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COURT OF APPEALS
STATE OF NEW YORK

KONKUR,

Appellant,

-against-

NO. 8

UTICA ACADEMY OF SCIENCE CHARTER
SCHOOL,

Respondent.

20 Eagle Street
Albany, New York
January 6, 2022

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE ANTHONY CANNATARO

Appearances:

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Amanda M. Oliver
Official Court Transcriber



1 CHIEF JUDGE DIFIORE: Okay, good afternoon. This
2 is appeal number 8 on this afternoon's calendar, Konkur v.
3 Utica Academy of Science Charter School.

4 Counsel?

5 MR. GOLDBAS: Good afternoon, Your Honors. My
6 name is David Golbas, I represent the Appellant.

7 I respectfully request two minutes of my time for
8 rebuttal.

9 CHIEF JUDGE DIFIORE: Yes, sir.

10 MR. GOLDBAS: May it please the Court, the
11 Appellant brings error from the Fourth Department's
12 decision dismissing on the law his claim for damages under
13 section 198 of the Labor Law.

14 That law is called the anti-kickback statute and
15 the pleadings are taken as true, and they detail the
16 coercion, the force, the intimidation which he suffered as
17 an employee of the Utica Charter School, which worked in
18 conjunction with the defendant, a non-profit organization
19 to - - - which worked to separate him from his wages in the
20 form of kickbacks. And he has sued for those kickbacks
21 under the Labor Law which is located in article 6 of the
22 Labor Law.

23 The statute itself is oddly constructed from a
24 grammatical point of view because it begins by saying the
25 practice of forcing the kickbacks is unlawful. And



1 further, after it defines what the kickbacks are and what
2 the unlawful practice is, it goes on to say that this
3 practice shall constitute a misdemeanor.

4 The Appellate Division read that section, that
5 statute, I believe, with blinders in a shortsighted way
6 because it overlooked - - -

7 JUDGE RIVERA: Counsel?

8 MR. GOLDBAS: - - - the intent - - -

9 JUDGE RIVERA: Counsel, I'm on the screen.

10 CHIEF JUDGE DIFIORE: On the screen, sir.

11 JUDGE RIVERA: On the screen, Counsel. Hello.

12 MR. GOLDBAS: Thank you.

13 JUDGE RIVERA: Happy New Year.

14 I wanted to ask you how, if at all, does the fact
15 that the courts of this state had recognized a private
16 cause of action for these kind of kickback denials of wage;
17 the courts had recognized that private civil cause of
18 action for these kickback claims. Prior to the movement of
19 the language that was found in the Penal Law to the Labor
20 Law, how does that affect your argument? Does that support
21 that then the legislature must have understood that a
22 private right of action also existed, or does it undermine
23 the argument that somehow the private right of action is
24 localized in the Labor Law?

25 MR. GOLDBAS: I would say that it supports it



1 because we have a traditional cause of act for extortion.
2 The Penal Law had outlawed extortion, and the 1938 - - -
3 '36 case cited in my brief did recognize the cause, and
4 sustain the cause of action before the enactment of Labor
5 Law 198.

6 And I would say that it is an enhancement of the
7 right which was granted by common law to be distinguished
8 from the cases in which this court and the courts of New
9 York have said that the implication of a private right of
10 action should not lie if the private cause of action would
11 contradict legislation.

12 And in the case that's cited by the Fourth
13 Department, Stoganovic v. Dinolfo, the court said that
14 there exists - - - we're not going too far afield with
15 piercing the corporate veil as the wage earner in
16 Stoganovic wanted. The piercing the corporate veil is an
17 extraordinary remedy. It was granted by statute.

18 And to the extent that extortion is already
19 prohibited by common law, and the legislature wanted to
20 enhance the common law right, I would say that the
21 legislature is mindful, has been mindful, of the common law
22 and wanted to apply it with the extra protections to the
23 wage earner that article 6 has.

