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**COVENANTS NOT TO COMPETE**

The Indiana Court of Appeals recently held that an employer's prior breach of an employment contract precluded the enforcement of a non-compete covenant contained in that contract.

**FACTS**

Sallee V. Mason actually involved two contracts: one for the sale of an accounting firm by the owner, Mason, and one providing for the subsequent employment of the seller by the buyer, Sallee. The employment contract contained a covenant not to compete that prohibited the former owner from directly or indirectly engaging in the practice of public accounting within Lawrence County and the counties surrounding it. The employment contract entitled the seller/employee to annual salary reviews and cost of living increases, entitled her to added compensation for hours worked in excess of 2,280 every year; and provided for termination upon 30 days notice. The sale contract incorporated the covenant not to compete contained in the employment agreement.

Within a year, the employment relationship became strained, and Mason arranged for Sallee to meet with her to discuss a renegotiation of her employment contract, and also her concerns that she was not receiving the remuneration provided for by the contract's terms. Before this meeting could take place, Sallee delivered to Mason a written letter of termination, effective immediately. Mason then opened a new business in Martinsville, two counties to the north, and soon had more than 500 clients, the majority of which followed her from the original Lawrence County business. Sallee immediately stopped payments under the sale contract, and sued for enforcement of the non-compete.

**COURT'S DECISION**

Sallee's downfall was his inability to demonstrate that he had fulfilled his obligations under the employment contract. At trial, he could provide no evidence that he had provided Mason with salary reviews, cost of living adjustments, or compensation for hours worked in excess of 2,280 in 1992, 1993, and 1994. Because Sallee breached the employment agreement first, Mason was under no obligation to abide by the covenant not to compete. In addition, because the non-compete contained in the sale contract was merely incorporated from the employment agreement, the Court held that agreement was equally unenforceable.

**IMPORTANCE**

Because covenants not to compete are disfavored under Indiana law, employers must be careful not to give courts a reason not to enforce them.

**NATIONAL ORIGIN DISCRIMINATION**

The Seventh Circuit Court of Appeals reaffirms that the court's duty is not to act as a "super personnel department" sitting in review of honest business decisions.

**FACTS**

Plaintiff Subhen Ghosh, a United States citizen who is a native of India, filed suit against his employer; the Indiana Department of Environmental Management ("IDEM"), claiming he was denied promotions because

of his national origin and in retaliation for filing a charge with the Equal Employment Opportunity Commission ("EEOC"). Ghosh had been hired by IDEM in 1985 as an environmental Engineer III in the Office of Water Management. Though he was eventually promoted to Engineer II, Ghosh filed suit after failing to receive promotions to several other positions he had sought during the course of his employment.

## **COURT'S DECISION**

Ghosh filed his suit under Title VII of the Civil Rights Act of 1964, which makes it unlawful for an employer to discriminate against an individual with respect to compensation, terms, conditions, or privileges of employment because of the individual's race, color, sex, or national origin. In its defense, IDEM argued that Ghosh failed to receive the requested promotions because he lacked the proper experience, had inadequate writing skills, did not submit the proper application, and did not score within the top 20 % of the candidates during the initial resume evaluation. In analyzing Ghosh's claim, the Court stressed that it would not "sit as a super-personnel department to review a company's honest business decisions" and would limit its analysis to whether the decisions to deny Ghosh the promotions in question were unlawfully motivated. Thus, even if the process by which Ghosh was evaluated for the promotions was poorly devised or executed, that fact alone would not be enough to create a presumption that the reasons IDEM offered as supporting this decision were pretextual, and that national origin discrimination was the true motivating factor.

Ghosh's claim ultimately failed because he made no effort to demonstrate that one of the reasons proffered by IDEM in support of the decisions not to promote him were pretextual. To prevail, the Court held that Ghosh would have to show that all of the reasons were pretextual; by failing to address one, he could not meet this burden.

## **IMPORTANCE**

The Court's holding in Ghosh underscores the importance of evaluating employees using objective criteria so that any court reviewing that decision will be more easily convinced that, whether right or wrong, it was honestly made.

## **SUPREME COURT AGREES TO REVIEW DECISION REINSTATING REPEAT DRUG OFFENDER**

The U.S. Supreme Court recently agreed to take up an employer's appeal of a lower court's decision which upheld an arbitrator's ruling reinstating a worker who twice tested positive for marijuana use.

## **FACTS**

In Eastern Assoc'd Coal Corp. V. United Mine Workers, the employee was reinstated to his safety-sensitive position as a heavy equipment operator. The employee tested positive for drug use twice in a 16 month period and was discharged. An arbitrator; however; ordered Eastern to reinstate the employee. The company appealed the arbitrator's decision, but the 4th Circuit (covering Maryland, North Carolina, South Carolina, Virginia and West Virginia) ruled that the arbitrator could have rationally found that there was no just cause for firing the employee because neither the collective bargaining agreement, nor the company's drug abuse policy, mandated the firing of workers who tested positive for illegal drugs.

The Supreme Court's decision will hopefully settle a current split among the courts regarding whether; as Eastern argues, there is a public policy against enforcing an arbitration award ordering reinstatement to a safety sensitive position of an employee who has tested positive for illegal drug use.

## **IMPORTANCE**

This case highlights the importance of clearly informing employees in writing the disciplinary actions that an employee will face if he or she tests positive for drugs in violation of an employer's anti-drug policy. If you have any questions about your company's drug policy, give us a call.