

COMMENTARY



Enforcement of Covenants Not to Compete in Pennsylvania When the Employer Terminates the Employment Relationship

Will Pennsylvania courts enforce a restrictive covenant against a terminated employee? In short, assuming the termination is not wrongful, Pennsylvania courts may enforce the restrictive covenant notwithstanding the employee's termination under certain circumstances. *Insulation Corp. of Am. v. Brobston*, 667 A.2d 729, 736 (Pa. Super. Ct. 1995); *Missett v. Hub Int'l. Pa., LLC*, 6 A.3d 530, 539 (Pa. Super. Ct. 2010). The circumstances surrounding the former employee's termination will affect at least two factors considered by a court in deciding whether to enforce a restrictive covenant: the legitimacy of the employer's interests and the degree of hardship imposed upon the terminated employee. *Brobston*, 667 A.2d at 737.

Brobston is the seminal Pennsylvania case on the impact of the termination of an employee in an action to enforce a restrictive covenant. In *Brobston*, an employer attempted to enforce a covenant not to compete against a former employee who had been terminated for poor job performance. 667 A.2d at 734-35. In declining to enforce the covenant, the Superior Court reasoned that the employee's termination "clearly suggest[ed] an implicit decision on the part of the employer that its business interests [were] best promoted without the employee in its service." *Id.* at 735. Once an employer reaches that decision,

the employer's "need to protect itself from the former employee is diminished by the fact that the employee's worth to the corporation is presumably insignificant." *Id.* The court found it "unreasonable as a matter of law to permit the employer to retain unfettered control over that which it has effectively discarded as worthless to its legitimate business interests." *Id.* However, the court stated that the circumstances of the employee's termination is only one of the factors that courts should consider in determining the enforceability of a restrictive covenant. *Id.*

Shortly thereafter, the Superior Court reaffirmed its holding in *Brobston*, stating in *dicta* that the circumstances surrounding the termination are relevant in deciding whether to enforce a covenant not to compete. The employer's right to injunctive relief may survive where "an employee intentionally engaged in conduct that caused his termination"; however, the employer's right to injunctive relief may be barred where "an employer terminated an employee for reasons beyond the employee's control." *All-Pak, Inc. v. Johnston*, 694 A.2d 347, 352 (Pa. Super. Ct. 1997).

In 2010, the Superior Court clarified its holdings in *Brobston* and *All-Pak* in *Missett*, 6 A.3d at 538-40. In *Missett*, the trial court held that where an employee

is terminated “to protect [the employer’s] bottom line,” the employer is barred from enforcing a restrictive covenant against that employee. *Id.* at 538. The Superior Court found the trial court’s interpretation of *Brobston* and *All-Pak* “myopic.” *Id.* at 540. It reversed and remanded, directing the trial court to consider other facts that “may be relevant to a determination as to whether the non-solicitation clause is reasonable and enforceable,” such as the employee’s accessibility to confidential and proprietary information, the duration of the restrictive covenant, and the possible negative consequences that enforcement of the covenant may have on the employee’s ability to earn a living. *Id.*; see also *Shepherd v. Pittsburgh Glass Works, LLC*, 25 A.3d 1233, 1246 (Pa. Super. Ct. 2011) (“It is clear that a restrictive covenant can be enforced even if an employee is terminated by an employer, and the fact that an employee was fired without reason, standing alone, will not prevent a non-compete from being enforced.”).

Thus, pursuant to *Brobston*, *All-Pak*, *Missett*, and *Shepherd*, the fact that an employee was terminated probably does not bar enforcement of a covenant not to compete. Rather, the circumstances of the employee’s termination is one factor Pennsylvania courts consider in determining the enforceability of a particular covenant on a case-by-case basis. However, the fact that an employee was terminated, particularly if the termination was for poor performance, may weigh against the employer’s legitimate business interests in enforcing the covenant and may tip the balance of hardships in favor of the employee. See, e.g., *Red Oak Water Transfer NE, LLC v. Countrywide Energy Servs., LLC*, No. GD 11-17598, 2012 Pa. Dist. & Cnty. Dec. LEXIS 236 at *24-26 (Pa. Cnty. Ct. 2012) (Ward, J.). If, on the other hand, the employee was terminated for intentional misconduct, then the balancing of the various factors may favor the employer. See *All-Pak, Inc.*, 694 A.2d at 352.

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