24 JUDGE GARCIA: Commissioner - - - Counsel, the -
25 - - the Commissioner can also bring some type of proceeding



1 here, right, there's some type of administrative proceeding
2 available; is that right?

3 MR. GOLDBAS: That is correct. And I would say
4 that the existence of the administrative remedy warrants
5 the private right of remedy because - - -

6 JUDGE GARCIA: I understand that point. But so
7 under that type of proceeding that the Labor Department can
8 recover money that then goes to the harmed employee, right,
9 that they can recover money that then will be given to the
10 employee at some point?

11 MR. GOLDBAS: That's correct.

12 JUDGE GARCIA: Right.

13 MR. GOLDBAS: That's correct.

14 JUDGE GARCIA: And as I understand some of the
15 federal cases, there was a point where the statute was
16 amended to specifically provide rights of actions in
17 certain sections but not this one. And that was relied
18 upon in some of the federal courts finding no private right
19 of action here.

20 MR. GOLDBAS: That is true. The Southern
21 District and the Western District have agreed with the
22 Fourth Department. But again, I say that the - - - this
23 court should overlook the authority of those cases because
24 they're not well-reasoned and they do not take into account
25 the text of the statute, the context of - - -



1 JUDGE GARCIA: But why isn't that a good reason,
2 that the statute was amended to provide it in some cases,
3 but not here?

4 MR. GOLDBAS: The statute does provide it because
5 by one reading it says that the practice is unlawful. And
6 a reasonable corollary - - -

7 JUDGE GARCIA: No, but the private - - - maybe -
8 - - and correct me if I'm wrong, but I thought that the
9 statute was amended to provide private rights of action
10 under certain subsections, but not the one that you want to
11 use.

12 MR. GOLDBAS: The statute was developed, the
13 article 6 was developed to protect wage earners. And the
14 amendments that you referred to are unknown to me. I have
15 never seen legislation, any act or any bill jacket of the
16 legislature, that says the private right of action under
17 198-b is prohibited, therefore, we must look to the - - -

18 JUDGE GARCIA: Well, we wouldn't be here if we
19 had that, right?

20 MR. GOLDBAS: Well, certainly. And we often talk
21 about the intent of the legislature, but it is difficult to
22 read the minds of these men and women and so I think the
23 most - - - the more beneficial approach is to determine the
24 legislative purpose, that is the legislative scheme. And
25 we have a legislative scheme here of article 6 designed to



1 protect the wage earner, designed to give him or her prompt
2 remedies, designed to deter the deprivation of wages in
3 various forms. And I would add that 198(2) of the Labor
4 Law allows all the remedies. It is cumulative to say - - -

5 JUDGE RIVERA: Counsel, can I - - - may I - - -
6 I'm back on the screen, Counsel.

7 I just want to clarify something from your
8 interpretation of the Labor Law. If the Commission of
9 Labor - - - if they do proceed in an action to recover
10 wages, under other provisions, let's not even talk about
11 this provision for one moment.

12 Does that mean that the private individual could
13 not forego that process and seek on their own for those
14 wages? I'm not talking about double dipping.

15 MR. GOLDBAS: The - - -

16 JUDGE RIVERA: In other words, can they run
17 parallel? Or is it that the wage owner can - - - on their
18 own say, you know, I thank you, Commissioner, I want to
19 proceed on my own, thank you very much. Or does the
20 Commissioner get to decide that only they can pursue the
21 lost wages on behalf of a worker?

22 MR. GOLDBAS: The Commissioner takes the claim on
23 an assignment. And once he or she has the assignment, the
24 case is in the Department of Labor for its prosecution.
25 And - - -



1 JUDGE RIVERA: So the Commissioner - - - so to
2 clarify then from your perspective, the Commissioner cannot
3 proceed if the wage earner decides not to assign that
4 right, that private right of action; is that what you're
5 saying?

