

**NEW YORK LAW SCHOOL MOOT COURT ASSOCIATION
THE 35TH ANNUAL ROBERT F. WAGNER
NATIONAL LABOR & EMPLOYMENT LAW MOOT COURT COMPETITION**

In the

SUPREME COURT OF THE UNITED STATES

**SPRING TERM 2011
Docket No. 11-0107**

POVTAK GROUP,

Petitioner,

-against-

**ROBERTA WAGNER & PROFESSIONAL ELECTRICAL WORKERS UNION, LOCAL
12-22,**

Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Thirteenth Circuit

BRIEF FOR PETITIONER

Team 19

Questions Presented

1. Whether an employer violates the Fourth Amendment privacy rights of an employee for discharging the employee for statements made on a social networking site through a company-issued communication device.
2. Whether a successor employer will be bound to the substantive provisions of a collective bargaining agreement entered into by a predecessor employer under 301 of the Taft-Hartley Act, 29 U.S.C. § 185.

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Opinions Below

Decided May 6, 2008, the U.S. Equal Opportunity Employment Commission determination and order on Plaintiff's Title VII discrimination claim is unreported but explained in the District Court opinion. Local 12-22, Prof'l Elec. Workers Union v. Povtak Group, 185 F.Supp.3d 1, 9 (W.D. Frl. 2009). The EOECE issued Plaintiffs an unpublished "right to sue" letter on June 19, 2008. The District Court's opinion on Plaintiff's motion for summary judgment and Respondent's cross motion on the Title VII discrimination claim, the Fourth Amendment claim, and the Taft-Hartley Act claim is published at Local 12-22, Prof'l Elec. Workers Union v. Povtak Group, 185 F.Supp.3d. 1 (W.D. Frl. 2009). After a jury trial on the Fourth Amendment issue, the opinion of the District Court on Defendant's directed verdict motion is published at Local 12-22, Prof'l Elec. Workers Union v. Povtak Group, 231 F.Supp.3d 20 (W.D. Frl 2009). The Thirteenth Circuit's opinion on the Fourth Amendment and Taft-Hartley Act claims is published at Local 12-22, Prof'l Elec. Workers Union v. Povtak Group, 1214 F.3d 1 (13th Cir. 2010).

Statutory Provisions Involved

The relevant provisions of The Labor Management Relations (Taft-Hartley) Act of 1947 have been attached as Appendix A.

Statement of the Case

The Povtak Group (Povtak) is a private company who contracts with the City of Dynes to provide environmentally friendly bussing services to local residents. Local 12-22, Prof'l Elec. Workers Union v. Povtak Group, 185 F.Supp.3d 1, 3 (W.D. Frl 2009). In order to promote a positive public image, the company launched a profile on the popular social networking website Facepage. Id. at 4. Facepage is similar to the more well-known Facebook in nearly every respect. Local 12-22, Prof'l Elec. Workers Union v. Povtak Group, 1214 F.3d 1, 18 (13th Cir. 2010) (Gould, J., concurring in part and dissenting in part). The company encouraged all of its employees to “Friend”¹ the Povtak Facepage profile and post positive comments on that profile. 185 F.Supp.3d at 4. The petitioner, Roberta Wagner, was one such employee who added Povtak as a friend. Id. Ms. Wagner created positive posts on the Povtak profile. Id. at 4-5. However, she simultaneously posted negative comments on her own profile in regards to Povtak and her supervisors. Id. at 5. The negative comments were viewable by any of Ms. Wagner’s Facepage friends, including users of the Povtak profile. Id. at 5 n.5. Ms. Wagner had the opportunity to restrict access to these negative posts by either adjusting her privacy settings on the Facepage website, or simply removing Povtak as a friend. See Id. (detailing more restrictive privacy settings than the one employed by Ms. Wagner as well as the access granted to previously approved Facepage “Friends”).

One of the negative posts on Ms. Wagner’s profile was a link to the blog “Crossing the Wires.” Id. at 5. This blog post contained a great deal of criticism about Povtak’s green initiatives and the character of Povtak supervisors. Id. at 6. The blog post

¹ For a detailed description of the concept of a Facepage “Friend” and the various privacy implications, see Judge Ahern’s opinion at Local 12-22, Prof'l Elec. Workers Union v. Povtak Group, 185 F.Supp.3d 1, 3 n.5-6 (W.D. Frl 2009).

was featured on a local newspaper and was authored by someone going by the name “PugLuv86.” Id. The depth of the article indicated it must have been written by a Povtak employee. Id. An investigation immediately ensued into the identity of PugLuv86.

Ms. Wagner was scheduled for a performance review designed to evaluate her overall job performance. Id. During this review, Ms. Wagner’s supervisor logged on to the Povtak profile in order to view Ms. Wagner’s Facepage profile. Id. at 7. It is unknown if the intent was to review Ms. Wagner’s overall job performance or to attempt to identify PugLuv86. Id. The supervisor was able to view Ms. Wagner’s profile given she was Facepage friends with the Povtak profile. The supervisor recorded the posts created on the Facepage wall and logged them in Ms. Wagner’s employee record. Id.

Two days later, Ms. Wagner handed her company-issued ePhone to the Povtak Technical Support Office. Id. Ms. Wagner complained about dropped calls potentially related to a faulty battery. Id. The technician investigated the problem and in the course of that investigation discovered that Ms. Wagner had installed a “Crossing the Wires” application on her ePhone. Id. at 8. The technician’s supervisor noted a potential connection between this blog and the negative article about the company. Id. Ms. Wagner was then terminated for violating company policy. Ms. Wagner responded by bringing this claim, alleging the viewing of her Facepage profile and ePhone applications violated her Fourth Amendment right against unreasonable searches and seizures.

Roberta Wagner and her union, the Electrical Workers Union, Local 12-22, are also seeking enforcement of an agreement they signed with one company, Crimaldi Corporation, against an entirely separate company, the Petitioner, Povtak Group. Signed by Crimaldi, its employees, and the Local 12-22 Union in September of 2005, this

agreement, known as the Collective Bargaining Agreement (CBA), provides for a series of dispute resolution mechanisms and minimum standards of professional conduct for the conduct of Crimaldi's business. Local 12-22, Prof'l Elec. Workers Union v. Povtak Group, 185 F.Supp.3d 1 app. A. The CBA has a traditional "just cause for discharge" provision, stating that an employee cannot be terminated without just cause. Id. art. 7. It also has a "grievance" provision, which specifies a mode of procedures for managing grievances between the three parties regarding any element of the employment relationship and an "arbitration" provision, which provides for the submission of alleged violation of the terms of the CBA to arbitration. Id. art. 14. By its terms, the CBA is set to expire on August 31, 2012. Id. art. 30.

Crimaldi had fulfilled the same contract before February 2008. Local 12-22, 185 F.Supp.3d at 2-3. When Crimaldi's Chief Executive Officer and Chief Operating Officer were indicted for various white collar criminal offenses, however, the city announced that it would seek a new transportation service provider and ultimately selected Povtak as the lowest bidder. Id. at 2. In a pre-bid conference, where Crimaldi employees were present, Povtak Chief Financial Officer Deborah Quine suggested that "we would need all the help it can get" in response to whether Povtak would hire any Crimaldi employees. Id. at 2; Id. app. C at 6. Ms. Quine made no affirmative statement about Povtak's relationship with Crimaldi's CBA and did not promise jobs to any Crimaldi employees expressly under any specific conditions. However, Povtak subsequently went on to hire 212 of Crimaldi's 342 employees, including Roberta Wagner. Id. at 3.

