



Bergen County Law Division Limits Scope of Non-Compete Clause

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The Bergen County Law Division recently determined that a restrictive covenant preventing an employee from accepting any employment with a competing business within five miles of the employer for a two-year period was unenforceable. In *Abuaysha v. Shapiro Spa, LLC, et. al.*, Docket No. BER-L-988-18 (Feb. 27, 2018) (Powers, J.), the court granted the plaintiff-employee's request for temporary restraints enjoining the defendant-employer from enforcing the non-compete agreement pending expedited discovery and a full hearing on plaintiff's application for a preliminary injunction. The court then denied the employer's motion to dissolve the restraints.

The defendant, a day spa, hired the plaintiff Olga Abuaysha in 2012 to work as a massage therapist. Abuaysha entered into a non-compete agreement that precluded her from competing "directly or indirectly" with the spa's business for a period of two years after her employment terminated "notwithstanding the cause or reason for termination." The non-compete agreement extended for "a radius of five miles" from the defendant's location in Red Bank.

In September 2017, Abuaysha performed a massage on one of the defendant's clients. Upon learning that the client had developed a rash on her face and possibly was afflicted with shingles, Abuaysha refused to perform any massages for the remainder of the day for safety reasons. Abuaysha visited a doctor to confirm that she did not have shingles, and did not return to work for three days. When she failed to provide a doctor's note upon her return, the spa terminated her employment.

Abuaysha then sought employment from a spa located within walking distance from the defendant's location. She filed an order to show cause seeking temporary restraints preventing the defendant from enforcing the non-compete agreement. The court entered the order to show cause with temporary restraints, and the defendant

moved to dissolve the restraints.

The court evaluated whether the plaintiff could demonstrate that she would suffer both imminent and irreparable harm if it permitted the spa to enforce the non-compete agreement. Abuaysha had submitted medical records showing that she suffered from a seizure-related disorder requiring two different medications. She argued that if she were not permitted to commence work with her new employer, she would be unable to pay for the necessary medications and less able to find employment generally. She also argued that money damages would not adequately address the imminent harm to her from an untreated seizure disorder.

The court then evaluated whether the spa could establish the non-compete agreement's reasonableness, observing that a restraint on an employee is illegal when its purpose is to prevent competition, "except when the methods of competition to be prevented are methods commonly regarded as unfair." The court found that the spa had not shown that the non-compete agreement was narrowly tailored. Determining that the only legitimate interest protected by the non-compete were client relationships, the court ruled that "[w]hile this is an important interest, a complete bar on competition is unnecessary...Rather, 'a ban on solicitation' would much more adequately protect defendant's interests in preventing exploitation of their client-base."

Finally, the court found that a restrictive covenant is unenforceable when an employee loses his or her job due to the employer's breach of the employment contract. Here, the spa allegedly involuntarily terminated the plaintiff's employment because she had requested leave from work to ensure that she had not contracted shingles from a customer. In denying the spa's motion to dissolve the temporary restraints, the court concluded that Abuaysha's hardships outweighed those of the spa and that Abuaysha had demonstrated a reasonable probability of success on the merits. The parties are currently engaging in expedited discovery and the return date of the plaintiff's preliminary injunction application is June 29, 2018. Venue has been transferred from Bergen County to Monmouth County.

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