

NY Musicians Defend Representation Fight Against Union

By **Beverly Banks**

Law360 (July 30, 2024, 7:06 PM EDT) -- Two orchestra musicians defended their duty of fair representation claims against an American Federation of Musicians local and breach of labor contract allegations against the New York Philharmonic, urging a federal judge to find the defendants are on the hook for actions involving their suspensions.

Matthew Muckey and Liang Wang asked a district court Monday to give them early wins for allegations linked to their suspensions, including claims under Section 301 of the Labor Management Relations Act against Associated Musicians of Greater New York AFM Local 802 and the New York Philharmonic.

"The problem for the union, here, is that it declined to grieve a suspension imposed without an even arguably facially legitimate reason for the suspension," Wang **argued** in his filing. "The union fares no better in arguing that it had discretion not to grieve the suspension because of the pending investigations."

The duo **filed separate suits** in May, bringing allegations against the union and orchestra over the musicians' suspensions after a New York Magazine article ran in April. According to court filings, the article referred to a 2020 arbitration award that reinstated Muckey and Wang following their terminations in 2018 over claims from years ago.

Muckey was terminated in 2018 after allegations of sexual misconduct in 2010 by former Philharmonic probationary musician Cara Kizer resurfaced, according to his suit, and Muckey denied the claims.

Wang said in his suit that he didn't face the allegations in connection with Kizer. According to a footnote in Wang's complaint, "his termination and resulting arbitration principally concerned different events at a different time (several years before 2010)."

In separate motions for partial summary judgment, Muckey and Wang doubled down on their allegations that Local 802 violated its duty of fair representation and the Philharmonic breached its collective bargaining agreement with the union by suspending the musicians without just cause.

Muckey **argued** that Local 802 was obligated to represent him in "seeking enforcement of the award and/or otherwise challenging the suspension as not being based upon just cause."

"Local 802 ignored a final and binding arbitrator's determination in favor of adopting a politically correct position that wholly contradicts and repudiates the award, which both Local 802 and the Philharmonic freely admit was final and binding," Muckey argued.

Wang **contended** that the Philharmonic sidestepped the collective bargaining agreement by not considering the 2020 award "final and binding" while the union wrongly refused to move ahead with his grievance.

"The union had an absolute and unambiguous duty to demand that the Philharmonic not use the matters adjudicated in the arbitration (directly or as the arbitration is recounted in the article) as an excuse to again remove Wang from performing with the orchestra, four years later," Wang said.

Muckey and Wang also raised separate arguments Monday in opposition to motions that the union and Philharmonic **submitted to dismiss** the suits.

Wang fought against the Philharmonic's "attempt to recast" his suspension as paid administrative leave. In its motions to dismiss, the Philharmonic said Wang and Muckey were put on paid leave "pending investigations into the culture of and conduct by employees" of the orchestra.

Muckey **challenged** the Philharmonic's argument that he hasn't shown the orchestra violated the collective bargaining agreement through alleged noncompliance with the award because Muckey wasn't terminated. Muckey **also fought** the union's defenses against his claims.

Stipulations of voluntary dismissal were filed in both cases Monday. For Muckey's case, the parties agreed to toss the fourth count from his suit for a prima facie tort against Local 802.

In Wang's suit, the parties signed off on dismissing the ninth and 10th counts for prima facie tort against the union and Philharmonic.

Jacqueline C. Gerrald, who represents Muckey, told Law360 on Tuesday that the Philharmonic's suspension of Muckey, "which has been ongoing for nearly four months now, has no legal basis."

There isn't a dispute that the Philharmonic suspended Muckey "solely because of the allegations" published in the article, "which had already been arbitrated and determined in his favor," Gerrald said.

"There's also no dispute that Local 802 refused to take any action to represent Mr. Muckey in challenging" the Philharmonic's violation of the award, which said Muckey couldn't receive discipline "for the same allegations which precipitated his suspension," Gerrald said.

Alan Lewis, who represents Wang, said in a statement to Law360 on Tuesday that the thrust of his client's brief is "that when the Philharmonic suspended Liang simply because he was the subject of a misleading magazine article and not because of anything that he did or was even accused of doing, it violated Mr. Wang's rights under the collective bargaining agreement."

"The brief also exposes the fatal flaw in the defendants' misleading contention that suspending Wang was related to certain investigations: no investigations were even in existence when Wang was suspended because of the magazine article," Lewis said.

Susan Davis, who represents Local 802, declined to comment.

Representatives of the Philharmonic did not immediately respond to requests for comment.

Muckey is represented by Paul H. Levinson, Steven J. Hyman and Jacqueline C. Gerrald of McLaughlin & Stern LLP.

Wang is represented by Alan S. Lewis and Karen E. Meara of Carter Ledyard & Milburn LLP.

The union is represented by Susan Davis and Olivia R. Singer of Cohen Weiss and Simon LLP.

The New York Philharmonic is represented by Howard Z. Robbins and Joshua S. Fox of Proskauer Rose LLP.

The cases are Matthew Muckey v. Associated Musicians of Greater New York Local 802 American Federation of Musicians et al. and Liang Wang v. The Philharmonic-Symphony Society of New York Inc. et al., case numbers 1:24-cv-03348 and 1:24-cv-03356, in the U.S. District Court for the Southern District of New York.

--Editing by Nick Petruncio.