After Ms. Wagner's termination, two individuals, Rahim Roth and Stefan Blancato, visited Povtak's human resources office to submit a grievance regarding Ms.

Wagner's dismissal, believing that the termination was without just cause in violation of Article 7.1 of the CBA and that the Union had not been informed in advance of the action, in violation of Article 14.1, Step 4. Id. at 8. After hearing about the visit from Mr. Roth and Mr. Blancato, Ms. Audrey Livramento, Assistant Human Resources Manager, called a meeting that occurred March 10, 2008. Id. The meeting's purpose was to explain the ECP and tangentially the cause for Ms. Wagner's termination. Id. at 8; Id. app. C at 11. Both Mr. Livramento in this meeting and General Manager of HR, George Daks, in an e-mail, clarified that no reason was necessary to justify termination since Povtak is an at-will employer. Id. at 8; Id. app. C at 11; Id. app. C Ex.

After Povtak refused to arbitrate under the CBA, Ms. Wagner and the Local 12-22 filed a complaint with the U.S. Equal Opportunity Employment Commission ("EOEC"), claiming that Povtak managers discriminated against Ms. Wagner on the basis of her national origin, as she is from Bhutan. Id. at 4, 9. The EOEC issued Ms. Wagner and the Local 12-22 a "right to sue" letter. Id. at 9. They then filed the current action under Seciton 301 of the Taft Hartley Act in Federal District court to compel Povtak to submit to the CBA's arbitration and grievance provisions.

The District Court granted summary judgment in favor of Petitioner on the Taft-Hartley claim because it found there was no "successorship" between Povtak and Crimaldi. Id. The Thirteenth Circuit, however, reversed the District Court and granted summary judgment in favor of Respondent on the Taft-Hartley claim because it found "successorship" between Povtak and Crimaldi. Local 12-22, Prof'l Elec. Workers Union v. Povtak Group, 1214 F.3d 1, 15 (13th Cir. 2010).

Summary of Argument

The Thirteenth Circuit must be reversed in their denial of the petitioner's Rule 50(a) motion. Neither the viewing of the respondent's Facepage profile nor the viewing of the respondent's ePhone applications violated the Fourth Amendment rights of Ms. Wagner. Ms. Wagner had no reasonable expectation of privacy on a public forum such as Facepage. Even if such an expectation existed, Ms. Wagner waived her privacy rights by consenting to a search of her Facepage communications. She consented to this search by preauthorizing such a search in writing and by adding the Povtak group as a friend. Even if a non-consensual search took place, the search was reasonable to meet the workplace needs of Povtak. Likewise, the viewing of the applications on the respondent's ePhone was done with consent. The same written authorization applicable to Facepage also applies to the ePhone. Furthermore, the respondent is the one who handed the ePhone to technical support for inspection. Such an act evidenced consent to a search necessary to repair the device. Even if consent was not given, this act was also reasonable and thus the Fourth Amendment rights of the respondent were not violated.

The Thirteenth Circuit must also be reversed on its finding that the grievance portion of Crimaldi's collective bargaining agreement is enforceable against Povtak. The Taft-Hartley Act itself as well as Supreme Court precedent and a majority of Circuit Court precedents demonstrate that the substantive terms of collective bargaining agreements should not be enforced against successor employers who did not explicitly or implicitly consent to their terms as a matter of law. Respondent has failed to prove that Povtak's relationship with Crimaldi or its former employees is legally substantial enough such that it warrants enforcement of the CBA. Failing to reverse the Thirteenth Circuit's

ruling on CBAs would change the current state of the law in a fundamentally unfair way and hinder businesses and labor from operating profitably together in the future.

Argument

I. NO FOURTH AMENDMENT VIOLATION OCCURRED AS NO MEMBER OF THE POVTAK GROUP ENGAGED IN A NON-CONSENSUAL, UNREASONABLE SEARCH OF THE RESPONDENT

The Thirteenth Circuit's determination that an unreasonable search occurred under the Fourth Amendment is incorrect as a matter of law. No reasonable expectation of privacy existed as to investigations of the respondent. Furthermore, all investigations were conducted with the consent of the respondent. Even if consent did not exist, all investigations were completed in a reasonable manner and thus the petitioner's Fourth Amendment rights were not violated. For those and the following reasons, the Thirteenth Circuit's holding as to the Fourth Amendment issue should be reversed.

A. Viewing the Respondent's Facepage Posts Does Not Constitute a Search Under the Fourth Amendment as the Respondent's Privacy Expectations Are Not Objectively Reasonable.

The Fourth Amendment protects against unreasonable searches by government employers. O'Connor v. Ortega, 480 U.S. 709, 717 (1987). However, if one does not have a reasonable expectation of privacy to the information sought, no search is deemed to have occurred. Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). To determine whether a reasonable expectation of privacy exists, the investigated party must have both a subjective expectation of privacy as well as an objective one. Id. An expectation of privacy meets the objective standard only if it is one society is prepared to accept as reasonable. Id. The expectation is unreasonable if the investigated party knowingly exposed the information to the public. 389 U.S. at 351.

It is also unreasonable if the investigated party assumed the risk the information would be given to a third party. See United States v. White, 401 U.S. 745, 752 (1971) (holding that one assumes the risk that their partners in crime will reveal incriminating information to the police and that the Fourth Amendment offers no protection in those circumstances).

If the respondent had a subjective expectation of privacy, that expectation was unreasonable for two reasons. First, by posting information on her Facepage wall, the respondent knowingly exposed that information to the public. Second, by adding the petitioner as a “friend” on Facepage, the respondent assumed the risk that the information would be viewed by a manager of the petitioner’s Facepage profile. For either reason, no search occurred as cognizable under the Fourth Amendment.

1. Creating a Post on a Facepage Wall is to Knowingly Expose that Post to the Public.

One can knowingly expose information to the public even if that information is not instantly available to the entire public community. In Greenwood, the defendant had left opaque garbage bags on the side of the curb that were later retrieved by the police. California v. Greenwood, 486 U.S. 35 (1988). The court found that the defendant knowingly exposed this trash to the public despite the fact that the contents were concealed from plain view. Id. at 41. The court reasoned that since animals, children, or curious neighbors could open the bag, the information was exposed to the public. Id. at 40. Bank account information has also been held to be knowingly exposed to the public despite the fact that ostensibly only the bank had access to the information. United States v. Miller, 425 U.S. 435, 437 (1976). Likewise, numbers dialed on a telephone are exposed to the public since the phone company records these numbers as a matter of course. Smith v. Maryland, 442 U.S. 735, 743-45 (holding that the installation of a pen

register on a defendant's phone did not violate the Fourth Amendment because a person has, "no legitimate expectation of privacy in information he voluntarily turns over to third parties"). Messages posted on an internet chat room are also exposed to the public despite the fact that the information is limited to that narrow segment of the internet community. United States v. Charbonneau, 979 F.Supp. 1177, 1185 (S.D. Ohio 1997).

