBT General Executive Board. Accordingly, plaintiff Gegare seeks an order directing the GEB of which he is a member to halt disciplinary proceedings against union members and subordinate union bodies. None of the other 49 plaintiffs are members of the GEB.

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The protestor contends that the suit has been “filed for purely retaliatory political purposes and should be ordered stopped.”

The 28th International Convention made its position on the Consent Decree part of the official proceedings. On June 30, 2011 (about two weeks after the Gegare suit was filed), the Convention heard a resolution that reaffirmed certain democratic reforms adopted in 2001 as “a permanent and vital component of the governance of the Teamsters Union” and expressing the desire of the Convention “that the Consent Decree be ended.” *28th Convention, Fourth Day* Tr. at 44 (June 30, 2011). After debate, the Convention adopted the resolution. *28th Convention, Fourth Day* Tr. at 44-46.

At the September 7, 2011 Candidate Forum, the General President candidates (or, in the case of Hoffa, his substitute Ken Hall) were each questioned about efforts “to end the trusteeship” and whether each would support continuing the rank-and-file election of the International officers under independent supervision even “if the Consent Decree were lifted.” *Candidate Forum Transcript* at 20-21, 23-24.

Analysis

Retaliation for activity protected by the *Rules* is forbidden. Article VII, Section 12(g) states that:

Retaliation or threat of retaliation by the International Union, any subordinate body, any member of the IBT, any employer or other person or entity against a Union member, officer or employee for exercising any right guaranteed by this or any other Article of the Rules is prohibited.

To establish a violation of this section, “the evidence must demonstrate that 1) the alleged victim engaged in activity protected by the *Rules*, 2) the charged party took adverse action against the alleged victim, and 3) the protected activity was a motivating factor in the adverse action.” *Bundrant*, 2005 ESD 19 at 10 (October 25, 2005), *aff’d*, 05 EAM 4 (November 15, 2005) (quoting *Cooper*, 2005 ESD 8 (September 2, 2005)). The Election Supervisor will not find retaliation if he concludes that the member or entity would have taken the same action even in the absence of the protestor’s protected conduct. *Gilmartin*, P32 (January 5, 1996), *aff’d*, 95 EAM 75. See *Leal*, P51 (October 3, 1995), *aff’d*, 95 EAM 30; *Wsol*, P95 (September 20, 1995), *aff’d*, 95 EAM 17.

Our precedents document two instances in which civil litigation was undertaken against a candidate during or immediately following an electoral campaign. Each case sought compensatory damages for tortious injury allegedly caused by the defendant candidate’s campaign speech. Thus, in *Hoffa*, P-1079 (October 23, 1996), *aff’d*, 96 EAM 267 (November 8, 1996), candidate Hoffa filed a protest alleging that candidate Carey engaged in prohibited retaliation against him by threatening and then filing a defamation action. The Carey suit alleged that the content of certain Hoffa campaign literature was maliciously false. Specifically, Carey alleged that Hoffa campaign content falsely and maliciously accused him of a serious conflict of interest by asserting that he secretly owned thousands of shares of UPS stock at the same time he negotiated a successor UPS collective bargaining agreement. Carey also claimed that Hoffa campaign literature defamed him by asserting

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that he had used a UPS lawyer to assist him in becoming principal beneficiary of the sizeable estate of an elderly widow. Carey sought damages against Hoffa for these alleged acts of defamation. Election Officer Quindel rejected Hoffa's contention that the *Rules* provide immunity from a private state law libel action for campaign speech, finding that such a suit, brought by a member as an individual and with no support or subsidization by the IBT or any subordinate body, may proceed if it is "well-founded."¹⁰ Such a suit could proceed even if motivated by a retaliatory purpose. The Election Officer reasoned that, while the *Rules* protect the right of members to free campaign speech, a candidate retains a countervailing right under the First Amendment to the U.S. Constitution to submit to the courts a well-founded claim for personal injury, including a claim for injury to reputation, even if the candidate has a retaliatory motive for bringing the suit. In *Hoffa*, the Election Officer concluded that the Carey lawsuit met this test and refused to enjoin it.

In a second case, Election Administrator Wertheimer directed the discontinuance of a defamation suit initiated on the recommendation of and in the name of Local Union 213 and members of its executive board. *Brown*, 2002 ESD 552 (January 15, 2002), concerned a defamation action filed by "Local 213, McGill and Zigmont" against Brown and Homestead. McGill and Zigmont were officers of Local Union 213 and candidates in the delegate election. Brown and Homestead were opposing candidates in the delegate election. The complaint alleged that a posting about one of the plaintiffs that appeared on the defendants' campaign website was maliciously false. The plaintiffs sought money damages for the alleged defamation. The investigation showed that the posting was made by an anonymous visitor to the site and was removed as soon as it was seen by the defendants' campaign webmaster. On those facts, the Election Administrator concluded that the union-sponsored defamation suit against the defendant candidates was not well-founded because the defendants were not responsible for initially posting the defamatory statement and removed it promptly after discovery.

Based on these precedents, the protestor here contends that the suit by Gegare *et al* constitutes retaliation against Hoffa under the *Rules*. The protestor contends that the suit was filed because of Hoffa's protected activity, his candidacy, and is not well-founded.