6 MR. GOLDBAS: That's correct. It is a two-tier -
7 - -

8 JUDGE RIVERA: The Commissioner may have other -
9 - - other law enforcement tools available to the
10 Commissioner to go against a particular employer, but when
11 it comes to the individual's wages, it is the wage earner's
12 ultimate decision that controls whether or not to proceed;
13 is that - - -

14 MR. GOLDBAS: That - - -

15 JUDGE RIVERA: - - - correct?

16 MR. GOLDBAS: - - - that is correct. That is
17 correct, Your Honor. It's been my experience from my
18 practice that the wage earner either goes to the Department
19 of Labor or she goes to the private counsel. And for wage
20 claims, there are two tiers or two tracks of enforcement,
21 one by the Commissioner and one by the - - - the private
22 cause of action.

23 And I would remind the court that section 198(2)
24 reads, "the remedies provided in this article may be
25 enforced simultaneously or consecutively so far as not



1 inconsistent with each other". But again, it's the
2 practice that if the State has the claim, it proceeds. If
3 it learns that private counsel is involved, they defer to
4 private counsel.

5 CHIEF JUDGE DIFIORE: And thank you, Counsel.
6 Counsel?

7 MR. PISTON: Thank you. Matthew Piston on behalf
8 of Respondent, High Way Education, doing business as the
9 Turkish Cultural Center.

10 Section 198-b of the Labor Law does not expressly
11 provide a private cause of action to recover kickbacks. It
12 is solely - - -

13 JUDGE RIVERA: Counsel, if I - - - can I just
14 clarify? I'm on the screen. Happy New Year.

15 MR. PISTON: Happy New Year.

16 JUDGE RIVERA: Thank you.

17 I just want to clarify. Putting aside the
18 argument on the Labor Law, do you agree that given the
19 existence of the private right of action before the
20 movement of the language from the Penal Law into the Labor
21 Law, that that private right of action was not extinguished
22 with that move? Not under the Labor Law, just as
23 recognized by these courts.

24 MR. PISTON: I think I understand your question
25 to be, do I believe that the common law right that existed



1 prior to this codification - - -

2 JUDGE RIVERA: Yes.

3 MR. PISTON: - - - in the Penal Law - - -

4 JUDGE RIVERA: Yes.

5 MR. PISTON: - - - whether or not that
6 codification extinguished the common law claim?

7 JUDGE RIVERA: Yes. Does the - - - in your view,
8 let's put aside the Labor Law for one moment, is it your
9 view that that would survive regardless of the way this
10 court interprets the Labor Law?

11 MR. PISTON: It is my view that it would not
12 survive, that the legislature, I think it can be presumed,
13 understood what the common law was at the time and chose to
14 disclude - - - dis-include that right within the statute
15 and the - - -

16 JUDGE RIVERA: Well, then how would that be in
17 furtherance of the labor laws given that the Labor Law does
18 recognize private rights of action of wage earners to
19 recover their wages? I mean, isn't this just another
20 version of wage theft?

21 MR. PISTON: Well, again, when this was codified,
22 it was codified under the penal statutes. And I - - - and
23 in my view - - -

24 JUDGE RIVERA: But no, but I'm talking about the
25 language now in the Labor Law. It - - - isn't this just



1 another form of wage theft? And if you're correct, would
2 we not anticipate that the legislature would be extremely
3 clear given that otherwise a wage earner has a private
4 right of action to sue to get their wages, improperly
5 withheld or threatened or, you know, and required to donate
6 their wages.