The respondent relies heavily on the privacy settings for her account to claim that the information was not knowingly exposed. Although the respondent did attempt to restrict access to the posts at issue, such an attempt is insufficient to satisfy the precedent of this court. The defendant in Greenwood acted to conceal the objects by placing them in an opaque container. Nevertheless, the act of placing the bag on the curb was sufficient to constitute knowing exposure. Likewise, the respondent may have acted to restrict the information. However, the act of posting on a public forum negates her privacy concerns. Facepage is identical to the social networking website Facebook in nearly every respect. 1214 F.3d 1, 18. As the Director of IT Policy and Computer Policy & Law Program at Cornell University stated, "[o]n Facebook, you have absolutely no expectation of privacy." Tracy Mitrano, Thoughts on Facebook, Cornell University (2006), <http://www.cit.cornell.edu/policies/socialnetworking/facebook.cfm>. Restricting access to Facepage friends is not at all foolproof. For example, one may be inclined to share a picture on Facebook with the intention of keeping that information among one's Facebook friends. However, one feature of Facebook is the "share" button. See Paul Nelson, Why Facebook's Privacy Settings Don't Always Work, KSL, Jan. 28, 2011, available at <http://www.ksl.com/?sid=14168498&nid=148>. See also Help Center, Facebook, <http://www.facebook.com/help/?faq=16833> (detailing the simple process of

sharing a link on Facebook). This button allows these same friends to share the original post with their entire Facebook network. See Nelson. If their privacy setting is set to “everyone”, the information is now completely within the public domain. Id. There are even websites dedicated specifically to publishing the most outrageous or embarrassing posts on social networking sites such as Facebook. See, e.g., Lamebook, <http://www.lamebook.com> (last visited Feb. 6, 2011). Although the respondent may have clicked her mouse twice in an attempt to conceal her information, it would take but two more clicks from any of her friends to relay that information to any interested party. If the respondent truly meant to keep her statements private, she should not have posted them on Facepage. Just as the side of the road is no place to keep private items, Facepage is no place to keep private information.

This level of information sharing is possible due to the invention of the Facebook and Facepage profile “wall”. The respondent posted her information on her Facepage wall. The concept of the wall was implemented by Facebook during its inception. See Facebook is Off-the-wall, Facebook, <http://blog.facebook.com/blog.php?post=3532972130> (last visited Feb. 6, 2011). Facebook began as a college-only social networking site where one’s information was automatically viewable by anyone in the user’s educational institution. Janet Kornblum, Facebook will Soon be Available to Everyone, USA Today, Sept. 11, 2006, available at http://www.usatoday.com/tech/news/2006-09-11-facebook-everyone_x.htm. The wall is a concept directly related to the dorm-room white-board typically placed on a college student’s door. The student could either write a statement on the board, or passers-by would write a message to the student. The notion that a statement placed on the whiteboard would remain private simply does not exist.

The Facebook and later Facepage wall systems work exactly the same way. The user can post on their own wall for others to view. 185 F.Supp.3d at 4 n.6. Alternatively, Facepage friends can post a public message on that user's wall. Id. Either post would be viewable by the user's network. Id. at 4 n.5-6. While it is true that the amount of users who could see these posts may be limited, the same is true for the college whiteboard. This whiteboard naturally would be limited only to residents of that dorm. Nevertheless, that whiteboard is a public method of communication not subject to a reasonable expectation of privacy. Neither should the internet version of the dorm-room whiteboard.

2. The Respondent Assumed the Risk that Povtak Officers would View the Respondent's Statements when the Respondent Added the Povtak Group's Facepage Profile as a "Friend."

The defendant in White made statements to an undercover police informant. White, 401 U.S. 745, 752 (1971). Although unaware that the second party was an informant and unaware the conversation was being recorded, the court found that the defendant assumed the risk that the statements would be relayed to a third party. Id. Thus the defendant had no reasonable expectation of privacy as to the recording. Id.

Here, the petitioner voluntarily added the Povtak Group as a friend on Facepage. By doing so, the petitioner allowed whoever had access to the Povtak profile to view her posts. Thus the privacy settings discussed above were no longer applicable in regards to the relationship between the petitioner and the respondent. The respondent could view the petitioner's profile just as easily as it could if the privacy settings were set to "everyone". The respondent asserts that it did not intend to grant access to Povtak supervisors. However, the respondent must have been aware that some person would have to manage the Povtak profile. The petitioner may have mistaken the identity of that

person, but such a fact was irrelevant in *White* and it is irrelevant in this case. *Id.* at 749 (holding the Fourth Amendment does not protect an individual from mistakenly talking to a police informant). By granting access to Povtak, the petitioner assumed the risk that a supervisor would access the information the petitioner voluntarily posted on Facepage. Furthermore, the retention of the Facepage posts is also constitutionally permissible. The court in *White* reasoned that since the informant could hear and relay the statement, he could also record that same statement. *Id.* at 751. The only distinction was a more accurate rendition of the conversation and a defendant has no right to a less accurate recollection of events. The same is true in this case. Since any manager of the Povtak profile could view the respondent's statements and relay the information, they are also permitted to record that information for a more accurate recollection.

B. Even If the Viewing of the Respondent's Facepage Posts Constitutes a Search, the Search is Permissible as the Respondent Provided Povtak With Consent.

An individual is always free to consent to a search by a government official. *Florida v. Bostick*, 501 U.S. 429, 434 (1991) (holding that a counter does not trigger Fourth Amendment scrutiny unless it loses its consensual nature). Such consent must be freely and voluntarily given. *Id.* at 401. Once consent is given, the government may then search the individual unless and until consent is withdrawn. See, e.g., *United States v. Parker*, 412 F.3d 1000, 1002 (8th Cir. 2005) (holding a search was valid since the defendant never withdrew his consent). A desire to conceal information from the government is not sufficient to vitiate consent. *See Id.* (holding a search valid even though the defendant hoped the police would not find the incriminating evidence).

The respondent consented to a search of the Facepage posts on two occasions. First, the respondent consented when it signed the Povtak Group's Electronic

Communications Policy (ECP). Second, the respondent consented when it added the Povtak Group as a friend on Facepage, granting access to future Facepage posts. Either act is sufficient to constitute consent to a search. Since the petitioner provided consent, there was no Fourth Amendment violation as to any search that took place.

1. The Electronic Communications Policy Signed by the Respondent Repeatedly Grants Consent for a Search of the Facepage Posts to the Povtak Group.

The ECP governs all “computers, printers, networks, hardware, software, [email], Internet/Web access and voice mail”. Local 12-22, Prof’l Elec. Workers Union v. Povtak Group, 185 F.Supp.3d 1 app. B at 1. The ECP goes on to state that the policy governs the use of “all of the Electronic Systems of Povtak Group,” even if accessed from the user’s home. Id. By signing the document, the user grants the Povtak Group “the absolute right to access, monitor and view all electronic communications and other components of its Electronic Systems at any time for any reason whatsoever.” Id. Furthermore, “users should not maintain any expectation of privacy with respect to any usage of the Company’s Electronic Systems.” Id. The signee “waive[s] any right of privacy in e-mail messages [or] other electronic communications.” Id. The company uses the ECP to retain the right to access this information “with or without permission from the employee.” Id. On the User Acknowledgment Form attached to the ECP, the signee acknowledges having read and understood the document. Id. at 4. The signee further acknowledges that violation of the ECP may subject him/her to discipline up to and including termination. Id. It states that the signee is “aware that the Company reserves and will exercise the right to review, audit, intercept, access and disclose all matters on the Company’s Electronic Systems at any time, with our without notice, and *I expressly*

consent to such monitoring.” *Id.* (emphases added). The User Acknowledgement Form was signed by the respondent, verifying her knowledge and consent to the potential search. *Id.* Such a signature evidences a contract that is valid even if the signee did not read or merely skimmed the document. *Ray v. William G. Eurice & Bros.*, 93 A.2d. 272 (Md. 1952). The law assumes signees have read documents they sign. *Id.*

