

Common Law Duty of Loyalty Claim Saves the Day

We often field questions from clients about how they can best protect their business interests, including their trade secrets. We do not take a one-size-fits-all approach, and the advice we give depends upon our clients' individual needs and circumstances. We take this approach because businesses have three sometimes overlapping, but distinct means of protection: restrictive covenants (e.g., noncompete, nondisclosure, and nonsolicitation agreements); statutes; and the common law.

It is important for businesses to keep this in mind so they maximize the precautions they can take against employees who leave to take positions with the competition. In the event that a lawsuit is necessary, it is important for businesses to assert every possible argument. In some cases, the former employee may not have signed a restrictive covenant. In other cases, the former employee's conduct may not be covered by any applicable statute. In those cases, the common law could still offer the protections the business needs. We've [previously written about](#) an employees' common law obligation to refrain from using or disclosing confidential information and how an employer can potentially stop a departing employee from competing using that information, even in the absence of a noncompete agreement.

A recent New Jersey case in federal court further illustrates how a business can successfully invoke another common law duty to restrain a departing employee from unfairly competing—this time utilizing the duty of loyalty.

In *SFX Installation, Inc. v. Pimental*, 2021 WL 4704964 (D.N.J. Oct. 8, 2021), the employer installed specialty laboratory equipment. The former employee worked there for four years, beginning as a helper and being promoted to foreman. As a foreman, the former employee had access to the employer's VPN, which contained company pricing information, bids, and proposals, and the company storage facility.

While still employed by the company, the former employee secretly formed a new company to compete. He solicited business for his new company by contacting the employer's customers. He also conducted some business for his new company on his employer's time,

using the employer's employees and resources. He also posted pictures of work he did for the employer on his new company's social media page.

The employee eventually resigned, citing personal reasons and not mentioning his new company. When the employer learned about the new company from its own customers, it sued for an injunction and monetary damages. Because the company did not require the former employee to sign a restrictive covenant, its complaint alleged the former employee violated the Defend Trade Secrets Act ("DTSA") and New Jersey Trade Secrets Act ("NJTSA") and asserted common-law claims of tortious interference with contract, conversion, and breach of the duty of loyalty.

The court rejected the employer's claims under DTSA and NJTSA on the grounds that the employer failed to sufficiently allege that the installation of laboratory equipment was a protectable trade secret, as opposed to unprotectable general industry knowledge. In addition, although the former employee had access to the employer's trade secrets (e.g., customer, pricing, and bid information), the former employer failed to present sufficient evidence that the former employee actually used it.

However, the rejection of the statutory claims did not end the analysis, as the employer also asserted common-law claims. The duty of loyalty prohibits employees from acting contrary to their employers' interests while employed. On this count, the employer sufficiently asserted a claim. The former employee admitted that he solicited and performed work for the employer's customers, and this work constituted a majority of the new company's business.

In addition, the employer alleged that the former employee used the employer's resources for his new company. For example, the employer presented receipts from EZ Pass and Home Depot indicating that the former employee performed work and made purchases for his new company during the days and times his timecard indicated he was working for the employer. He used the employer's company cell phone for calls for his new company. He used some of the employer's equipment to conduct work for his new

company, and he advertised for his new company by posting pictures of work done for the employer.

As a result of the duty-of-loyalty claim, the Court granted the employer's request for a preliminary injunction. This case presents a couple of valuable lessons. First, it shows that there does not necessarily need to be a restrictive covenant in place for an employer to be successful in a case against a disloyal former employee. Second, although there is often overlap between statutory claims and common-law claims, sometimes a disloyal former employee's conduct can run afoul of the common law without violating a statute. It is important that employers are aware of and assert all possible claims when filing a lawsuit. This is especially true when the former employee's conduct is especially egregious, as it arguably was in this case.

If you have any questions about this case or how best to protect your business from the potential of disloyal former employees, feel free to contact [Tom Muccifori](mailto:tmuccifori@archerlaw.com), Chair of Archer's [Trade Secret Protection and Non-Compete Group](#) at 856-354-3056 or tmuccifori@archerlaw.com, or any member of the Group in: Haddonfield, NJ at 856-795-2121, Princeton, NJ at 609-580-3700, Hackensack, NJ at 201-342-6000, Philadelphia, PA at 215-963-3300, or Wilmington, DE at 302-777-4350.

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