We reject the protestor's contention. Both *Hoffa* and *Brown* considered whether civil litigation seeking personal injury compensatory damages for maliciously false campaign speech constituted retaliation under the *Rules*. In each case, the plaintiff candidate alleged that campaign speech of the defendant candidate was false and defamatory and sought compensatory damages for personal injuries allegedly caused by election-related conduct. Here, by contrast, the plaintiffs' suit does not seek any personal injury damages from Hoffa or even to enjoin or limit any conduct of Hoffa as a candidate in the International officer election. The complaint alleges that Hoffa, in his official capacity as IBT General President, committed misfeasance and non-feasance in office with the objective of maintaining rather than ending the Consent Order. The instant suit makes no reference to the pending election or Hoffa's candidacy and does not depend for its factual or legal sufficiency on Hoffa's candidacy. Rather, the allegations against Hoffa are based, both factually

¹⁰ Internal union charges seeking remedies against members that criticize union management are treated differently from litigation filed in court because union trial committees frequently are not independent of the management. "It is settled law that a union may not impose internal union discipline against a member for uttering even libelous statements about union affairs." *Bales*, 2011 ESD 286 at 4 (June 28, 2011). The Gegare suit was filed in federal court, and does not involve any of the issues presented by an attempt to abuse the internal union disciplinary process.

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and legally, on the manner in which he allegedly exercised his official duties as General President (or his alleged failure to exercise them).

While we find that Hoffa has engaged in activity protected by the *Rules* by establishing and pursuing his candidacy for elected office (the first element of a retaliation claim), we find that plaintiffs' suit against him is connected to the exercise or failure to exercise official duties of office rather than to his candidacy for election. Accordingly, we conclude that the protestor has not established that the suit is connected to Hoffa's candidacy.

The protestor contends nonetheless that plaintiff Gegare would not have brought the suit were Hoffa not a candidate for election. As such, the protestor argues that the suit is motivated by Hoffa's candidacy and therefore is *per se* retaliatory under the *Rules*. The evidence the protestor advances to support this claim is that the Gegare-Sheard campaign website contains periodic news items concerning the suit.¹¹

Whether Gegare would have become a plaintiff in this case against Hoffa but for the election misses the point of the retaliation analysis under the *Rules*. The *Rules* do not insulate a sitting officer from suits alleging official misconduct merely because that officer is a candidate in an election the *Rules* regulate. A candidate competing against an incumbent may argue in campaign literature that the incumbent's performance in office fails to satisfy his duties as established by law. So far as the *Rules* are concerned, this suit, which seeks no relief against Hoffa personally (whether in the form of tort damages or equitable relief) does nothing more.

We note that the suit by Gegare and the 49 other plaintiffs is not financed, directed, or supported in any tangible way by the IBT or any subordinate body. Nothing about the Gegare suit invokes or relies upon the authority of the union to impose a remedy that would in any way alter Hoffa's status or ability to participate in the International officer election, or impose a sanction on him based on election-related conduct. This further distinguishes the case from the precedent in which retaliation was found. *Compare Hoffa*, P1019 (no union support for lawsuit; defamation suit not retaliation prohibited by the *Rules*) with *Brown*, 2002 EAD 552 (union sponsored defamation suit seeking damages for election-related speech held retaliation prohibited by the *Rules*).

We also conclude that Hoffa has not suffered adverse action because of the suit, and therefore the protestor has not established the second element of a retaliation case. Unlike the lawsuit defendants in *Hoffa* and *Brown*, where money damages were sought from them, the suit here does not seek money damages or any other relief from Hoffa individually. Rather, the complaint seeks declaratory relief only, which does not constitute adverse action against Hoffa as a member or officer of the IBT.¹²

The protestor contends that the suit is not "well-founded." Whether it is or is not is irrelevant to our analysis. Under our precedents, the determination of "well-founded" is required

¹¹ The protestor offers no evidence as to the motivation of the other 49 plaintiffs.

¹² Hoffa has not been served with the suit to date, and has not incurred any expense in defending himself against it. Even if he had been served, Article IX, Section 9(a) of the IBT constitution permits the General Executive Board, by majority vote, to authorize payment of legal expenses of any officer sued in any civil action where the officer is charged with acting on behalf of the International Union or its affiliates. The decision to authorize such payment lies within the sole discretion of the GEB majority.

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only where a suit aims to achieve a judicial remedy for campaign speech.¹³ In such a case, a suit by one candidate against another is considered retaliatory because it seeks to extract compensation from the speaker for uttering or publishing maliciously false speech about the plaintiff candidate. However, our precedents permit such a suit to proceed, even though retaliatory, if it is “well-founded,” because the plaintiff candidate is asserting a constitutional right to petition that is countervailing to the defendant candidate’s constitutional right to free speech. In contrast, the suit at issue in this protest is not subjected to a “well-founded” analysis because it does not challenge the individual defendant’s exercise of his right to free speech. Our conclusion that the suit neither relates to Hoffa’s protected activity nor constitutes retaliation provides independent bases for resolving this protest. If the suit proceeds, the Court that oversees this office will address the merits of the claim.

For the foregoing reasons, we DENY the protest.

Any interested party not satisfied with this determination may request a hearing before the Election Appeals Master within two (2) working days of receipt of this decision. The parties are reminded that, absent extraordinary circumstances, no party may rely upon evidence that was not presented to the Office of the Election Supervisor in any such appeal. Requests for a hearing shall be made in writing, shall specify the basis for the appeal, and shall be served upon:

Kenneth Conboy
Election Appeals Master
Latham & Watkins
885 Third Avenue, Suite 1000
New York, NY 10022
Fax: (212) 751-4864

Copies of the request for hearing must be served upon the parties, as well as upon the Election Supervisor for the International Brotherhood of Teamsters, 1801 K Street, N.W., Suite 421 L, Washington, D.C. 20006, all within the time prescribed above. A copy of the protest must accompany the request for hearing.

Richard W. Mark
Election Supervisor

cc: Kenneth Conboy
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¹³ Were such an analysis necessary, it would require consideration of judicial precedents such as *Friedman & Hughes* and the *1991 Election Rules Order*, among other things.

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