The ECP clearly grants the respondent’s consent to the search in question. Facepage posts are encompassed by the terms “other electronic communications,” “Internet/Web access,” and “Electronic Systems.” The respondent accessed Facepage from the company’s ePhone. 185 F.Supp.3d at 5 (noting that the respondent made at least some of the negative Facepage posts from the company ePhone). This qualifies as the company’s “electronic systems”. When the respondent logged on to Facepage, she engaged in “Internet/Web access.” When the respondent posted the negative comments to onlookers on Facepage, she sent a form of “other electronic communication.” By reading and signing this document, the respondent consented to any search of communications from the ePhone for “any reason whatsoever”. With this consent, even an unreasonable search would have been permissible. The respondent was well-aware of the ECP and the company’s right to search her communications. As the respondent never withdrew this consent, the ultimate search is constitutionally permissible.

2. Adding the Povtak Group as a “Friend” on Facepage Authorizes Users of the Povtak Profile to View the Posts, Removes All Privacy Restrictions, and Constitutes Consent to View the Statements.

The respondent voluntarily added Povtak as a “Friend” on Facepage. *Id.* at 4. This act rendered useless the privacy settings the respondent has previously relied upon. The Povtak Group instantly was able to view her profile, her “wall”, and any of her posts.

Id. If the respondent wished to keep these posts private even from Facepage friends, such an option was available to her. One potential privacy setting is “Only Me”, which would have restricted this information to the respondent alone. Id. at 4 n.5. She chose instead to grant access to friends under the “Friends” privacy setting. Thus the combined acts of setting the privacy level to “Friends” and adding Povtak as a friend constitute a granting of consent to view the respondent’s posts. As the respondent at no time sought to revoke consent, the viewing of her posts was constitutionally permissible.

C. Any Search of the Respondent’s Phone Was Conducted Only After Receiving Consent and thus No Fourth Amendment Violation Occurred.

Just as the ECP provided the petitioner with consent to search Ms. Wagner’s Facepage posts, so too did it provide consent to search her ePhone. The ECP governs all “computers, printers, networks, hardware, software, [email], Internet/Web access and voice mail.” Local 12-22, Prof’l Elec. Workers Union v. Povtak Group, 185 F.Supp.3d 1 app. B at 1. The ePhone is not just a phone. It is, for all intents and purposes, a computer. From an ePhone one can send emails, access the internet, download programs, and view documents. 185 F.Supp.3d at 4 (detailing how the respondent was able to send perform these functions from the company issued ePhone). The only distinction between a desktop computer and a smart-phone such as an ePhone is the size of the machine. Even if the ePhone is not a computer, it is at the very least hardware or one of the “electronic systems.” The ECP governs the respondent’s use of the ePhone thus the User Acknowledgement Agreement provided the technicians with consent to search the phone.

Even if the ECP does not apply, the respondent provided consent to the technicians by handing her phone to the Povtak Technical Support Office for repair. Id. at 7. While it is conceivable that this act did not authorize unlimited entry into every

personal file contained in the phone's computer memory, it did at least provide consent to search the phone as necessary to effectuate a repair. As there is no evidence that the technicians were engaging in anything other than routine repair procedures, the acts of these technicians were consented to by Ms. Wagner.

D. Even If the Viewing of Either the Respondent's Facepage Posts or Phone Applications Constituted a Search Without Consent, Such a Search Was Reasonable Under an Ortega Analysis.

The lower courts were correct in that Ortega sets a framework that governs Fourth Amendment claims against government employers. However, this framework only applies if an employee has a legitimate privacy expectation. Ortega, 480 U.S. at 712 (holding that the first step is to determine whether a reasonable expectation of privacy exists before analyzing the reasonableness of the search). Thus the respondent must first satisfy the Katz framework of proving a search indeed took place as cognizable under the Fourth Amendment. However, even if such an expectation of privacy existed; the respondent's claims fail as any search was reasonable under the Ortega framework. Ortega states that to determine reasonableness, "we must balance the invasion of the employees' legitimate expectations of privacy against the government's need for supervision, control, and the efficient operation of the workplace." Id. at 719-20. In work-related searches by employers, the usual warrant requirement does not apply due to the special needs of the workplace. Id. at 722. The usual probable-cause requirement is also not applicable in these circumstances. Id. at 723. Neither is the typical requirement of individualized suspicion. See, e.g., Vernonia Sch. Dist. 47j v. Acton, 515 U.S. 646, 653 (1995) (upholding a search without individualized suspicion due to the special needs of the school environment). The reasonableness framework thus is the sole standard to

be applied in this case. Both the inception and the scope of the search must be reasonable. Ortega, 480 U.S. at 728. A lower expectation of privacy requires less justification to satisfy the reasonableness standard. City of Ontario v. Quon, 130 S. Ct. 2619, 2623 (2010) (holding that since Quon had only a limited privacy expectation, the search was reasonable due to the lesser risk of discovering private information).

Both searches were reasonable both in inception and scope. The Facepage search was a reasonable step to determine the identity of a rogue employee as well as to discover potential workplace misconduct. The search of the ePhone was reasonable to fix a broken piece of company equipment. Furthermore, the search of the ePhone revealed not one piece of new information and thus the respondent suffered no cognizable damage. For the above reasons, no Fourth Amendment violation occurred under Ortega.

1. The Facepage Search was Reasonable to Determine the Identity of “PugLuv86” and to Complete an Effective Performance Review of the Respondent.

The Ortega court offered a framework for whether a search is justified at inception.

Ordinarily, a search of an employee's office by a supervisor will be "justified at its inception" when there are reasonable grounds for suspecting that the search will turn up evidence that the employee is guilty of work-related misconduct, or that the search is necessary for a noninvestigatory work-related purpose such as to retrieve a needed file. Ortega, 480 U.S. at 729.

The district court found that it was “unclear as to whether Milmine viewed Wagner’s personal profile as part of the performance evaluation or as part of the investigation into the identity of PugLuv86.” 185 F.Supp.3d at 17. Either reason is sufficient under Ortega. There existed multiple reasonable grounds for suspecting PugLuv86 had been engaged in work-related misconduct. First, the ECP forbids sending any communication from a pseudonym such as PugLuv86.

Likewise, falsifying one's identity to others while using the network or accessing the Internet is prohibited. All communications or postings on the Internet, Intranet or other component of the Company's Electronic Systems must be identified with the name and title of the person making the communication or posting. 185 F.Supp.3d 1 app. B at 2.