7 MR. PISTON: Sure. Under article 6 of the Labor
8 Law, they explicitly and expressly do provide certain
9 causes of action for private individuals. And they did not
10 provide it in 198-b. So again, under the - - -

11 JUDGE RIVERA: Well, I guess my - - - again,
12 let's go one step further. Is that really necessary when
13 there is already a private right of action? So you're just
14 moving it over, and there you have the private right of
15 action. That's why I asked you if you thought the common
16 law one was extinguished or if you thought there was
17 something else going on here. And it strikes me that
18 you're basically saying not only did the legislature
19 understand that there was this private action, and when
20 they moved it over, it's not just a question of did they
21 also in addition to wanting to continue the criminal
22 penalty for kickbacks, they also expressly wanted to
23 eliminate the private right of action even though
24 everything else in the Labor Law, and given the overarching
25 purpose of the Labor Law, would be to allow a wage owner to



1 seek claim to their wages. That's why I asked the question
2 because it seems to me difficult to understand that
3 position.

4 MR. PISTON: Well, again - - -

5 JUDGE RIVERA: It would be one thing if you
6 argued, no, the common law one continues, but you know, the
7 Labor Law and whatever other benefits you might get under
8 the Labor Law, a private right of action doesn't apply
9 here. But it strikes me as a much more challenging - - -
10 in my view, challenging position that you've taken.

11 JUDGE GARCIA: Is there a common law claim here?

12 MR. PISTON: There is no common law claim. This
13 is strictly under 198-b.

14 JUDGE WILSON: So why doesn't section 198 - - -
15 because it's also under 198, right? That - - - is 198
16 pleaded?

17 MR. PISTON: I'm still a little unclear about
18 what that pleading was. They did bring claims under - - -

19 JUDGE WILSON: Did they mention 198?

20 MR. PISTON: - - - 198, but it - - -

21 JUDGE WILSON: Okay. So - - -

22 MR. PISTON: - - - but in my view, that was
23 strictly their measure of damages.

24 JUDGE WILSON: 198 was their measure of damages?
25 Doesn't the fair reading of 198 contemplate a private right



1 of action?

2 MR. PISTON: In certain circumstances, yes, but
3 it would - - -

4 JUDGE WILSON: Well, what are the circumstances?
5 It says for any wage claim, no?

6 MR. PISTON: But again this is not a wage claim.
7 This is a kickback. So this is not a wage claim. My
8 client, High Way Education, was not an employer.

9 JUDGE WILSON: So how do we know what's a wage
10 claim and what's a kickback?

11 MR. PISTON: Well, in this case, they brought it
12 under 198-b.

13 JUDGE WILSON: And 198, no?

14 MR. PISTON: That has not survived. The - - -
15 again, the only - - - as I understood - - - read the
16 pleadings, and as the Fourth Department found, 198, that -
17 - - the mention of 198 only deals with the measure of
18 damages and the level of damages for the - - - if they were
19 successful in proving 198-b. And in it, they were seeking
20 - - - trying - - - attempting to seek attorneys fees. They
21 were trying to seek a recoupment of the funds that were a
22 kickback, and they were - - - I believe it was double
23 damages, as well.

24 JUDGE WILSON: So you don't read 198 as providing
25 a civil action for violations of section 6 broadly?



1 MR. PISTON: Well it - - - there's been other
2 indications, 198-a and 198-c, which are criminal, and this
3 court has ruled and affirmed the decision of the Fourth
4 Department saying that they are criminal in nature and
5 there's no private cause of action.

6 So I think just because something appears in
7 article 6 doesn't necessarily mean that there's
8 automatically a private cause of action.

9 JUDGE RIVERA: Yes, but you see this is where I
10 have the difficulty because there was a civil action - - -
11 or has been a civil action before that movement. So it's
12 not like the legislature created a brand new cause of
13 action or created - - - wanted to recognize that the
14 conduct was criminally unlawful and stop there. You
15 already have the civil right of action. So that - - -
16 that's where I'm finding - - - having difficulty.

17 But let me ask you one other thing because I just
18 want to be crystal clear about your position. If I
19 understand your position, the logical conclusion would be
20 that if for whatever reason, the District Attorney, the
21 local district attorney, and the Commissioner of Labor,
22 decide not to pursue an individual's complaint, right, they
23 might bring it to either or both, a complaint of an alleged
24 kickback, that that wage earner has no recourse? I just
25 want to be clear; is that your position?



