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Class Action Attempt to Void Jimmy John's Non-Competes Goes Stale

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Sandwich chain Jimmy John's has been in the news lately because of non-compete agreements that employees of its franchisees are required to sign. This is not necessarily good news for Jimmy John's, but it does underscore some interesting issues.

On April 8, 2015, a United States District Court in Illinois issued an opinion and order which held that two employee plaintiffs did not have standing to pursue their claims for declaratory relief to determine the legal interests, validity and enforceability of the Confidentiality and Non-Competition Agreements. Plaintiffs Emily Brunner and Caitlin Turowski brought suit against several defendants for violations of the Fair Labor Standards Act and the Illinois Minimum Wage Law. Additionally, the employees' Second Amended Complaint sought a declaratory judgment and injunctive relief seeking to invalidate the Confidentiality and Non-Competition Agreements.

According to the court's opinion, Jimmy John's is a gourmet sandwich company with more than 2,000 standardized sandwich shops located throughout the United States (in 44 states and the District of Columbia). Jimmy John's was founded in 1983 by James John Liautaud, who is an Illinois resident and the current CEO of Jimmy John's. After founding the company, Liautaud began franchising Jimmy John's Sandwich Shops to franchisees. Essentially, there were three categories of defendants: 1) Liautaud, 2) the Jimmy John's franchisor entities, and 3) the franchisee/operator defendants. Each employee of Jimmy John's or a franchisee is required to sign various agreements, including Confidentiality and Non-Competition Agreements, as a condition of their employment. The Confidentiality and Non-Competition Agreements lay out various restrictions concerning where former employees can work, what job functions they can perform and when a former employee must disclose their intent to work at a competing food service establishment. Specifically, the Non-Competition Agreement prohibits former employees from working at food service venues which derive 10 percent or more of their revenue from the sale of sandwiches, submarines or wraps. This prohibition is applicable to all food service venues within a prescribed radius of the Jimmy John's Sandwich Shop where the employee formerly worked.

Plaintiff Emily Brunner is still employed as an assistant store manager (ASM) at a franchised Jimmy John's Sandwich Shop in Downers Grove, Illinois, which is owned and operated by the JS Fort Group. These defendants own and operate 28 different Jimmy John's Sandwich Shops in Illinois.

Plaintiff Caitlin Turowski formerly worked as a delivery driver and an ASM at a franchised Jimmy John's Sandwich Shop in Gurnee, Illinois. The Gurnee, Illinois, franchise is owned and operated by the Severson Defendants, who own and operate 12 different Jimmy John's Sandwich Shops throughout Illinois.

Count VII of the Plaintiffs' Second Amended Complaint sought to invalidate confidentiality and non-compete agreements that Jimmy John's, LLC requires its employees, including low-level sandwich makers and delivery drivers, to sign. The defendants argued that the plaintiffs lacked standing to pursue injunctive and declaratory relief. The court noted that a federal court may only declare the rights and other legal relations when there is an actual controversy.

Brunner (who still works at a franchised Jimmy John's Sandwich Shop) alleged that she "does not understand the scope of her obligations under the confidentiality provisions of the Confidentiality and Non–Competition Agreement ... and is reasonably apprehensive that her prior and ongoing/current disclosures of certain information could constitute breach...." The court noted that not only did Brunner fail to specify if she applied, was interviewed or was offered a position, but she was also unsure if any of the sought-after food service establishments are covered under the terms of the Non-Competition Agreement. Brunner's fear apparently stemmed from her knowledge of a past lawsuit in which Liautaud sued his cousin to enforce the Confidentiality and Non-Competition Agreements.

Turowski formerly worked at a franchised Jimmy John's Sandwich Shop. After she left Jimmy John's Sandwich Shops, she was employed by BBQ'd Productions in Third Lake, Illinois, a restaurant located within the prohibited three-mile radius of the Libertyville Jimmy John's Sandwich Shop. Turowski was uncertain whether BBQ'd Productions is a "competitor" under the terms of the Non-Competition Agreement.

The court held that Brunner and Turowski failed to allege any facts, beyond a "litany of possibilities," demonstrating any concrete, sufficient injury giving them standing to pursue injunctive relief. The court further held that the complaint did not state valid reasons for the plaintiffs possessing a reasonable fear of litigation. Interestingly, the court noted that Jimmy John's and the franchisee defendants submitted affidavits attesting to their intention not to enforce the Confidentiality and Non-Competition Agreements against the plaintiffs "in the future." The court granted the defendants' motion to dismiss Count VII, which sought declaratory relief on the non-compete agreements. The court dismissed many of the claims, but did allow the plaintiffs' claims for violation of the FLSA to proceed against the franchisee defendants.

So, Jimmy John's managed to avoid an opinion on the merits that these agreements were invalid. By prevailing on the standing issue, Jimmy John's lived to fight this issue of enforceability of the non-compete agreements another day. But the case does raise a few questions, including what the result might have been if the employee had gone to work for a competitor that violated the letter of the non-compete agreement.

Generally, a restrictive covenant is reasonable only if it is no greater than is required for the protection of a legitimate business interest of the employer, does not impose undue hardship on the employee and is not injurious to the public. In a case like this, the employer might have a hard time articulating a legitimate business interest. On the one hand, a three-mile geographic radius is very small and almost unheard of today. Surely an employee could find a new job five or ten miles away, if he or she wanted to. On other hand, what is the point of having a three-mile radius restriction at all? These restrictions are typically directed at the market reality that retailers face: when an employer invests time and energy in training, it hates to lose an employee to a competitor for a small increase in wages or benefits. Cutting attrition is a reasonable objective.

This case serves as a reminder to remember essential questions all employers should consider regarding their policies for covenants not to compete and confidentiality agreements. Each employer should determine whether a covenant not to compete is necessary in the first place, and whether such an agreement is really necessary for all its employees or just certain employees. Would the employer be comfortable arguing for the enforcement of the non-compete agreement in court? Would the employer's attorneys feel comfortable seeking enforcement of or defending the agreement in court? Does the employer have legitimate trade secrets it is trying to protect? If so, does the employer adequately communicate with its employees about what information is confidential? It is worthwhile for employers to periodically review policies and procedures for non-compete agreements and confidentiality agreements.

In addition to the news reports and legal articles on the subject of Jimmy John's non-compete agreements, certain Congressmen have urged the Department of Labor and the Federal Trade Commission to investigate

Jimmy John's practice. Thus, while Jimmy John's may have dodged a bullet on the non-compete agreements in this case, we may hear more about this topic and this system in the future.