Second, the ECP also forbids the creation of the article drafted by PugLuv86. The ECP states, "[c]ommunication of the Company's proprietary or confidential information either outside of the company or to Users within the Company not authorized to receive such information is strictly prohibited." Id. at 3. The district court found that the Crossing the Wires article created by PugLuv86 contained "intimate details about the inner working of Povtak." 185 F.Supp.3d at 6. This information was so intimate that the Povtak officials believed it had to have been made by an employee. Id. Third, the company has an interest in controlling the public's perception of the company. This is evidenced by the creation of the Povtak Facepage profile in the first place. It was not merely a resource for customers, but also served as a public relations tool designed to boost the company's image. This is why the company encouraged its employees to become Facepage friends with its profile and to post positive stories about the "green jobs" the company offered. Id. at 5. If apparent employees were permitted to publically condemn the company, the results would be catastrophic and the entire public relations campaign would be undermined. Not only would the Povtak Group potentially lose business, it could potentially lose its contract with the city altogether. With reasonable grounds to believe that PugLuv86 was an employee and reasonable grounds to believe that the employee had committed misconduct, the Ortega doctrine is satisfied and the search should be deemed reasonable at its inception.

The scope of the search was also reasonable. In analyzing the scope of a search, the court has typically required less justification for a less invasive search. Compare Florida v. Riley, 488 U.S. 445, 449 (1989) (holding an aerial search of a home is permissible because one's home is "not necessarily protected from inspection that involves no physical invasion"), with Bond v. United States, 529 U.S. 334, 339 (2000) (distinguishing Riley based on the increased level of intrusion a physical inspection imposes on a suspect). Here, the level of intrusion was de minimis. The entire act of the supervisor involved logging on to Facepage, viewing the respondent's profile, and recording the image. 185 F.Supp.3d at 7. The respondent at no time had the use of her profile interfered with. Neither was this information leaked to anyone without a need to see the posts. Her password or other user information was not seized in order to retrieve these posts. Furthermore, the company attempted to use less invasive means before viewing the respondent's profile. The company first directed the supervisors of the various departments to examine the posts created by employees on the Povtak Group's profile. 185 F.Supp.3d at 6. There is no evidence that this course of action was successful in revealing the identity of PugLuv86. Viewing the public posts of employees on their own Facepage wall is but one small step away from this tactic.

The search is also permissible in the course of a standard performance evaluation. The company has an interest in ensuring employee satisfaction with Povtak. Furthermore, just as the need to avoid bad press justified an investigation into the identity of PugLuv86, it also justifies investigating the Facepage posts of employees. Afterall, the company was aware that at least one employee was disgruntled and publically defaming the company. If this was a symptom of a much larger disease, the company had an

imminent need to correct the problem. The company has an interest in making sure employees unsatisfied with their experience at the Povtak Group either had their workplace environment improved, or were transferred to a division or office in which they would be satisfied. Whatever the motivation behind the investigation, the Povtak Group's search was reasonable to meet the legitimate needs of the workplace. Thus the search met the criteria of Ortega and was permissible under the Fourth Amendment.

2. The ePhone Search was Conducted to Fix a Broken Piece of Equipment and Thus was Reasonable Under an Ortega Analysis.

The cited example of a reasonable non-investigative search in Ortega is one, "to retrieve a needed file." Ortega, 480 U.S. at 729. This was deemed hypothetically reasonable as the fast paced demands of the workplace require supervisors and other employees to be able to enter an office and retrieve such a file. Id. Otherwise, productivity and efficiency would be severely hampered. The search of the ePhone is analogous to the search of an office for a needed file. Just as the hypothetical supervisor in Ortega needed access to the file to complete a work-related task, so too did the technician in this case. The technician required access to the phone in order to diagnose and repair the problem. As stated above, the technician received consent to this search from Ms. Wagner. If this is the relevant search in this case, the respondent's claims must fail. The technician could not have respected the privacy rights of Ms. Wagner in a more significant way. He or she received consent, searched only as far as to determine the problem and the applications installed on the phone, and made a report based upon his or her findings. 185 F.Supp.3d at 7-8. There is no evidence that he or she searched the personal information potentially recorded on the phone. There is no evidence that he or she opened any user-created files such as email documents or photographs. There is no

evidence that the technician searched any further than was required by the mechanical problem presented. Furthermore, any incriminating facts taken from this search were mere implications from the technician's supervisor. 185 F.Supp.3d at 8. Making an assumption does not violate the Fourth Amendment rights of the respondent. Neither does the minimally invasive search by the technician. If he or she overstepped his or her bounds, then the commonplace activities by computer technicians in offices across the country would implicate the Fourth Amendment. No technician could repair a Company device without violating the privacy rights of the employee whose information is stored on that device. Such a rule would be unworkable. Ms. Wagner had notice and provided consent, and no more can feasibly be required by the constitution.

I. A NON-CONSENTING, SUCCESSOR EMPLOYER WITHOUT ANY LEGAL RELATIONSHIP TO A PREDECESSOR EMPLOYER CANNOT BE BOUND BY THE SUBSTANTIVE TERMS OF THE PREDECESSOR'S COLLECTIVE BARGAINING AGREEMENTS.

The decision of the Thirteenth Circuit finding that under the Respondent's section 301 Taft-Hartley Act claim the substantive provisions of Crimaldi's collective bargaining agreement bind Povtak is incorrect as a matter of law. Povtak is one of Crimaldi's competitors. The fact that Povtak outbid Crimaldi on a government contract and subsequently employed a number of Crimaldi employees does not create a legal relationship between the two companies that is sufficient to bind Povtak to Crimaldi's CBA without the firm's consent. Thus, the decision of the Thirteenth Circuit on the Taft-Hartley Act claim granting summary judgment for Ms. Wagner and the Local 12-22 should be reversed and summary judgment granted for Povtak.

A. The Thirteenth Circuit's Application of the Substantive Provisions of The Collective Bargaining Agreement to Povtak is Based on an Erroneous Conception of Section 301 of the Taft-Hartley Act and Controverses the Act's Purpose.

In its findings favoring Respondent, the Thirteenth Circuit’s fails to properly address the purpose of the Taft-Hartley Act. Legislators intended the Act to provide employers with additional rights against employees in the wake of the National Labor Relations Act or Wagner Act’s more liberal regime, which was perceived as being so labor friendly that it was economically impracticable. Gerard D. Reilly, The Legislative History of the Taft-Hartley Act, 29 Geo. Wash. L. Rev. 285. Prior to this revision, the Wagner Act’s regime created an atmosphere that was very disruptive of day-to-day business operations because it promoted too much Union activism in a way that simply stymied productivity rather than protecting labor. Id. at 285-89. As stated in section 1 of the Taft-Hartley Act, its purpose was to reduce “industrial strife” and thus interruptions in the prosperous operation of businesses by providing “orderly and peaceful procedures” for dispute resolution. The Labor Management Relations (Taft-Hartley) Act of 1947, 29 U.S.C. § 141(b) (2006). While the Wagner Act’s goal was to promote employer-employee collective bargaining , Taft-Hartley sought to reign in Union power within the Wagner Act’s mandate, adding balance to what had been a one-sidedly pro-labor regulatory scheme. Cynthia Estlund, Economic Rationality and Union Avoidance: Misunderstanding the National Labor Relations Act, 71 Tex. L. Rev. 921 (1993) (describing the Wagner Act’s emphasis on empowering labor via collective bargaining at the expense of employer rights).

Section 301 of the Taft Hartley Act establishes a cause of action for a breach of a collective bargaining agreement and envisions the creation of federal common law to enforce them. §301(a), 29 U.S.C. 185(a); Textile Workers Union of America v. Lincoln Hills, 353 U.S. 448 (1957) (finding in the Act’s legislative intent, a desire to create a

cause of action, not just federal question jurisdiction for CBAs). The Act's intent was to hold both labor and employers to the terms of their collective-bargaining agreements, favoring their enforcement against both sides by providing jurisdiction in federal court. Textile Workers Union of America, 353 U.S. at 453 (citing both House and Senate reports); S. Rep. No. 105, 80th Cong., 1st Sess., 16-17 (1947).

