

First Wednesday

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A Monthly Discussion of Employment Law Issues and Other Hot Topics for Management

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California Courts Expand Wrongful Termination Law – Again

Employee non-compete agreements (“non-competes”) are unenforceable in California, subject to a few exceptions. The public policy grounds favoring employee mobility are so strongly against non-competes that employers who require their employees to sign them are subject to a lawsuit for unfair business practices. Until recently, however, no California appellate case had ruled that an employer who chooses to terminate an employee subject to a non-compete “out of respect and understanding with colleagues in the same industry,” may be sued for wrongful termination in violation of public policy. But that’s exactly what happened in *Silguero v. Creteguard, Inc.*, a case decided by the Second Appellate District in Los Angeles on July 30, 2010 (Case No. B215179).

The plaintiff, Rosemary Silguero, alleged in her complaint that in 2003 she began working for Floor Seal Technology, Inc., which will be referred to as “Employer No. 1.” She worked there as an inside sales representative. In August 2007, she was threatened with termination unless she signed a confidentiality agreement. Silguero signed the agreement, which also contained a non-compete: it prohibited her from “all sales activities for 18 months following either departure or termination.” Despite signing, Silguero was terminated in October 2007.

Shortly after her termination, she found employment with Creteguard, Inc. (“Employer No. 2”). Here’s where it gets interesting. Employer No. 1 contacted Employer No. 2 and requested its “cooperation and participation” in enforcing the confidentiality agreement, including those provisions barring Silguero from all sales activities for 18 months following her departure. Silguero did not last long with Employer No. 2. In November 2007, Employer No. 2’s CEO informed Silguero in writing that “it has been brought to my attention...that you have signed a confidentiality/non-compete agreement with your past employer. We regret to inform you that Creteguard is unable to continue your employment effective today, 11/14/07. Although we believe that non-compete clauses are not legally enforceable here in California, Creteguard would like to keep the same respect and understanding with colleagues in the same industry.”

After being terminated by Employer No. 2, Silguero sued both employers (No. 1 for interference with her current employment, and No. 2 for wrongful termination). The appellate court’s ruling dealt with Employer No. 2’s liability, which raised a novel issue under California law: can an employer be sued for wrongful termination in violation of fundamental public policy after terminating its employee “out of respect and understanding” for a competitor’s non-compete with that employee?

The court held that, yes, Employer No. 2 could indeed be sued despite its argument that it did nothing wrong by honoring a potentially valid non-compete agreement between Silguero and her former employer. (Never mind that the CEO's letter concedes that they didn't think the non-compete was valid.)

The court had two basic problems with Creteguard's argument. First, recognizing that employers may not terminate employees for reasons that violate public policy, the court held there is a clear and fundamental public policy against the enforcement of non-competes (the court wasn't buying the argument that the clause was potentially valid). Second, allowing a wrongful termination claim under these facts advances the interests of employees in their own mobility and betterment, which is "deemed paramount to the competitive business interests of the employers, where neither the employee nor his new employer has committed any illegal act accompanying the employment change."

The court was not happy with the "understanding" between the two employers because it would allow the first employer to accomplish indirectly what it could not accomplish directly. Recall that the Creteguard CEO's letter terminating Silguero was in keeping with the respect and "understanding" he had with colleagues in the same industry.

While we never know all the facts and dynamics behind the scenes, it appears the termination of Silguero was not handled well. The CEO's termination letter was not a helpful fact for the defense.

All terminations must be handled with care. This case highlights another checklist item to consider before carrying out a termination -- has the employer been informed of any post-employment restrictions on the employee? If so, the proper response is probably NOT to immediately fire the person. Instead, the employer should investigate the facts and consider sending an appropriate response letter to the previous employer. That response will, of course, depend on the unique facts and circumstances in each case.

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