1 MR. PISTON: I think it depends on who it is that
2 they are attempting to retrieve that quote/unquote kickback
3 from. Is it a third party? Or is it an employer? And if
4 it's an employer and there's - - - there was a requirement
5 by an employer to kick back wages, then I think under 193
6 and 198, they can - - - they have a private cause of action
7 to recoup those.

8 If it's a third - - -

9 JUDGE RIVERA: Oh, so let - - - so now let me
10 just clarify.

11 So your position is if indeed your kickback
12 action is against an employer, you may proceed civilly,
13 privately?

14 MR. PISTON: I don't - - -

15 JUDGE RIVERA: But your argument here is that - -
16 - you're just not the employer; is that correct?

17 MR. PISTON: No, no, Your Honor. I don't think
18 that they have a cause of action under 198-b. But if we're
19 talking about employer/employee wages, and an illegal
20 deduction of wages, or however you want to categorize it,
21 then I think that there are other - - - there are other
22 statutes within article 6 that would apply and would give -
23 - -

24 JUDGE RIVERA: Oh, I see. Because you're arguing
25 that labeling something a kickback is just one way of



1 expressing what is otherwise a type of wage theft; is that
2 correct?

3 MR. PISTON: The way that I read 198-b, that - -
4 - it's a requirement to pay over wages in order to keep
5 their job.

6 JUDGE RIVERA: Um-hum. Um-hum.

7 MR. PISTON: And that is unlaw - - - it is
8 criminal to - - -

9 JUDGE RIVERA: Um-hum.

10 MR. PISTON: - - - to require that or to do that
11 on behalf. So - - -

12 JUDGE RIVERA: Yes. But the diminishment of
13 their wages, right? It's like saying, here's a - - - I
14 mean, it's hard to see the difference between here's a
15 hundred dollars, if you want to come tomorrow, you're going
16 to give me twenty dollars back versus here's eighty
17 dollars, I've taken out twenty so that you can have your
18 job tomorrow.

19 MR. PISTON: I did not read 198 that - - - to
20 have actually have a payment over of wages.

21 JUDGE RIVERA: Um-hum.

22 MR. PISTON: I think that that threat of losing
23 your job or not having that job is sufficient to violate
24 198-b and to be criminally prosecuted.

25 JUDGE RIVERA: Thank you.



1 CHIEF JUDGE DIFIORE: Thank you, Counsel.

2 MR. PISTON: Thank you.

3 CHIEF JUDGE DIFIORE: Counsel, your rebuttal?

4 MR. GOLDBAS: May it please the Court, we did
5 plead 198. We sought our remedy under 198 based on the
6 violation of 198-b. We were deprived of wages by
7 kickbacks.

8 And if the Second Department's ruling is affirmed
9 it would lead to an anomalous result, which is that the
10 wage earner could be deprived of wages by his employer for
11 non - - - unintentional reasons, he couldn't pay, he forgot
12 to pay, he didn't want to pay, and that employer that would
13 have to answer in 198 for double damages and attorneys fees
14 and all the remedies in 198. But if that same employer
15 used force or threat of force to force the kickback, and
16 violate 198-b, there would be no civil right of action in
17 that situation.

18 And likewise, there would be no civil action if
19 the employer, through that same force, used a third party
20 to cause that same intimidation and that same, what the
21 legislature called, vicious practice. That is an anomaly,
22 and that is a fair implication we submit of the statute to
23 allow a civil action for kickbacks.

24 Thank you.

25 CHIEF JUDGE DIFIORE: Thank you, Counsel.



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(Court is adjourned)



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C E R T I F I C A T I O N

I, Amanda M. Oliver, certify that the foregoing transcript of proceedings in the Court of Appeals of Konkur v. Utica Academy of Science Charter School, No. 8 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Signature: Amanda M. Oliver

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