While section 301 might seem to support the Thirteenth Circuit's ruling in suggesting the importance of providing a remedy for breach of collective bargaining agreements, the goal of this singular section must be read in the context of the Act's broader purpose of facilitating smooth labor-employer relationships articulated in section 1. 29 U.S.C. § 141(b). The Act did not envision enforcing a remedy without a legal basis but rather sought to ensure dispute resolution procedures on what the parties agreed to. Textile Workers Union of America, 353 U.S. at 453 (citing the Act's legislative history); Groves v. Ring Screw Works, 498 U.S. 168, 172-73 (1990) (highlighting that section 301 intends to foster peaceful dispute resolution). If this court accepts the Thirteenth Circuit's holding, the inescapable conclusion to be drawn is that the Act's purpose is to uphold the right to remedy of employees and unions, at any cost to employers and to business operations generally. Binding companies like Povtak to substantive provisions of CBA agreements of predecessor companies will not only stymie competition in the open marketplace for government contracts like the one in Dynes, it will also prevent companies from willingly hiring employees from their predecessor companies, hindering businesses from getting the most experienced labor as well as triggering general unemployment concerns. Local 12-22, 185 F.Supp.3d 1 app. C at 5 (describing fears among Dynes politicians of striking laborers and unemployment if

Povtak were to take the transportation contract without hiring Crimaldi's workforce). In this regard, the Thirteenth Circuit's holding does not adequately respect the Taft-Hartley Act's focus on employer rights and yields results that are contrary to public policy.

B. Supreme Court Precedent Clearly Establishes that a Non-Consenting Successor Employer Cannot Bound to Substantive Terms of a Predecessor's Collective Bargaining Agreement.

The Supreme Court addressed whether the substantive provisions of a predecessor's collective bargaining agreement may legally be applied to a successor employer in three decisions that has created considerable confusion on the issue. John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543 (1964); NLRB. v. Burns Int'l Sec. Servs., Inc., 406 U.S. 272 (1972); Howard Johnson Co. v. Detroit Local Joint Executive Bd., 417 U.S. 249 (1974). While the three cases appear to be in conflict, they are not if read to indicate that a successor employer cannot be bound to the substantive terms of a CBA merely by virtue of being a successor. Moreover, one thing they all clearly have in common is their emphasis on requiring a cautious approach in binding employers to contractual terms they did not explicitly agree to.

As a matter of pure contract law, under the doctrine of privity, a company cannot be made liable for an agreement to which it is not a party unless it receives a positive benefit or has ratified acceptance of the contract with some kind of confirmatory performance. Wiley, 376 U.S. at 550; 2-5 Corbin on Contracts, § 5.11 (2010), available at LexisNexis; Restatement (Second) on Contracts § 304 (1981) (describing that third-party rights are not created unless the third party is a beneficiary); Restatement (Second) on Contracts § 71 (1981) (requiring consideration or mutual inducement to enforce contracts). The Wiley court created a limited exception in the employment context to this

rule under section 301 of the Taft-Hartley Act, upholding the application of a CBA to a successor employer who was technically not a party to the original contract. 29 U.S.C. §185. In Wiley, a union sought to compel arbitration pursuant to a Collective Bargaining Agreement signed with an employer that subsequently merged with another company to create an entirely new legal entity. In creating this exception to privity rules, the court highlighted the “impressive policy considerations favoring arbitration” in the employment context as outweighing the traditional need for explicit and direct consent in contractual relationships. Wiley, 376 U.S. at 547. Wiley represents an attempt to provide some stability of contract for both employers and employees, in a world where business operations change hand frequently.

In dicta, Wiley suggests it is impossible and unproductive to separate procedural and substantive elements from CBAs because they are difficult to differentiate, thus implying that enforcing the substantive provisions of a CBA against a non-signatory successor employer is also appropriate. Id. at 556-57. However, as the Thirteenth Circuit correctly recognizes, the holding in Wiley was strictly limited to arbitration, with only an implication that the grievance parts of the agreement would also be enforced. Local 12-22, 1214 F. 3d at 10. Moreover, the court was careful to limit its holding, suggesting that an arbitration agreement should not apply for “every case in which the ownership or corporate structure of an enterprise is changed”. Wiley, 376 U.S. at 551.

Subsequently in Burns, the Supreme Court found under a section 8(a)(5) Taft-Hartley Act claim, that since a successor employer was not a party to the original agreement that it did not have to abide by its substantive terms, including the grievance clause. Burns, 406 U.S. at 281-82; 29 U.S.C. §158(a)(5). Section 8(a)(5) prohibits an

employer from refusing to collectively bargain with the representatives of his employees. 29 U.S.C. §158(a)(5). The court emphasized that its holding intended to uphold a “fundamental premise” of labor law: freedom of private bargaining with a view toward promoting free capital transfer and efficient business operation. Burns, 406 U.S. at 287-88. While many read this case as contradicting Wiley, Wiley only indicated in dicta that substantive terms of a CBA might apply to a succeeding employer.

Moreover in Howard Johnson, the Supreme Court held that Wiley and Burns both apply to section 301 claims. Howard Johnson, 417 U.S. at 255. While some previous courts had distinguished Wiley from Burns by the fact that they were brought under different sections of the Taft-Hartley Act, Howard Johnson clarified that Burns and Wiley should both be applied to section 301 claims, thus, placing the narrower Burns view as a limit on Wiley’s potentially broad implications. Id. at 256-57. In looking at Burns and Wiley together, the court in Howard Johnson suggested the need to “proceed cautiously, in the traditional case-by-case approach of the common law” when applying CBA provisions to non-signatories. Id. at 256. Thus, while Wiley remains good law on some points, it is clear that its dicta on substantive provisions of CBAs should be governed by the Burns holding stating that substantive terms of a CBA will not bind a non-consenting party.

1. Respondent Has Failed to Show that Povtak and Crimaldi Have Any Kind of Legal Relation that Would Allow Crimaldi’s Collective Bargaining Agreement to be Enforced Against Povtak under Burns and Wiley.

Burns dealt with a very different set of facts than those in Wiley. In Burns, a merger did not create the relationship between the prior and successor employers; instead a competitor, Burns, took the prior employer’s place in a contractual relationship with a

third party, much like Povtak did. It is this distinction of the relationship between the succeeding and preceding employers that would have made holding the succeeding company to the substantive terms of the CBA in Burns untenable even under Wiley, because it presents a situation where there is no common law background rule providing liability. Local 348-S v. Meridian Mgmt. Corp., 583 F.3d 65, 81 (2d Cir. 2009) (Livingston, J., dissenting). Thus, finding liability in a case like Burns would have resulted in taking “impos[ing] [something] from without, not reasonably to be found in the particular bargaining agreement and the acts of the parties involved”, which even the Wiley court found unacceptable. Wiley, 376 U.S. at 551.

