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A Vital Business Tool For Employers

*By Oldrich Foucek, III and
Michael R. Smith*

Restrictive Covenant Given Favorable Interpretation by Third Circuit

Restrictive covenants are illegal in some states, void as against public policy in others, and looked upon with disfavor in most jurisdictions.¹ However, on August 23, 2007, the United States Court of Appeals for the Third Circuit issued an opinion that will have a positive impact on the use of restrictive covenants in Pennsylvania. In *Victaulic Company v. Joseph Tieman and Tyco Fire Products, LP*, the Third Circuit, applying Pennsylvania law, held that Victaulic's non-compete and non-solicitation agreement could be enforced.

This case centered on a dispute between an employer and a former sales representative, who had a three state sales territory. As a condition of employment, the employee signed a one year, nationwide non-compete and non-

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LEGAL UPDATE

Insights and Developments in the Law

Fall 2007

Isiah Thomas Fouls Out; Knicks Lose 11.6 Million to Zero

By George C. Hlavac, Jeffrey S. Stewart, and Edward J. Easterly

Former basketball star and current New York Knicks coach Isiah Thomas, is making headlines off the court for his alleged sexual harassment of a female in the workplace. In *Anucha Browne Sanders v. Madison Square Garden, et al.*, the conduct of Isiah, and his employer, led to an \$11.6 million verdict against Madison Square Garden ("MSG") (the owner of the Knicks) as well as MSG chairman James Dolan. There are a number of lessons that can be learned from this case to help all employers avoid sexual harassment liability.

In 2005, Sanders, a Senior VP of Marketing & Business Operations, alleged that Thomas, the President of Basketball Operations, began sexually harassing her. According to Sanders, Thomas repeatedly referred to her as a "bitch" and a "ho", told her that he loved her, requested that she "go off site" with him and made other unwanted sexual advances (can anyone say "hostile work environment"). In response to Thomas' conduct, Sanders made three separate complaints. Sanders' initial complaints were ignored and no investigation was conducted (can anyone say "big mistake"). Only after Sanders complained directly to the MSG human resources department was an investigation initiated.

Based on the findings of the investigation, MSG's General Counsel prepared a memorandum of recommenda-

tion. The memorandum recommended that Thomas receive "sensitivity training" and that MSG should discuss any lessons which may be learned from the investigation. The Memo also concluded that most of Sanders' allegations were not confirmed and recommended that, based on issues with her communication skills and overall work performance, her employment should be terminated. As a result, Sanders was terminated by MSG on January 19, 2006, six days after the investigation concluded (can anyone say "retaliation").

Not surprisingly, Sanders sued MSG, Thomas, and Dolan for gender discrimination, sexual harassment, and unlawful retaliation pursuant to Title VII of the Civil Rights Act of 1964 and New York law prohibiting discrimination and harassment.

At trial, MSG's problems were compounded when it, and Dolan specifically, could not provide a consistent reason for Sanders' termination. Dolan stated that Sanders was terminated due to her deficient work performance. He also testified, however, that she would not have been terminated but for her conduct during MSG's internal investigation of her sexual harassment complaint. With no consistent reason for the termination, the jury chose to believe Sanders' allegation that her termination was in re-

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Firm Welcomes New Shareholders

We are pleased to announce that **Charles F. Smith, Jr.** joined the Firm as a Shareholder on October 1, 2007 and **John F. Lushis, Jr.** and **F. Peter Lehr**, former associates of the Firm, have been elected new Shareholders.

CHARLES F. SMITH, JR. has been in civil practice for nineteen years. He is a graduate of Lafayette College (B.A., 1985) and Villanova University School of Law (J.D., 1988). His primary areas of focus include civil litigation, real estate transactions and land development. He is a resident of South Whitehall Township where he resides with his wife of twelve years, Susanne, and his two young sons, Tom and Joe. He is currently Chief Public Defender in Lehigh County where he administers a staff of seventeen attorneys. He sat on the Board of Governors of the Pennsylvania Bar Association from 1996-1998. He was Chairperson of the Pennsylvania Bar Association Young Lawyers Division from 1996-1997 during which he conceptualized and initiated the Day on the Hill legislative awareness program which has become an annual event sponsored by the PBA.

JOHN F. LUSHIS, JR. is originally from Easton, Pennsylvania and holds a Bachelor of Science Degree, cum laude, in Mechanical Engineering from the University of Notre Dame and his Juris Doctorate Degree from The Dickinson School of Law of Pennsylvania State University. John joined the Firm in 2003 after spending more than 22 years as in-house counsel at Bethlehem Steel Corporation where he helped spearhead the sale of the Corporation's assets to International Steel Group for \$1.5 billion. John is active in the community serving as the Community Service Director for the University of Notre Dame Lehigh Valley Alumni Club and on the Finance Committee of St. Simon & Jude Church. He and his wife, Ann Corinne, are the parents of two children, Christopher and Emily

John's practice focuses on real estate, environmental and transaction law including loan transactions, the ac-

quisition, divestiture and lease of commercial and residential properties and businesses, industrial development authority financings, and commercial agreements. He also serves as one of the Firm's corporate environmental counsel, focusing on soil remediation.