Similarly, the Howard Johnson court specifically distinguished Burns from Wiley in two ways. Howard Johnson, 417 U.S. at 257. First, in Wiley, the resulting employer that did not technically sign the CBA came into existence through a merger and, thus, might be understood to have assumed the obligations of its prior company as a matter of corporate law. Thus, expectations of the parties were not frustrated. Id. at 257. Povtak and Burns, on the other hand, have both simply taken on a contract that a prior company, without any arrangements with the prior company’s managers themselves. Other courts have also found that the extension of CBA liability to a successor company is and should be limited by common law principals. E.g., Meridian Mgmt. Corp., 583 F.3d at 82; Ameristeel Corp. v. Int’l Bhd. Of Teamsters, 267 F.3d 264, 277 (3d Cir. 2001) (recognizing that equitable considerations alone are not sufficient to enforce a collective bargaining agreement without another more substantially legal theory of liability).

Support for this approach is also found in the way the court has interpreted union action under a CBA. When interpreting a collective bargaining agreement in terms of a

Union's responsibility, the Supreme Court found that the legislative history of section 301 indicated that a Union could only be held responsible indirectly by applying the common law rules of agency. Carbon Fuel Co. v. United Mine Workers of America, 444 U.S. 212 (1979). Thus, employees, who arguably have a stronger privity relationship to a CBA than a successor employer cannot attribute their actions to a Union for the purpose of the agreement without a proving the existence of an agency relationship. Given the Taft-Hartley Act's purpose of ensuring the Unions honored their contracts, it seems strange to hold companies to a higher standard of responsibility through a lower standard of privity than unions. S. Rep. No. 105, 80th Cong., 1st Sess., 17 (1947) (describing the intent of the Act was to make both unions and employers responsible for their contracts). Povtak certainly cannot be seen as being an agent of Crimaldi in any way, even if they hired the same employees and run the same busses.

The second differentiating factor found by Howard Johnson was that in Wiley, the complete disappearance of the original entity of employment might have denied a remedy had the court not applied the terms of the CBA to the successor company. Howard Johnson, 417 U.S. at 257. Thus, the CBA was applied based on an estoppel rationale, to prevent an employee from being unable to exercise a valid claim for relief due to the lack of a defendant. Such a fear was manifestly absent in Burns and is absent regarding Ms. Wagner's claims since without the CBA there is no remedy. The Thirteenth Circuit, therefore, misapplies the estoppel rationale from Wiley to create defendants where there is not a valid legal claim to be argued. Thus, based on the most recent word from the Supreme Court on Burns and Wiley, Wiley does not apply to this case.

2. Respondent has Failed to Demonstrate that a Procedural Element of a Collective Bargaining Agreement is not Enforceable in an Entirely Separate Way from its Substantive Elements.

Taking Wiley, Burns, and Howard Johnson together, the Supreme Court has suggested that in weighing the interests of employer and employee, it may generally enforce the procedural but not substantive parts of collective bargaining agreements. On the one hand, such a distinction between the procedural and substantive has been criticized as impossible because it leaves parties with “nothing to arbitrate”. Ameristeel, 267 F.3d at 276-77. Even if one did imagine that an agreement to arbitrate could not be enforced without the substantive provisions of the agreement, it is clear from the Supreme Court’s precedent that one should err on the side of non-enforcement, which would result in neither being enforceable rather than both. Howard Johnson, 417 U.S. at 254-56 (emphasizing the need for caution in assigning liability on successorship ground).

Such a narrow view of the purpose of arbitration is not only inaccurate but at odds with the Taft-Hartley Act’s purpose of protecting dispute resolution rather than any substantive terms of that resolution. 29 U.S.C. § 141(b) (describing the purpose of the Act in promoting peaceful dispute resolution procedures). There is no reason to suppose that an arbitral body cannot apply federal law outside of the substantive terms of an agreement. The legislative history of the Act focuses on finding effective modes of dispute resolution, and the Act mandates very few substantive provisions on employer-employee relationship itself. In the Povtak contract, moreover, the arbitration clause suggests that grievances that involve an “alleged violation of this agreement” can be arbitrated. Local 12-22, 185 F.Supp.3d 1 app. A at art. 14.2. By its terms, this article is

no more than a jurisdictional pre-requisite and does not suggest that an arbitration's outcome must be determined by the substantive terms of the agreement itself.

C. A Majority of Circuit Court Precedent Does Not Support the Thirteenth Circuit's Determination of Liability for Povtak Under Crimaldi's Collective Bargaining Agreement.

The Thirteenth Circuit largely relied on proof that Povtak was Crimaldi's successor to find that it was subsequently liable under the grievance provisions of the CBA. Most courts, however, require either a finding that the two companies are alter egos or that the succeeding company has demonstrated some kind of consent or represented that consent to a third party. E.g., Hosp. and Institutional Workers Local 520 v. Pasatiempo Development Corp., 627 F.2d 1011 (9th Cir. 1980) (holding that a successor employer cannot be held to the substantive terms of a collective bargaining agreement unless the firm consented implicitly or expressly); Southward v. S. Cent. Ready Mix Supply Corp., 7 F.3d 487, 493 (6th Cir. 1993) (finding that a company must be an alter ego or an explicit or implicit consenter to be bound by the terms of a CBA). The Thirteenth Circuit correctly held that Povtak satisfied neither of these conditions. Local 12-22, 1214 F.3d at 6-10.

Moreover, as Third Circuit majority mentioned, there is substantial jurisprudential support against forcing a successor employer to be bound to the terms of a contract it did not agree to. Ameristeel, 267 F.3d at 274. The Eleventh Circuit also stated that in most circumstances a successor company is only bound to bargain collectively with the union and is rarely liable under the substantive terms of a CBA. Rd. Sprinkler Fitters Local Union No. 669 v. Independent Sprinkler Corp., 10 F.3d 1563, 1567 (11th Cir. 1994). The D.C. Circuit has stated that under Burns, a successor employer is only required to bargain

with an incumbent union and is never bound by the substantive terms of the predecessor's CBA. Sullivan Indus. v. NLRB, 957 F.2d 890, 894-95 (D.C. Cir. 1992). Both the Eighth and Fourth Circuits have also found that the law requires nothing more than a duty to bargain with a predecessor employer's union and that a successor cannot be bound to the substantive terms of the predecessor's CBA. NLRB v. Winco Petroleum Co., 668 F.2d 973, 982 n.9 (8th Cir. 1982); Price v. U.S., 599 F.2d 594, 597 (4th Cir. 1979).

Succeeding in the alter ego claim would require proof of a substantial sameness between Crimaldi and Povtak in terms of the identity of the managers and employees as well as the general operation of the entire business. Carpenters Local Union No. 1846 Of the United Bhd. v. Pratt-Farnsworth, Inc., 690 F.2d 489, 507 (5th Cir. 1982). Typically, it would also involve proof of the employer attempting to evade the terms of the CBA or at minimum, a relationship between the two companies. Id. As the Thirteenth Circuit correctly found, the management of Povtak does not overlap with Crimaldi's in any way and Crimaldi did not give Povtak the contract or have any relationship with the firm. Local 12-22, 1214 F. 3d at 7.

If Ms. Wagner could prove that Povtak implicitly or explicitly adopted the CBA, the firm would face liability under the contract. 3750 Orange Place Ltd. v. NLRB, 333 F.3d 646, 654 (6th Cir. 2003) (finding that some type of consent was required from a successor employer to bind it to a predecessor's CBA). An alternate form of this consent-based requirement is the "perfect successor concept", in which Povtak would have represented its intention to be bound or take on obligations under the CBA. Coastal Int'l Sec. Inc. v. NLRB, 320 Fed. Appx. 276, 284 (5th Cir. 2009). There was nothing in the contractual arrangement between Povtak and the city to suggest an intent to adopt the

CBA. At the press conference discussing Povtak's interest in bidding on the city contract, CFO Deborah Quine suggested that Povtak might hire some Crimaldi employees when she said the firm required "all of the it help it could get". Local 12-22, 185 F.Supp.3d at 2. However, she made no mention of adopting any of Crimaldi's labor policies. Courts have found that even a more emphatic statement of continuity, such as "nothing is going to change" is not enough to establish perfect successorship. S & F Mkt. St. Healthcare, LLC v. NLRB, 570 F.3d 354, 361-62 (9th Cir. 2009). Moreover, there was reason at the time to assume that Povtak would completely change labor polices, since several of Crimaldi's employees were criminally indicted, suggesting perhaps bad labor policies. Both Mr. Livramento and Mr. Daks, as agents of Povtak, also expressed a clear intent that they were an at-will employer after the fact. Local 12-22, 185 F.Supp.3d at 8-9.

1. The Thirteenth Circuit Erroneously Equates Proof of Successorship for Povtak With Proof of Liability Under the Collective Bargaining Agreement.

While correctly determining Povtak's standing under the alter ego and consent-based tests, the Thirteenth Circuit then erred by suggesting that proving "successorship" is equivalent to proving that the company should be bound by the terms of another company's CBA. The Circuit Court's argument rests exclusively applying an analysis from Fall River Dyeing & Finishing Corp. v. NLRB, a case involving a determination of successorship, not CBA liability. Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27 (1987). As a second circuit judge astutely noted, "successorship" as found in Fall River is not determinative of contractual liability. Meridian Mgmt. Corp., 583 F.3d at 79-80. The concept of "successorship" has often been confused with that of "alter

ego”, a valid means of determining CBA liability for a successor firm. The Ninth Circuit admitted that its findings of what it termed “successorship” in a few cases were actually findings that one company was the alter ego of another. E.g., Hawaii Carpenters Trust Funds v. Waiola Carpenter Shop, 823 F.2d 289 (9th Cir. 1987).

The Supreme Court has never found “successorship” alone to trigger CBA liability. Burns explicitly stands for the proposition that successorship does indicate a requirement to bargain with a Union but not an obligation to be bound to a contract to which it is not a signatory. Burns, 406 U.S. at 284. Howard Johnson also indicated that successorship is a necessary but not sufficient condition of successor liability under a CBA. Ameristeel, 267 F.3d at 269.

2. The Thirteenth Circuit’s “Sliding Scale Approach” to Collective Bargaining Agreement Liability Represents an Erroneous Interpretation of the Law That is Not Supported By Court Precedent, The Taft-Hartley Act, or Public Policy.

Howard Johnson called for a case-by-case determination of whether successorship would bind a company to the terms of a predecessor’s CBA. Howard Johnson, 417 U.S. at 256. However, there is nothing in the Court’s language to suggest that a sliding scale approach is appropriate; instead, the court found Burns a more persuasive precedent than Wiley and expressly narrowed the court’s discretion in finding liability under a CBA without consent. Ameristeel 267 F.3d at 273-74. Adopting the sliding scale would assign liability too often and too unpredictably.

As a matter of public policy, the sliding scale concept does not conform to the requirements of the Taft-Hartley Act’s purpose nor does it forward good business or labor policies. Instead of providing for predictability as well as peaceful and final dispute settlement, a sliding scale model like the one adopted by the Thirteenth Circuit would

subject employer-employee relationships to increased unpredictability and disputes rather than resolution of those disputes. It would render the decision of whether a successor was bound by a contract *always* an open-ended matter worthy of litigation by the courts. This does not forward Taft-Hartley's goal of binding parties to their agreements nor does it forward a policy of peaceful and expedient dispute resolution. 29 U.S.C. § 141(b); Textile Workers Union of America, 353 U.S. at 453.

3. *Povtak's "Successorship" is Not Established Under Fall River.*

Even if successorship is probative of Povtak's liability under the CBA, the Thirteenth Circuit misstates the Fall River holding, equating a non-exhaustive list of factors with a test for substantial continuity. In Fall River, since the original business, Sterlingwale, had gone out of business, a few of its employees found a financial backer and created a new company to continue running Sterlingwale's dyeing business, using the same factory, the same business processes, and many of the same employees. The Circuit correctly states that the Fall River court suggests that it is helpful to look at the following elements in determining successorship: (1) whether the business of both employers is the same, (2) whether the employees of the new company are doing the same jobs in the same working conditions under the same supervisors and (3) whether the new entity has the same production process, makes the same product, and has the same body of customers. Local 12-22, 1214 F.3d at 13 (citing Fall River, 482 U.S. at 43). However, the Fall River court emphasized that the test is a "totality of the circumstances" examination of the relationship between the two companies. Fall River, 482 U.S. at 43. Thus, establishing the foregoing three factors is relevant to proving that there is "substantial continuity" but is not alone dispositive.

The relationship between Povtak and Crimaldi does not meet the three Fall River criteria, as the District Court properly determined. Local 12-22, 185 F.Supp.3d at 19. First, the Thirteenth Circuit reads too broadly the first element, sameness of business; adopting its analysis, all competitors in the same industry could be held to the terms of CBA contract. Local 12-22, 1214 F.3d at 13, 15. Second, working conditions do differ from those under Crimaldi. It is not as if, employees from Crimaldi “woke up one morning to find that they were now employed by... [Povtak] rather than... [Crimaldi]”. Local 348 S, 583 F.3d at 74. Employees attended a pre-bid meeting where they learned about what would happen after Crimaldi was fired and another firm hired. Local 12-22, 185 F.Supp.3d at 2. After winning the contract, Povtak also introduced new training programs and policies such as the ECP and did not promise to hire all Crimaldi employees. Id. at 2-3. Finally, while the product is somewhat similar, Povtak reorganized Crimaldi’s bus routing and made the City’s bus fleet more environmentally friendly, obtaining funding from the Department of Transportation and the Environmental Protection Agency to do so. Id. at 3. Electricians had to attend additional training classes as well. Id. The Fall River criteria are not met with enough certainty that the matter could be decided on a summary judgment motion.

Conclusion

For the aforementioned reasons, this court should reverse the Thirteenth Circuit’s holding regarding the Fourth Amendment claim as well as the holding regarding section 301 of the Taft-Hartley Act. The District Court’s grant of summary judgment in favor of Petitioner should be reinstated.

Appendix A: Relevant Statutes

29 U.S.C. § 141

§ 141. Short title, Congressional declaration of purpose and policy

(b) Industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with each other, and above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest.

It is the purpose and policy of this chapter, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce.

29 U.S.C. § 158(a)(5)

§158. Unfair labor practices

(a) Unfair labor practices by employer

It shall be an unfair labor practice for an employer--

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

29 U.S.C. § 185

§ 185. Suits by and against labor organizations

(a) Venue, amount, and citizenship

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Responsibility for acts of agent; entity for purposes of suit; enforcement of money judgments

Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

(c) Jurisdiction

For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(d) Service of process

The service of summons, subpoena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) Determination of question of agency

For the purposes of this section, in determining whether any person is acting as an “agent” of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.