F. PETER LEHR began his legal career as an attorney with the Coding and Compliance Division of Quadra-Med Corporation, a nationally recognized health information technology company. Since joining Tallman, Hudders & Sorrentino, P.C., Peter has continued his practice in the field of hospital and healthcare law, advising clients on diverse medical-legal issues including Stark Law and Anti-Kickback Statute compliance, managed care contracting, and physician compensation arrange-

ments. His practice also includes commercial lending transactions, and he has negotiated loan agreement provisions governing numerous forms of credit facilities, as well as the terms and conditions of related security, collateral pledge, and suretyship documents. In addition, Peter practices land development and zoning law, having represented individuals, businesses and municipalities in land use matters ranging from subdivision and land development approvals to zoning determination appeals.

Peter grew up in Easton, Pennsylvania and attended Vanderbilt University in Nashville, Tennessee, where he received a B.A. degree. He studied law at Case Western Reserve University in Cleveland, Ohio.

New Attorneys

The Firm is pleased to announce the addition of three new attorneys.

Mary Ellen Dirksen - Ms. Dirksen earned her Masters of Law in Taxation from Villanova University School of Law in 2007. She received her J.D. from the University of South Dakota School of Law in 2004, where she was a Sterling Honors Graduate, and Ms. Dirksen received her Bachelor of Science Degree in Biology, with Honors, from the University of Sioux Falls in 2001. While earning her Masters of Law in Taxation, Ms. Dirksen completed an internship with the Office of Associate Chief Counsel to the Internal Revenue Service in Philadelphia, Pennsylvania. Prior to completing her Masters of Law, Ms. Dirksen practiced law with a firm in the Midwest. Ms. Dirksen will practice in the areas of taxation, estate planning and administration, and transactional law.

Edward J. Easterly - Mr. Easterly received his B.A., from Muhlenberg

College in 2003, and his J.D. from Villanova University School of Law, *cum laude*, in 2006. Prior to joining Tallman, Hudders & Sorrentino, Mr. Easterly practiced in Philadelphia, Pennsylvania where he gained experience in a wide variety of employment matters. Mr. Easterly practices in the area of employment and labor law and is a member of the Firm's Litigation Practice Group.

Stephanie A. Kobal - Ms. Kobal earned her law degree from Widener University School of Law in 2007 where she graduated *cum laude*. While at law school, Stephanie was a member and managing editor of the Widener Law Journal. Ms. Kobal earned a Bachelor of Science degree in Marketing and a Bachelor of Science degree in Women's Studies from the Pennsylvania State University in 2004. Ms. Kobal is engaged in general civil practice with an emphasis on real estate transactions.

Knicks Lose

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tialiation for her complaints against MSG and Thomas.

Clearly, MSG's problems began well before Sanders' retaliatory termination. First, while it is important to have a sexual harassment policy, that policy **MUST** be followed. MSG claimed to have a written sexual harassment policy in place to prevent the actions of individuals such as Thomas. Sanders' early complaints, however, were met without a response. This allowed for the continuation of the harassment, and, ultimately allowed Sanders to prevail at trial with respect to her sexual harassment claims.

An effective sexual harassment policy should not only provide an appropriate complaint mechanism (*i.e.*, a multi-tiered mechanism), but should also assure employees that all complaints will be investigated promptly, with all necessary confidentiality measures taken. An employer's response to an allegation of sexual harassment should include an investigative process and set forth forms of remedial action which may be utilized by the employer. An effective sexual harassment policy, and an employer taking prompt, remedial action to prevent future harassment, may limit liability with respect to an otherwise actionable claim.

Like many employers, MSG did not conduct any regular or periodic sexual harassment training for its employees. This omission was of significance to the jury in determining whether MSG had taken all appropriate measures to avoid sexual harassment in the workplace. An employer should ensure that its employees, and especially its supervisors, are provided sexual harassment training on a periodic basis.

Another lesson employers should take away from the Sanders case is that an employer may not retaliate against an

employee for complaining about sexual harassment. An employer must proceed with caution when taking an adverse action against an employee who has complained of sexual harassment. An employer must ensure that it can establish a legitimate, non-discriminatory reason for the adverse action. The reason articulated by the employer must be supported by adequate, contemporaneous documentation and must be consistent with the employer's past practices.

Additionally, once such an adverse action is taken, it is critical for the em-

ployer to stick with the initial justification for the action. Changing the reason for the action at a later time or adding reasons will only result in credibility issues for the employer. If you don't believe us, just ask MSG and Dolan.

The Sanders case — and its whopping \$11.6 million verdict — is a wake up call to employers to take all necessary steps to ensure that the workplace is free from sexual harassment. When it comes to sexual harassment issues, employers cannot afford to miss the game winning shot.

Announcements

The Firm's Litigation Practice Group (LPG) has elected Shareholder and former Lehigh County **Judge Thomas A. Wallitsch** as Chairperson to lead the Group in its effort to provide the highest quality representation for the Firm's clients. The ten Firm attorneys who are regular members of the LPG meet twice each month to promote effective handling of the Firm's litigation matters and to share information and provide case evaluation, educational experiences and mentoring for the Firm's attorneys engaged in the trial and appellate practice area.

Shareholder **Thomas C. Sadler, Jr.** was awarded membership in the *Fleur-de-Lis Society* by the Minsi Trails Council of the Boy Scouts of America in recognition of his support for the Urban Scouting Initiative which provides financial assistance to youths unable to otherwise participate in scouting.

On May 9, 2007, Shareholder **Timothy J. Siegfried** appeared as a panelist on Channel 69 WFMZ's "Business Matters" Show on Eminent Domain.

On September 18, 2007, at the annual meeting of the American Red

Cross of the Greater Lehigh Valley, Shareholder **George C. Hlavac** was elected Chair of the Board of Directors for a two-year term. Attorney Hlavac, who chairs the TH&S Labor and Employment Law Department, joined the Red Cross Board in September of 2003 and has previously served as the Board's Vice Chair and a member of the Executive and Human Resources Committee. Shareholder **Ronnie F. Hess** was also elected to serve on the Board of Directors and has served on the Red Cross Finance Committee for 6 years.

At its Professional Advisors Reception on October 18, 2007, the Lehigh Valley Community Foundation gave recognition to Shareholder **Dolores A. Laputka** for her service to non-profits, to the nurturing of philanthropy and to clients with charitable intentions. Additionally, on October 21, 2007, the Arthritis Foundation held its *Evening of Honors* reception at which Dolores was given its Spirit of Philanthropy Award.

Associate **S. Graham Simmons, III** was recently appointed to the Board of Directors of the Two Rivers Area Chamber of Commerce (TRACC).

Actual resolution of legal issues depend upon many factors, including variations of facts and state laws. This newsletter is not intended to provide legal advice on specific subjects, but rather to provide insight into legal developments and issues. The reader should always consult with legal counsel before taking action on matters covered by this newsletter.

A Vital Business Tool

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solicitation agreement. Upon leaving Victaulic, the former employee began working for a competitor, selling products similar to those he sold for Victaulic. Victaulic filed a civil lawsuit against the former employee and the new employer in the United States District Court for the Eastern District of Pennsylvania. The District Court found that Victaulic's non-compete and non-solicitation agreement was overbroad, unreasonable and unenforceable. The Third Circuit, however, reversed the Eastern District Court and held that the restrictive covenant could be enforced.

The Third Circuit's opinion is a positive sign for employers in many respects. Significantly, the Third Circuit broke from the negative perception that courts often associate with restrictive covenants. Historically disfavored, Pennsylvania courts have long viewed restrictive covenants with exacting scrutiny. However, in this case the Third Circuit gave a favorable interpretation of restrictive covenants finding that they are "important business tools that allow employers to prevent their employees and agents from learning their trade secrets, befriending their customers and then moving into competition with them."

In addition to lifting this cloud of disfavor, the Third Circuit also outlined the types of restrictions that are reasonable and enforceable in Pennsylvania. First, the Court held that an employer could restrict an employee from selling products unrelated to those he sold for the employer. In the case at hand, Victaulic restricted the employee from selling any Victaulic product for a competitor, not simply the types of products actually sold by the employee. The Court found that an employer does not have to limit a restrictive covenant to the small subset of a product line sold by the employee. Rather, an employer can restrict the employee from selling different, unrelated products for a competitor.

Second, the Third Circuit held that a nationwide restrictive covenant can

be enforced by an employer. In this case, Victaulic restricted the employee from selling products for a competitor anywhere in the world. The Court held that under appropriate circumstances, a nationwide restrictive covenant can be enforced. The Court indicated that a nationwide restriction is permissible if the employer engages in national business or if the employee services customers and builds relationships across the country.

Lastly, the Third Circuit held that non-solicitation restrictions need not be limited to the customers that the employee personally serviced. In the case at hand, Victaulic restricted the employee from soliciting any past or present Victaulic customer, not simply those customers that the employee personally called upon. The Third Circuit found that an employee can be restricted from soliciting any and all customers of the employer. The Court noted that this restriction is reasonable if the employee has specialized knowledge regarding marketing techniques or product lines.

The notion that a company's greatest assets ride up and down the elevator every day is more true now than ever before. The Third Circuit's opinion in Victaulic should come as welcome relief to employers who decide to protect those assets with restrictive covenants. Courts applying Pennsylvania law will continue to analyze each matter on the facts of the particular case and overbroad, unreasonable restraints on competition will continue to be struck down. It is important, therefore, for employers to consult with legal counsel familiar with their business before implementing any policy involving the use of restrictive covenants.

Oldrich Foucek, III, Esquire argued the case before the Third Circuit Court of Appeals. Kelly M. Smith, Esquire assisted in the writing of briefs for the Third Circuit and Steven E. Hoffman, Esquire and Michael R. Smith, Esquire were part of the trial team.

Endnote

¹ In Pennsylvania, restrictive covenants are enforceable if they are inci-

dent to an employment relationship between the parties, are reasonably necessary for the protection of the employer's legitimate business interests, and are reasonably limited in duration and geographic extent.

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